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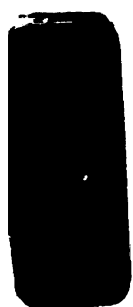
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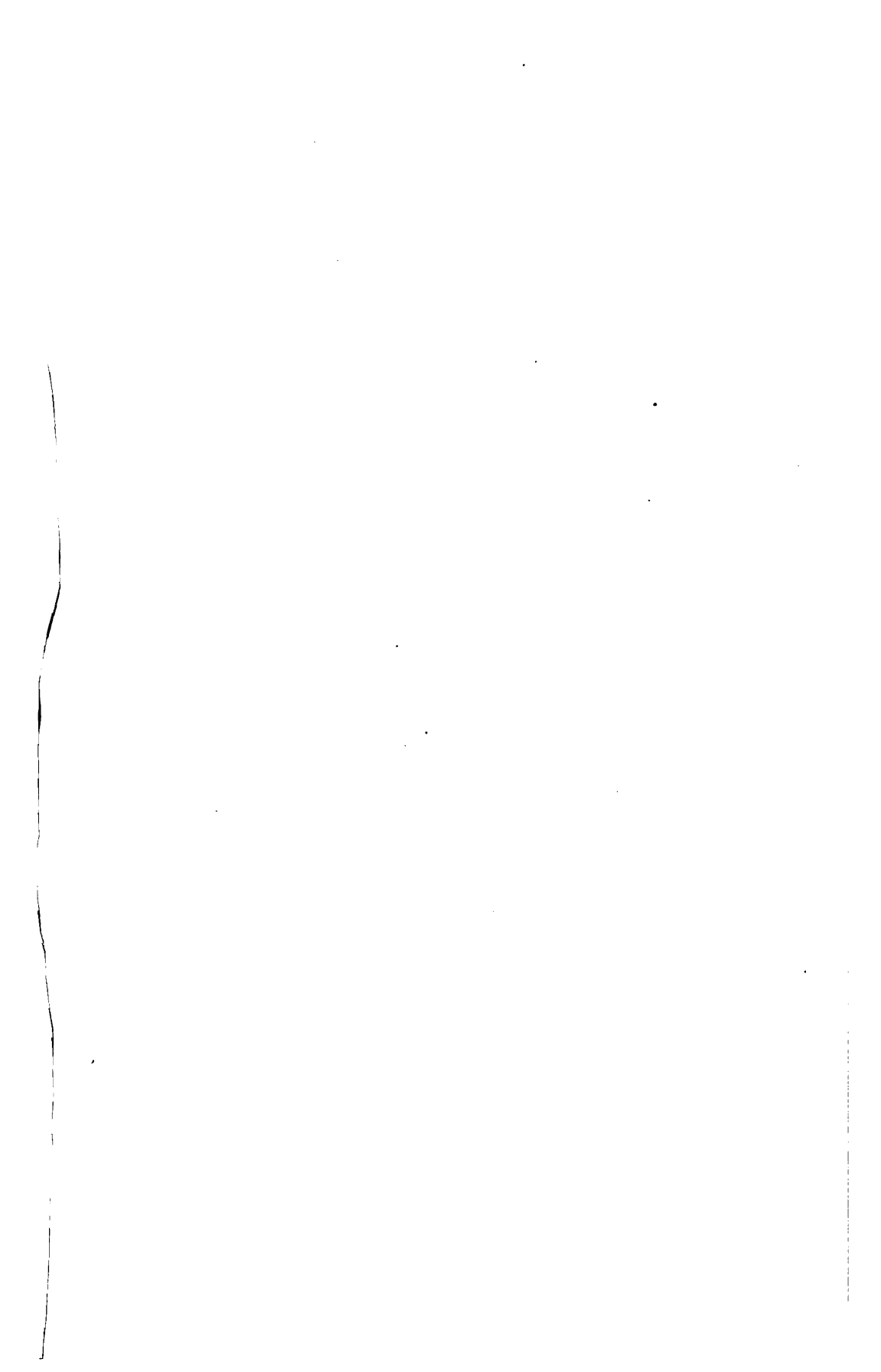
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THE
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ANNOTATED

BOOK XXVII.

ALL CURRENT CASES OF GENERAL VALUE AND
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BURDETT A. RICH, EDITOR, HENRY .
P. FARNHAM, ASSISTANT

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LAWYERS' REPORTS,

ANNOTATED.

NEW YORK COURT OF APPEALS.

HANOVER NATIONAL BANK of the
City of New York, *Appt.*,
v.
Sarah F. BLAKE, *Resp't.*

(143 N. Y. 404.)

A composition with creditors is not made entirely void so as to defeat a recovery on notes given in furtherance thereof merely because of a secret agreement giving to that creditor a preference by way of security for other notes given him under the composition.

(June 5, 1894.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of defendant in an

action brought to enforce her alleged liability as surety upon a promissory note which formed part of an agreement of composition with creditors of an insolvent. *Reversed.*

Statement by **Gray, J.:**

The action is brought by the payee of a promissory note against the indorser. The facts were not in dispute, and were stated by the general term as follows: Frederick D. Blake and Charles Waterman were partners engaged in the dry-goods business under the firm name of F. D. Blake & Co. They were indebted to various creditors, including the plaintiff, and becoming insolvent, executed a general assignment of all their property to James H. Thorp on the 24th day of April, 1888. On the 4th of June, 1888, the creditors of F. D. Blake & Co. signed a composi-

NOTE.—*Effect of giving one creditor a secret advantage in a composition.*

- I. *Effect on the composition.*
- II. *Action on original claims.*
- III. *Contracts to induce assent to a composition.*
- IV. *Action for balance.*
- V. *Reservation of part of the original claim from the composition.*
- VI. *Liability of creditor on obtaining a fraudulent preference.*
- VII. *Composition not general.*

I. *Effect on the composition.*
In the case of **HANOVER NAT. BANK v. BLAKE** the composition agreement was for 40 per cent payable by notes for 10 per cent each, the last two of the four notes to be indorsed by B., but the plaintiff in this case, without the knowledge of the other creditors, obtained an indorsement by B. on the first two also of his notes. The action was brought upon the third note properly indorsed, as the composition agreement provided, and it was claimed that the demand of security on the first two notes as an advantage over other creditors vitiated the composition, to the extent of preventing a recovery on the note sued on, which was executed under the composition and not itself connected with the secret preference. But the court of appeals, reversing the lower court, held that while it did not appear what had become of the earlier notes, the fraud in obtaining such security did not affect the composition notes and allowed a recovery thereon.

As to the question of the effect on the composition and dividend notes the case of **HANOVER NAT. BANK v. BLAKE** is probably the first case which discusses the subject thoroughly and distinguishes the decisions which heretofore have been regarded as vitiating composition notes. There is some conflict on this question and some cases and dicta on the contrary doctrine. It will be seen from the

cases given below that there are not many which are decided squarely upon the question of the direct validity of composition notes but rather turn on the validity of preferential security or indorsement.

The distinguishing feature in each case is given below, from which it will be seen that there are but few cases in which the question of validity of composition notes is directly involved.

A creditor cannot recover dividends, where such creditor paid the assignee a bonus to procure him to join in the release, as the whole should be forfeited. *Frost v. Gage*, 3 Allen, 580.

Following the decision of the lower court which was afterwards reversed in the above case of **HANOVER NAT. BANK v. BLAKE** it was held in *Bradley & C. Co. v. Lally*, 2 Misc. 285, that a creditor taking three composition notes and an additional note as an inducement to enter in the composition, and suing on two composition notes and the last note given to induce him to join, cannot recover as all the notes are void.

And in *Gourley v. Tyler* (Tex.) Feb. 14, 1891, it was said that a preference in a composition renders the whole void, but the question involved in that case was respecting a contract to consent to a deed of assignment.

In *Crandall v. Cochran*, 44 Tex., the question as to whether a fraudulent preference of a creditor would bar him from recovering any dividends is not decided.

Where the creditor insisted that the debtor should indorse a bill drawn by the debtors and accepted by another as an inducement to enter into a composition, and then sued upon the composition notes, he was denied a recovery on the ground of fraud. It was contended that he might negotiate the bill and recover on that also, but the court only decided that the composition was void.

tion agreement by which they agreed to take 40 per cent of their respective claims, to be paid by four notes, made by the members of the firm, each for 10 per cent of the claim; two payable in six and twelve months, and two in eighteen and twenty-four months,—the latter two indorsed by Sarah F. Blake. The Hanover Bank, desiring to have the security of Mrs. Blake upon all the notes, asked that she indorse the first two as well as the last two, which she did. This was not known to the other creditors, and was a security additional to that provided by the terms of the composition agreement. The note in suit is the third of the series, payable in 18 months, and properly indorsed by Mrs. Blake, in accordance with the composition agreement. At the trial both parties moved for judgment, which the court directed for the defendant. At the general term that judgment was affirmed, and the plaintiff has again appealed to this court.

Messrs. Moore & Wallace, for appellant:

The secret agreement rendered void the indorsement by Mrs. Blake on the first two notes, that being a security additional to the terms of the composition agreement, but under the facts in this case, the composition agreement is still binding upon the parties to this action, and the notes given in accordance therewith are enforceable.

White v. Kuntz, 170 N. Y. 518; *Breck v. Cole*, 4 Sandf. 79.

It is not disputed that Mrs. Blake's indorsement on the first two notes, made in pursuance

of the secret agreement, was void and inoperative.

Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 574; *Fellows v. Stevens*, 24 Wend. 294; *Waite v. Harper*, 2 Johns. 286; *Payne v. Eden*, 3 Cal. 218; *Yeomans v. Chatterton*, 9 Johns. 295, 6 Am. Dec. 277; *Wiggin v. Bush*, 12 Johns. 306, 7 Am. Dec. 324; *Tusbury v. Miller*, 19 Johns. 311; *Van Brunt v. Van Brunt*, 3 Edw. Ch. 14, 6 L. ed. 553; *Pinneo v. Higgins*, 12 Abb. Pr. 384; *Carroll v. Shields*, 4 E. D. Smith, 466; *Townsend v. Newell*, 22 How. Pr. 164; *Gilmour v. Thompson*, 49 How. Pr. 198; *Hughes v. Alexander*, 5 Duer, 488; *Williams v. Carrington*, 1 Hilt. 515; *Beach v. Ollendorf*, Id. 41; *Eldridge v. Strenz*, 2 Jones & S. 491; *Crandall v. Cochran*, 3 Thomp. & C. 208; *Williams v. Schreiber*, 14 Hun, 38; *Lawrence v. Clark*, 36 N. Y. 128; *Bliss v. Matteson*, 45 N. Y. 22; *Harloe v. Foster*, 58 N. Y. 386; *Baxter v. Bell*, 86 N. Y. 195; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Goldenbergh v. Hoffman*, 69 N. Y. 322; *Blair v. Wait*, Id. 118; *Almon v. Hamilton*, 100 N. Y. 527; *Bean v. Aminck*, 10 Blatchf. 361.

Equality, the creditor's right, being enforced, there is no equity appealing to the court to enable the debtor to escape the payment of his entire obligation. The action of the plaintiff may invalidate the composition at the option of the innocent creditors, but carries no such penalty, with it as the extinguishment of all the plaintiff's rights.

Mr. C. Bainbridge Smith, for respondent:

Where a debtor in embarrassed circumstances enters into an agreement with his cred-

Howden v. Haigh, 1 Ad. & EL 1083, 3 Perry & D. 661.

A creditor who signed a composition taking bills for the balance as an inducement for such composition deed, which deed was not to be effectual unless the composition bills were delivered on a certain day, has no claim against the bankrupt sufficient to support suing out a fiat of bankruptcy against the debtor, as he has released his claim and ceased to be a creditor for any sum whatever, and is not a creditor for the original amount, for he released that demand, nor for the composition amount because no right accrued under a fraudulent deed in favor of a fraudulent concocter. *Re Cross*, in note to 4 De G. & S. 364.

And where a creditor signed a composition for ten shillings on a pound, and was paid the other ten shillings on a fraudulent agreement with the debtor's brother, who paid him in coal, he could not recover on the composition note, as the court said the creditor has had his ten shillings, and cannot have it again. *Knight v. Hunt*, 5 Bing. 432, 3 Moore & P. 13.

A creditor cannot recover on an indorsement in composition notes where such indorsement was obtained as an inducement to sign, giving him a secret fraudulent preference over other creditors. *Pinneo v. Higgins*, 12 Abb. Pr. 384.

A creditor in an action upon an indorsement on a composition note could not recover thereon, where he had taken a note in addition to the composition in fraud of other creditors and inflated his claim also in the composition, the court saying that such fraud renders the whole composition note and the notes so taken for the excess void also; but this last statement was not necessary to the question involved. *Doughty v. Savage*, 28 Conn. 146.

A creditor receiving a guaranty for advancing 27 L. R. A.

money for a composition, and securing himself by fraudulent contract outside of the composition should lose all benefit of the guaranty, and the same was set aside at the instance of another creditor. *Pendlebury v. Walker*, 4 Younge & C. 424.

A creditor who receives a guaranty in composition notes, where he has a secret bargain to be paid in full, should lose the guaranty in the composition, and the court said that what such creditor was to receive in the composition might be forfeited at the instance of other creditors, and that his whole debt might be forfeited, and held that as the debtor though *particeps fraudis* would be relieved, the guarantor would be also relieved. *Clarke v. Ritchey*, 11 Grant, Ch. (U. C.) 499.

And in *Sternburg v. Bowman*, 103 Mass. 325, it was held that notes given to a creditor in excess of his claims so as to enlarge the sum in the composition, are void. The case does not show whether they were excessive dividend notes sued upon, or notes in excess of dividend.

Where a debtor made a composition and failed to pay at the precise time and the debtor brought a bill for specific performance and it was shown that some of the creditors had entered into the composition under a fraudulent arrangement for preference, the plaintiff could not obtain any relief or any decree of specific performance and the bill was dismissed. *Child v. Danbridge*, 2 Vern. 71.

But in *Feize v. Randall*, 1 Esp. 224, 6 T. R. 146, where a creditor obtained security in his composition note differing from other creditors, it was held that this did not avoid the note, and that recovery could be had thereon. It was said that security only for an overplus in a composition is void, but not for the composition itself as it did not impose a greater burden on the creditor, but this case was subsequently overruled in *Leicester v. Rose*, and *Ex parte Sadler and Jackson*, *infra*.

itors to pay them a composition upon their claims, any private agreement between such debtor and one of the creditors, who professes to join in the general arrangement, that the former or a third party for him, shall pay a further sum of money, or give a better or further security than such as is provided for the other creditors, is void as a fraud on them. Accordingly, if one creditor does make such stipulation, in fraud of the other creditors, the effect thereof will be to destroy any security which may have been given to him, even for the legal amount of the composition.

Chitty, Cont. 9th Am. ed. Perkins, 694; *Leicester v. Rose*, 4 East, 872; *Ex parte Saddler and Jackson*, 15 Ves. Jr. 52; *Knight v. Hunt*, 5 Bing. 429; *Howden v. Haigh*, 11 Ad. & El. 1033; *Higgins v. Pitt*, 4 Exch. 812; *Pendlebury v. Walker*, 4 Younge & C. 424; *Bradshaw v. Bradshaw*, 9 Mees. & W. 29; *Mallatieu v. Hodgson*, 16 Q. B. 689; *Re Cross*, reported in a note to *Re Hodgson*, 4 DeG. & S. 354; *Ex parte Phillips, Re Harvey*, 36 Week. Rep. 567; *Clarke v. Ritchey*, 11 Grant, Ch. (U. C.) 499; *Doughty v. Savage*, 28 Conn. 147; *Moses v. Katzenberger*, 1 Handy (Ohio) 46; *Frost v. Gage*, 3 Allen, 560; 3 Addison, Cont. Abbott's Notes, 731; Leake, Cont. 3d ed. 689; Wald's Pollock, Cont. Am. ed. 1885, 233; Chitty, Cont. 12th Eng. ed. 699; Lawson, Cont. § 800; *Knight v. Hunt*, 5 Bing. 429.

A creditor committing such a fraud lost all benefit he would otherwise have derived under the composition deed.

Howden v. Haigh, and *Higgins v. Pitt*, *supra*; *White v. Wright*, 3 Barn. & C. 273.

In *Whittemore v. Obear*, 58 Mo. 230, it was held that a surety in a composition note, sued by one creditor, could not claim that he was released on account of other creditors having committed a fraud.

See *Leicester v. Rose*, *infra*.

II. Action on original claim.

The weight of authority is clear, that a creditor not guilty of fraud may recover on the original claim and ignore a general composition where another creditor has secretly obtained an undue advantage, and a fraudulent preference in the composition. *Cobb v. Tirrell*, 137 Mass. 143; *Ramsdell v. Edgerton*, 8 Met. 227, 41 Am. Dec. 533; *Kahn v. Gumberts*, 9 Ind. 420; *Hefter v. Cahn*, 73 Ill. 293; *Saul v. Buck*, 72 Ga. 254; *Woodruff v. Saul*, 70 Ga. 271; *Kullman v. Greenebaum*, 92 Cal. 403; *Zell Guam Co. v. Emry*, 113 N. C. 85; *Daughish v. Tennent*, L. R. 2 Q. B. 49, 3 Best & S. L. 36 L. J. Q. B. 10, 15 Week. Rep. 193; *Spooner v. Whiston*, 3 J. B. Moore, 580; *Partridge v. Messer*, 14 Gray, 180; *Orandall v. Cochran*, 3 Thomp. & C. 202.

In *Seying v. Gale*, 23 Ind. 426, the same was said to be the rule but was not the question involved.

And the creditor may set aside a composition where other creditors have obtained an excess from the debtor's brother. *Ex parte Milner*, L. R. 15 Q. B. Div. 605, 54 L. J. Q. B. 425, 53 L. T. N. S. 652, 35 Week. Rep. 367.

And one partner may ignore a firm composition and sue a special partner for contribution where such special partner as a firm creditor has obtained an undue advantage over other creditors in signing the composition. *Crossley v. Moore*, 40 N. J. L. 37.

And so it has been held that a creditor may ignore a composition where another creditor has been secretly preferred, although such preference was 27 L. R. A.

No authoritative case has been produced that controverts the rule laid down in the cases cited.

In *Breck v. Cole*, 4 Sandf. 79, Judge Duer rendered the opinion of the court, in which he reviewed many authorities.

The learned judge quotes with approval *Knight v. Hunt*, 5 Bing. 432; *Leicester v. Rose*, 4 East, 872, and *Ex parte Sadler and Jackson*, 15 Ves. Jr. 52, and as to them he adds: "No addition can be made to the authority of these cases - when we state that in the first the decision was pronounced by Lord Ellenborough and in the second by Lord Eldon." If the learned judge had read those cases with ordinary care he would have discovered that each of those judges had condemned the *dictum* he expressed, and both had overruled the case of *Feige v. Randall*, 1 Esp. 226, 6 T. R. 146, where that doctrine was advanced.

In *Higgins v. Pitt*, *supra*, decided in 1849, Parke, B., referring to *Howden v. Haigh*, said: "Some doubt was, it is true, stated by my brother Alderson, as to the propriety of that decision in *Davidson v. M'Gregor*, 3 Mees. & W. 755, but we do not think that decision was wrong.

In *Pendlebury v. Walker*, 4 Younge & C. 424, A. D. 1841, Baron Alderson, who expressed an alarm at the extent the decision in *Howden v. Haigh* goes, cited that case and *Knight v. Hunt* with approval.

Mr. Charles A. Decker, also for respondent:

The real contract was the agreement to sign

without the common debtor's connivance and made by a third person. *Luehrmann v. St. Louis Furniture Co.* 21 Mo. App. 499.

Or when made by the debtor's attorney. *Bank of Commerce v. Hoeber*, 11 Mo. App. 475, 38 Mo. 37, 37 Am. Rep. 359, 8 Mo. App. 171.

And in *Martin v. Adams*, 38 N. Y. S. R. 397, the same was held where the preference had been by the son of one of the insolvent firm. But in *Martin v. Adams*, 81 Hun, 9, which was a retrial of the same case, where it was proved that the debtor had no knowledge of any secret arrangement, the action to set aside the composition failed.

But in *Page v. Carter*, 16 N. H. 254, 41 Am. Dec. 726, it was said that while a note given to induce consent to a composition is void, yet in an action on the original debt by a signing creditor it was held that the composition would not be held void, even if other creditors obtained an advantage by secret agreement as the rule for avoiding composition appears to have been made for the benefit of the debtor rather than that of the creditor, - drawing a distinction between the English cases claiming that they are affected by the English bankrupt law.

And in *Bartlett v. Blaine*, 33 Ill. 25, 25 Am. Rep. 346, it was held that a creditor could not sue on the original claim although the debtor had given a note to another creditor of \$500 to induce him to join the composition, where in an action on that note it had been held void, and as it was void, it was therefore equivalent to nothing, - and the acceptance of a void note does not prejudice the creditor or avoid the composition.

And the same was also held in *Babcock v. Dill*, 43 Barb. 577, although the son of the debtor paid the note after the composition.

As to whether a creditor who has made a secret fraudulent contract more beneficial to himself than the other creditors in signing a composition.

the composition deed if the plaintiff received four notes, all of which should be indorsed by the defendant. This agreement was fraudulent and is void. If the superior contract is void, all the notes are void for lack of consideration.

Belding v. Pitkin, 2 Cal. 149.

Even if the condition precedent, the composition deed and the notes may be said to be of equal force in the transaction, they together make one contract, which is indivisible, and no part is complete without the others.

Secor v. Sturgis, 16 N. Y. 548; *Verplanck v. Van Buren*, 76 N. Y. 285; *Tracy v. Talmage*, 14 N. Y. 180, 67 Am. Dec. 182; *Pelly v. Naylor*, 189 N. Y. 598.

The plaintiff sues to recover upon a note which it claims to have received under the composition deed. It never complied with the composition agreement; what it did comply with was an entirely different arrangement, and that was fraudulent.

It cannot cancel the real contract, and eliminate the fraud by relinquishing any claim against the defendant on the fraudulent instruments.

Tracy v. Talmage, *supra*; *Leicester v. Rose*, 4 East, 872; 1 Story, Eq. Jur. par. 870; *Baldwin v. Short*, 125 N. Y. 558.

The acts of the plaintiff preclude it from recovering on the note in suit. They were *malum in se*. It has no standing in court.

Tracy v. Talmage, *supra*; *White v. Buss*, 8 Cush. 448; *Solinger v. Earle*, 82 N. Y. 898.

The contention of the defendant is supported by direct precedent.

Howden v. Haigh, 3 Perry & D. 661, 11 Ad. & El. 1038; *Ex parte Sadler and Jackson*, 15 Ves. Jr. 52; *Jackson v. Lomas*, 4 T. R. 156; *Wells v. Girling*, 1 Brod. & B. 447; *Knight v. Hunt*, 5 Bing. 433; *Frost v. Gage*, 8 Allen, 560; *Doughty v. Savage*, 28 Conn. 147.

Gray, J., delivered the opinion of the court:

In the general term opinion the question of law was stated thus: "Did the secret agreement, by which Mrs. Blake indorsed the first two notes, invalidate the whole composition agreement, so that notes given in pursuance of its terms are not enforceable by the plaintiff?" The learned justices, finding no controlling authority in this state, determined the question adversely to the plaintiff, and upon the ground, in substance, that, as the agreement was fraudulent, the fraud permeated and vitiated the whole composition agreement, and disabled the creditor from recovering anything under it. In this view we are not able to agree with them. It may be true that there was no decision, in the courts of this state, in its features so precisely in point as to compel adherence to its authority, and it is true that the view of the general term has support in decisions of English courts. I think, however, that in our state there are expressions of opinion by eminent judges of this court, and by a former very distinguished judge of the superior court of the city of New York, which rather commit us to a contrary view, and which should commend themselves to us, as fur-

may thereafter claim that the composition is void on account of fraudulent preference to other creditors, and demand payment of his whole claim, the weight of authority is against the right of such creditor to ignore such composition. *Baldwin v. Rosenman*, 49 Conn. 105; *O'Brien v. Greenebaum*, 28 Cal. 104; *Mallallen v. Hodgson*, 18 Q. B. 689, 20 L. J. Q. B. 389, 15 Jur. 817.

And he cannot claim that the composition should be avoided on account of the fraudulent preference obtained by his agent in making such a composition. *Blair v. Walt*, 69 N. Y. 112.

In *Watts v. Hyde*, 10 Jur. 127, 17 L. J. Ch. 400, in which it developed during the trial in an action to enjoin a judgment where the defendant in the injunction suit had put the same demand in the composition and had been preferred, the plaintiff was allowed to amend his bill to set up the facts.

And the creditor making a fraudulent secret contract for a preference cannot claim that the composition is invalid, by reason of the subsequent condition contained therein, that it should be void in default of payment of any of the composition notes. *Ex parte Phillips*, *Re Harvey*, 38 Week. Rep. 807.

In *Smith v. Salzmann*, 9 Exch. 535, 23 L. J. Exch. 177, where it was claimed that the creditor could not avoid the compromise because such creditor was a party to a fraudulent preference, such plea was not proved.

But in *Stewart v. Blum*, 28 Pa. 225, it was held that a creditor may recover of the debtor the remainder of his original claim unsatisfied in the composition, where such composition was fraudulent, although such creditor himself committed a fraud on other creditors at the time of the composition in an agreement which he could not enforce.

And in *Elfelt v. Snow*, 2 Sawy. 94, it was held that a creditor could ignore a composition ob-

tained from him by fraudulent misrepresentations as to the debtor's assets, although such creditor had obtained a fraudulent preference.

And in *Davis v. Holding*, 11 Ad. & El. 710, 3 Perry & D. 413, in a suit on the original claim, where it was pleaded that the creditor had agreed to take more in the composition than others, and abandon proceedings under a fiat of bankruptcy, the plea was bad as it did not show that the creditor was within the provisions of the bankrupt act, forfeiting the whole debt.

A subsequent creditor after a composition is not prejudiced by fraudulent preference therein. *Guggenheimer v. Groeschel*, 23 S. C. 274, 55 Am. Rep. 20.

And one creditor cannot ignore a composition on account of a subsequent payment preferring another creditor, as such payment is not a fraud upon other creditors. *Re Sturgis*, 16 Nat. Bankr. Reg. 304.

III. Contracts to induce assent to a composition.

Contracts, notes, securities, and obligations, obtained by one creditor to induce him to sign the composition as a secret advantage over other creditors are void whether made before or after the composition or whether made by the debtor himself in person or by another for his benefit, or where a note is in the hands of third parties who have taken it subject to equities. *Spurter v. Spiller*, 1 Atk. 105; *Townsend v. Newell*, 22 How. Pr. 164; *Geere v. Mara*, 38 L. J. Exch. 50, 2 Hurlst. & C. 830, 8 L. T. N. S. 463; *Coleman v. Waller*, 3 Younge & J. 215; *Hagaman v. Burr*, 9 Jones & S. 423; *Lewis v. Jones*, 4 Barn. & C. 503, 3 Dowl. & B. 567; *Bastian v. Dreyer*, 7 Mo. App. 322; *O'Shea v. Collier White Lead & Oil Co.* 42 Mo. 397, 97 Am. Dec. 322; *Lothrop v. King*, 8 Cush. 322; *Fay v. Fay*, 121 Mass. 561; *Harvey v. Hunt*, 119 Mass. 279; *Howe v. Litchfield*, 8

nishing a wise and more politic rule in these cases of composition by an insolvent debtor with his creditors. The general principle has been long settled in England and here that a secret agreement which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality, and that equality would be destroyed if the secret agreement were given effect. In *Leicester v. Rose*, 4 East, 872, at page 381, Lord Ellenborough observed that the principle of all the cases was "that where the creditors, in general, have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." In *Russell v. Rogers*, 10 Wend. 474-479, 25 Am. Dec. 574, Justice (afterwards chief justice) Nelson said: "So scrupulous are courts in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown to the other creditors, is void and inoperative." It is in the extent of the operation of the principle, which was thus early asserted, that we will find the divergence of judicial opinions between English judges and those of this state. It is curious

to observe that, though *Leicester v. Rose* was relied upon as the basis of authority for their conclusions, the application of the doctrine of that case has been different in each country. *Leicester v. Rose* was decided in 1803. Its facts were that several creditors of the insolvent refused to sign unless collateral security, which was to be given for the first two installments of the composition payment, should also be given for the last two. The defendant agreed to procure this additional security, and, not having done so, the action was brought to enforce his agreement. Lord Ellenborough stated the question to be whether any legal effect could be given to such an agreement, which gave to some creditors a better security than to others; and he held that it could not, as it was a fraud upon the rest of the creditors. The case of *Houden v. Haigh*, 11 Ad. & El. 1033, was decided in 1840, and was a suit upon composition notes. By a secret agreement between the plaintiff and defendant that the latter should indorse to him a bill accepted by a third party, in order to give him a preference beyond the other creditors, the former had been induced to sign the composition deed. It was held that he could not recover. Lord Denman, relying upon *Leicester v. Rose*, *supra*, and *Knight v. Hunt*, 5 Bing. 432, held that every part of the transaction was avoided by reason of the deceit upon the other creditors. Littledale, J., while agreeing with him that the fraud extended over the whole, remarked, rather significantly, "It is possible that the plaintiff may be entitled to sue for

Allen, 443; Partridge v. Messer, 14 Gray, 180; Case v. Gerrish, 15 Pick. 49; Goodwin v. Blake, 3 T. B. Mon. 106, 16 Am. Dec. 87; Bryan v. Christie, 1 Stark. 329; McFarland v. Garber, 10 Ind. 151; Re Clement's App. 52 Conn. 464; Fenner v. Dickey, 1 Filipp. 34; Patterson v. Boehm, 4 Pa. 507; Way v. Langley, 15 Ohio St. 392; Bliss v. Matteson, 45 N. Y. 22, affirming 52 Barb. 335; Brown v. Nealley, 161 Mass. 1; Cockshot v. Bennett, 2 T. R. 783; *Ex parte Sadler* and Jackson, 15 Ves. Jr. 52; Wood v. Barker, L. R. 1 Eq. 139, 35 L. J. Ch. 276, 11 Jur. N. S. 906, 14 Week. Rep. 47, 13 L. T. N. S. 318; Hughes v. Alexander, 5 Duer. 488; Beach v. Ollendorf, 1 Hilt. 41; Higgins v. Mayer, 10 How. Pr. 368; Williams v. Schreiber, 14 Hun, 38; Breck v. Cole, 4 Sandf. 79; Carroll v. Shields, 4 E. D. Smith, 466; Lawrence v. Clark, 38 N. Y. 128; Huckins v. Hunt, 138 Mass. 305; Constanten v. Diache, 1 Cox. Ch. 297; Clay v. Ray, 17 C. B. N. S. 188; Wells v. Girling, 1 Brod. & B. 453, 4 J. B. Moore, 75, and in *Leicester v. Rose*, 4 East, 872, 1 Smith, 41, where a creditor required a contract for additional security on the two last installment notes, and sued on a breach of such contract alleging that thereby the first installment note was due, he was consulted on the ground that such a contract was a fraud on other creditors, denying the authority of *Pease v. Randall*, 1 Esp. 224, 6 T. R. 146.

In *Jackson v. Davison*, 4 Barn. & Ald. 695; Piddock v. Bishop, 3 Barn. & C. 605, 5 Dowl. & R. 505; Clarke v. White, 37 U. S. 12 Pet. 173, 9 L. ed. 1048; Williams v. Carrington, 1 Hilt. 515; Mawson v. Stock, 6 Ves. Jr. 300; Jackson v. Lomas, 4 T. R. 160; Feldman v. Gamble, 26 N. J. Eq. 494, and *Fellows v. Stevens*, 24 Wend. 294,—it was said that contracts made to induce a creditor to enter into a composition are void although this was not directly involved in such cases.

And one creditor may prevent the other credi-

tors from taking possession of all the debtor's property for their benefit and advantage. Bank of Montgomery v. Ohio Buggy Co. (Ala.) July 27, 1883.

So a third party cannot recover on a note given him to induce a creditor to sign. *Winn v. Thomas*, 55 N. H. 294.

And an agent of the creditor cannot recover on a note given to him as an inducement not to interfere with the composition. *Bullene v. Blaine*, 6 Biss. 22.

And a contract by one creditor to pay another as an inducement to join a composition is void. *Lee v. Sellers*, 81* Pa. 473.

So a contract for an extension in aid of an assignment preferring one creditor is void. *Gibbon v. Bellas*, 2 Phila. 890.

And in *White v. Kuntz*, 107 N. Y. 518, the court refused to enforce a contract to purchase composition notes at a greater amount than their face value.

And in *Davidson v. M'Gregor*, 8 Mees. & W. 755, where the debtor claimed that the contract was a fraud on other creditors, it was held that he must plead and prove that this preference was not known to other creditors.

But in *Davis v. Benton*, 24 Conn. 561, it was held that a creditor could recover upon a note given to induce him to sign a composition deed where such deed never took effect, and the maker of the note was not the debtor, but held funds of the debtor in his hands to pay the note.

In *Small v. Breckley*, 2 Vern. 602, it was held that a debtor being guilty of fraud in the composition is not entitled to relief in equity against security given to the creditor for the balance of the composition.

In *Smith v. Owens*, 21 Cal. 11, it was said that notes made in fraud of the composition are void in

the original debt." The case of *Knight v. Hunt*, 5 Bing. 433, referred to by Lord Denman, if we are to regard the language of the opinion, did not expressly decide that the whole transaction was avoided. In that case the plaintiff had refused to accede to a composition of 10 shillings in the pound until a brother of the debtor agreed to supply him with coals to an amount in value equal to half the debt. The coals were furnished; but the notes remained unpaid, and the plaintiff brought this suit upon them. Best, *Ch. J.*, stated the principle that the judgment of the creditors is influenced by the supposition that all are to suffer in the same proportion, and briefly concluded with the remark: "Here the plaintiff has had his ten shillings in the pound in coal, and he cannot have it again in money." In *Mallalieu v. Hodgson*, 16 Q. B. 689 (decided in 1851), Erle, *J.*, held that "where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void. Not only can he take no advantage from it, but he is also to lose the benefit of the composition." In this ruling he relied upon *Leicester v. Rose* and *Howden v. Haigh*. The plaintiff there was seeking to recover for the balance of his original debt, after allowing for the amount of the composition and the value of a preference. It was his claim that the composition deed had not released the debt to him, because he had been induced to believe that he alone was preferred, whereas some other creditors had also been secretly preferred. It will be ob-

served that, in *Mallalieu v. Hodgson*, it was unnecessary to decide whether the plaintiff had lost the benefit of the composition. The question was whether the plaintiff could defeat the effect of the composition agreement by the plea that he had been deceived into supposing that he was the only creditor secretly preferred. As an expression of judicial opinion, it must, however, be accorded its weight as evidencing the continuance of the authority of *Howden v. Haigh*. That case furnishes the sole basis of authority on which subsequent decisions and text-writers have rested the doctrine that the fraud in the secret agreement with the creditors so vitiates the whole transaction of composition as to disable him from recovering even the amount of the composition. Leake, *Cont.* 768; Chitty, *Cont.* 994; Wald's *Pollock*, *Cont.* 235. I say the sole authorities, because *Leicester v. Rose* did not go so far as that, and *Howden v. Haigh*, was an extension of the principle which was supposed to be justified by Lord Ellenborough's decision in the former case. The doctrine of *Howden v. Haigh*, it may be observed, did not go wholly unquestioned in England, as may be inferred from the remarks of Littleale, *J.*, in that case, which I have quoted, and of Baron Alderson in *Davidson v. M'Gregor*, 8 Mees. & W. 763; who said he was "alarmed at the extent to which that decision goes."

In this state, with the case of *Leicester v. Rose* before him, Judge Duer, in *Breck v. Cole*, 4 Sandf. 79, formed quite a different conclusion as to the effect of the effect of a secret

the hands of creditors, but in this case a recovery was had, because the answer failed to plead the composition and fraud.

IV. Action for balance.

A creditor perpetrating a fraud upon other creditors in obtaining a secret preference cannot recover on the note or contract for the balance. Willis v. Morris, 63 Tex. 468, 51 Am. Rep. 655; *Ex parte Oliver*, 4 DeG. & S. 354; Callahan v. Aukley, 9 Phila. 99; Crandall v. Cochran, 3 Thomp. & C. 203.

And so it was held in *Mackenzie v. Mackenzie*, 16 Ves. Jr. 372, that a bond creditor uniting in a composition, could not maintain an action thereafter on a bond beyond the terms of the composition.

But a creditor could recover the balance of his claim where other creditors in the composition had been fraudulently preferred. Cobleigh v. Pierce, 22 Vt. 788; Brownville Mfg. Co. v. Lockwood, 8 McCrary, 606; Greer v. Shriver, 63 Pa. 259.

See also subhead, "Action on original claim."

The fact that the day before a small claim was set for trial it was paid in full will not justify another creditor in suing for the balance of his claim, where it was not shown but what this was known to all the signers of the composition and besides the payment in such a case was not a voluntary payment. Carey v. Barrett, L. R. 4 C. P. Div. 379.

A subsequent agreement to pay the balance, made some time after the composition, may be enforced. Trimball v. Tilton, 21 N. H. 129; Tuck v. Tooke, 9 Barn. & C. 437, 4 Mann. & R. 393; Took v. Tuck, 12 J. B. Moore, 435, 4 Bing. 224.

But in *Rasmussen v. State Nat. Bank*, 11 Colo. 301, it was held that after a composition has been made and carried out a note for the balance would not be enforced as being made without any consideration; but the question of fraud does not seem to have entered in this case.

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V. Reservation of part of the original claim from the composition.

A creditor will not be allowed to split his claims and sign the composition for part, reserving to himself the right to pursue the debtor for the remainder, as such reservation is a fraud on the other creditors, and cannot be enforced even where he assigns a part of his claim in order to obtain a preference. Harloe v. Foster, 53 N. Y. 385; Cecil v. Plastow, 1 Anstr. 202; Robinson v. Striker, 6 Hun. 546; Cowper v. Green, 7 Mees. & W. 633; Britten v. Hughes, 3 Moore & P. 77, 5 Bing. 460; Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 574; Holmer v. Viner, 1 Esp. 131; Van Brunt v. Van Brunt, 3 Edw. Ch. 14, 6 L. ed. 553; Harry v. Wall, 1 Barn. & Ald. 103; Van Bokkelen v. Taylor, 62 N. Y. 105, reversing, 2 Hun. 123; Perry v. Armstrong, 30 N. H. 523; Huntington v. Clark, 39 Conn. 540.

In *Adams v. Outhouse*, 45 N. Y. 318, it was said that the debtor could not secretly split his claim and reserve a part which should not enter in the composition.

But an open reservation in a composition reserving all rights against the surety who signed the composition will be sustained. Rockville Nat. Bank v. Holt, 58 Conn. 520.

And a creditor may recover from the debtor who had previously released a judgment, which he had assigned to such creditor, who had no knowledge at the time of making the composition of the release made by the debtor. Russell v. Rogers, 15 Wend. 354.

And a creditor signing a composition may recover from the debtor on a note outstanding which he had indorsed, and which after the composition such creditor had to pay as an indorser, and which was not expressly provided for in the composition. Lipman v. Lowitz, 78 Ill. 233; Hamblen v. Ratigan, 119 Mass. 153.

agreement which attempts to secure to a creditor an advantage over the other creditors. *Brack v. Cole* was an action upon a promissory note secretly given to the plaintiff in addition to the composition notes, as an inducement to him to agree to the composition. Judge Duer, in his opinion, comments upon the fraudulent nature of the agreement, in its effect upon the other creditors; observing that "it is, in all cases, the concealment of a fact which it was material for them to know, and the knowledge of which might have prevented them from assenting to the composition. . . . Every composition deed is, in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." The learned judge then

advert to the violation of the equality among creditors worked by secretly giving additional security, and states this conclusion: "Hence, either the composition deed itself, . . . or the private agreement, which seeks to evade—and, if valid, would defeat—it, must be set aside; and sound policy and the principles of good faith require that the latter course should be followed. It is perfectly just that every creditor who signs a composition deed should be estopped from setting up any private agreement repugnant to its terms, or inconsistent with its intention and spirit, and . . . every private agreement . . . is of this character, and consequently . . . every security which is the fruit of such an agreement is illegal and void." He reviews the early decisions in the courts of England and of this state, and concludes that "it is the clear and inevitable result of the decisions that, where a composition is made with creditors, every security given to a particular creditor, not

And where a creditor was induced to transfer a note against the debtor to a third party who should claim the composition, this did not release other claims which the creditor held against the firm, where such debtor fraudulently represented that he was only a special partner and not personally liable. *Almon v. Hamilton*, 100 N. Y. 327.

And where a creditor had a bill indorsed by a third party, and the composition did not provide for giving up security, it was held that he might retain the proceeds of such bill where altogether he did not draw a greater per cent than the other creditors. *Thomas v. Courtney*, 1 Barn. & Ald. 1.

VI. Liability of creditor on obtaining a fraudulent preference.

Generally a creditor obtaining a greater share than the other creditors by a fraudulent secret preference, as an inducement to join the composition or requiring a note which the debtor has been compelled to pay to a third party, may be required to give the same up to the debtor notwithstanding such debtor is to a certain extent a participant in such fraud. *Gilmour v. Thompson*, 49 How. Pr. 398; *Re Lenzberg's Policy*, L. R. 7 Ch. Div. 650, 47 L. J. Ch. 178, 25 Week. Rep. 253; *Eastabrook v. Scott*, 3 Ves. Jr. 456; *Mare v. Earle*, 3 Giff. 108, 7 Jur. N. S. 1280, 4 L. T. N. S. 852; *Mare v. Warner*, 3 Giff. 100, 7 Jur. N. S. 1223, 4 L. T. N. S. 861; *Turner v. Hoole*, Dowl. & R. N. P. 27; *Atkinson v. Denby*, 7 Hurlst. & N. 334, 31 L. J. Exch. 862, 6 Jur. N. S. 1012, 7 L. T. N. S. 93, 10 Week. Rep. 389, affirming 6 Hurlst. & N. 778, 20 L. J. Exch. 361, 7 Jur. N. S. 1205, 4 L. T. N. S. 252, 9 Week. Rep. 530; *Bradshaw v. Bradshaw*, 9 Mees. & W. 22; *Smith v. Cuff*, 6 Maule & S. 100; *Stock v. Dawson*, 1 R. & P. 285; *Horton v. Riley*, 11 Mees. & W. 492, 13 L. J. Exch. 81; *Jackman v. Mitchell*, 13 Ves. Jr. 581.

And the assignee of a creditor may recover payments, which were made to induce such creditor to join the composition. *Bean v. Amsinck*, 10 Blatchf. 261; *Bean v. Brookmire*, 2 Dill. 108; *Alger v. Spalding*, 6 Scott, 204, 4 Bing. N. C. 407, 1 Arn. 131.

And in *Pfeiger v. Browne*, 28 Beav. 391, where the creditor obtained an insurance policy as an advantage, it was held to belong to the representative of the family of the debtor even though the insurance company issued a new policy payable to the creditor in lieu of the old one.

In *Mare v. Sandford*, 1 Giff. 253, 5 Jur. N. S. 1230, it was held that a bankrupt may recover a fraudulent preference from a creditor under the Bankrupt Act, section 221, providing that if any creditor

obtains any advantage in composition over others he should forfeit the debt together with the composition.

Creditors who obtain from the debtor security for a fraudulent preference as an inducement to enter the composition will be compelled to give them up to the party giving such security. *Cullingworth v. Lloyd*, 2 Beav. 335, 9 L. J. Ch. N. S. 218, 4 Jur. 234; *Middleton v. Onslow*, 1 P. Wms. 768.

But in *Moses v. Katzenberger*, 1 Handy (Ohio), 46, it was held that a debtor who had preferred a creditor in a composition could not maintain a suit to have a satisfaction of the judgment by such creditor entered of record, as the parties being both guilty of fraud, the court leaves them where it finds them.

In *Solinger v. Earle*, 52 N. Y. 393, 13 Jones & S. 80, and 604, it was held that the payment of a note to a "bona fide" holder executed by a brother-in-law of the debtor, which note was given in fraud of creditors, could not be recovered by such brother-in-law as he was not so near a relative as come within the rule of "duress."

A debtor who paid a greater amount to one creditor than to another cannot recover the same after the matters have all been closed, where he voluntarily paid without objection. *Wilson v. Ray*, 10 Ad. & El. 62, 3 Perry & D. 253, 3 Jur. 384.

And in *Ward v. Bird*, 2 Chitty, 582, it was held that he could not recover the difference between the composition and the payment in full, without showing that the composition notes had been paid.

A debtor cannot maintain an action in a composition covenant to indemnify him in the composition where the defendant had been preferred, and he may plead his own fraud as a bar. *Higgins v. Pitt*, 4 Exch. 312, 18 L. J. Exch. 488.

And where a creditor gave up the composition notes after the composition and obtained security, he was not liable to the other creditors, unless the agreement therefor was prior to or part of the composition. *Hagen's App.* 11 W. N. C. 86.

VII. Composition not general.

A creditor cannot avoid a composition that is not general because other creditors not parties thereto may have obtained an advantage. *Smith v. Stone*, 4 Gill & J. 310; *Eaton v. Lincoln*, 13 Mass. 424; *Argall v. Cook*, 43 Conn. 160; *Cheveront v. Textor*, 58 Md. 295.

In the preparation of this note cases in regard to preferential assignments and releases under the assignment or bankruptcy statutes providing for such releases have not been included. L. T.

provide for in the terms of the deed, and not disclosed, is void, as a fraud upon the creditors from whom it is concealed." The importance of this expression of judicial opinion should not, in my judgment, be underestimated. It was delivered by one of the most eminent judges in this state, and was concurred in by his associates, *Judges* Mason and Campbell. It does not appear from the opinion that *Howden v. Haigh* was before him, although it had been decided ten years before. But, whether his attention was called to it or not, the learned judge's opinion was formed after considering the same early English cases as were considered by *Lord* Denman in *Howden v. Haigh* and by *Justice* Erie in *Mallalieu v. Hodgson*. *Judge* Duer limited the effect of the fraudulent secret agreement to the nullification of any rights or advantages attempted to be gained under it, and regarded it as something quite separable from the composition agreement itself. From all the early cases in England and in this state, the inference from the decisions is, not that the composition agreement is avoided, but, as *Justice* Nelson stated it in *Russell v. Rogers*, "the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, . . . is void and inoperative." So in *Fellows v. Stevens*, 24 Wend. 294, *Justice* Cowen held that the law would set aside "all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors." It is the secret agreement itself which is fraudulent and void. *Bliss v. Matteson*, 45 N. Y. 23; *Harloe v. Foster*, 58 N. Y. 385. And that is all that I think *Leicester v. Ross* decided. *White v. Kuntz*, 107 N. Y. 518, is one of the latest cases in which this court has considered the effect of composition agreements. In that case the plaintiff had signed a composition agreement by which he agreed with other creditors of the debtors to accept one third of the indebtedness due them in four notes, to be indorsed by the father of the debtors. To induce the plaintiff to sign this agreement, Kuntz, the father of the debtors, secretly agreed to purchase of him the composition notes within a specified time, and to pay \$10,000; the composition notes aggregating only about \$6,000. This secret agreement Kuntz refused to perform, alleging that it was null and void. Thereupon, plaintiff brought an action, alleging these facts in his complaint, and also that several other creditors had been induced to sign by a secret agreement to pay them a larger percentage than the one third provided for in the composition agreement, and, upon the ground that that agreement was void as to him, demanded its cancellation, and that of the notes delivered under it, and a judgment against the debtors, for the amount of the original indebtedness. Demurrer to the complaint was sustained below, and in this court the judgment was sustained. It was held that the agreement between plaintiff and Kuntz, the debtors' father, was fraudulent, and could not be enforced, and that the composition agreement, as to all the innocent parties, was avoided. As the plaintiff was not an innocent

party, but had himself taken a fraudulent advantage, he could not set up the fraud of the creditors. The opinion discusses what were his rights. It was said that he had not forfeited all claims upon his debtors; that "he must have either the composition notes, or his original notes;" that he could not avoid the composition agreement as to himself, and enforce his original notes for their full amount, as that would unjustly result in an advantage over the other creditors, and "he should be held to the composition." "His only remedy," it was said, "against the defendants, is upon the composition notes." *Judge* Earl, in delivering the opinion in *White v. Kuntz*, cited the English case of *Mallalieu v. Hodgson*, *supra*, as an authority in point; but that he did not adopt the opinion, in all its expressions, is evident, for he held that there was "no ground upon which he [the creditor in the case before him] can be deprived of all remedy." It is very plain from the opinion in *White v. Kuntz*, that it is the secret agreement, by which the creditor receives an undue advantage, which is deemed to be avoided. It was so considered, again, by *Judge* Andrews, in *Meyer v. Blair*, 109 N. Y. 600, who, referring to *White v. Kuntz* as authority for the statement that a collateral agreement is void in composition cases, which secures to one creditor an advantage over others, said, "The court refuses to enforce the secret bargain, and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept." In *Solinger v. Earle*, 82 N. Y. 393, the facts were that a third party had given his note for a portion of the insolvent's debt to the defendants, to induce them to agree to the composition. Having paid the note to a transferee thereof, he brought an action to recover back from the defendants the money so paid. It was held that the action could not be maintained, for, although the transaction was a fraud upon the other creditors, the parties were *in pari delicto*. *Judge* Andrews, remarking that fair dealing condemned such a transaction, said: "If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover." Inasmuch as the note sued upon was for an additional amount beyond the amount of the composition agreement, the remark of the learned judge was in line with all the authorities. He held the secret agreement was void, and could not have been enforced. The case is in no wise in conflict with *White v. Kuntz* or *Meyer v. Blair*.

If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt; a view which *Littledale, J.*, regarded as possible in *Howden v. Haigh*. It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agree-

ment has been avoided, it has become inoperative as an agreement for any purpose. We assert a wholesome rule, and one which works a just result, if we hold that the secret and fraudulent agreement itself is illegal, and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition, though it has support in some of the English cases referred to. It seems to me the case falls easily within the rule which permits a severance of the illegal from the legal part of the covenant. *Pickering v. Ifracombe R. Co.* L. R. 8 C. P. 235, 250; *United States v. Bradley*, 85 U. S. 10 Pet. 343-360, 9 L. ed. 443, 455. In *Malan v. May*, 11 Mees. & W. 653, the plaintiffs, who were surgeon dentists, agreed to take the defendant as an assistant, and to instruct him for a term of years, and he agreed, at the expiration of that term, not to practice his profession "in London, or any of the towns in, or places in, England or Scotland, where the plaintiffs might have been practicing." It was held that the covenant as to not practicing in London was valid, and that not to practice elsewhere was illegal, but that the valid part was not affected by the illegality of the other part. Here, the agreement with other creditors for a composition was lawful and valid, unless they should elect to rescind it upon the discovery of the secret agreement,—an element not present. But the agreement for, and the giving of, additional security, was unlawful and void. Is there any reason why the bad may not be rejected, and the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiff's original demand, or that it shall fall, and leave the plaintiff at liberty to recover the original debt, I am for upholding it, and I fail to see why the legal part of the transaction had with it cannot be severed from the illegal part. We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor, and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far, and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is execu-

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tory, they may not so elect, and may rely that the creditor secretly seeking to obtain some promise of advantage over them will be prevented from enforcing it, and from gaining anything by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation which, from its inception, was unlawful, and which the law annuls. *Bliss v. Matleson*, 45 N. Y. 22.

It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain there would be an inducement to an unscrupulous creditor to commit a fraud, for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent, that may be true; but, on the other hand, it may be suggested that if it were the rule the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement, and thus, by trick and device, to leave them wholly remediless,—disabled to recover the amount of the composition, and disabled from pursuing the original debt which the composition agreement released. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement. The conclusion reached is the result of a careful examination of the authorities and the doctrine they teach, and it is in accord with a wiser policy. It must not be forgotten that the defendant's contract of indorsement is within the terms of the composition agreement with respect to the note in suit. We know nothing of the fate of the earlier notes, the indorsement upon which by defendant was secretly and fraudulently procured to be added. She had a perfect defense to the enforcement of her contract. We are only concerned now with the question of whether the plaintiff shall have the amount of the composition, notwithstanding it may have been agreed secretly that it should have some better security for the payment of some of the composition installments. This question, for the reasons stated, should be answered in the affirmative; and therefore the judgments below should be reversed, and a new trial ordered, with costs to abide the event.

All concur, except *Andrews, Ch. J.*, and *Peckham, J.*, dissenting.

CHAS. S. HIGGINS CO., *Appt.*,

v.

HIGGINS SOAP CO., *Resp't.*

(144 N. Y. 462.)

1. The right of a person to use his own name in business notwithstanding the prior use of the name by others in a similar business, does not extend to a corporation of which he is a promoter and member.
2. The use of the name "Higgins Soap Co." to some extent as that of the "Chas. S. Higgins Co." which is engaged in manufacturing various kinds of soap called by the general name of "Higgins Soap" will prevent the right of a company subsequently incorporated in another state under that name to use it in a rival business in the same city.

(January 2, 1896.)

APPPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Special Term for Kings County in favor of defendant, in an action brought to enjoin defendant from using the name under which it was doing business. *Reversed.*

The facts are stated in the opinion.

Mr. H. Aplington, for appellant:

The relief asked for in this action is based upon the principles involved in trade-mark cases.

Reeves v. Denicks, 12 Abb. Pr. N. S. 92; *McCardel v. Peck*, 28 How. Pr. 120; *Levy v. Walker*, L. R. 10 Ch. Div. 437.

The plaintiff is entitled to an injunction herein.

The name of a corporation will be protected as against another corporation with the same name or a name so similar as to be liable to produce confusion or deceive the public.

Newby v. Oregon Cent. R. Co. 1 Deady, 609; *American Grocer Pub. Asso. v. Grocer Pub. Co.* 25 Hun. 898; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94.

A name cannot be used to represent that your business is my business.

William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co. 11 Fed. Rep. 495; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Rogers v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78; *Massam v. Thorley's Cattle Food Co.* L. R. 6 Ch. Div. 574, L. R. 14 Ch. Div. 748; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176; *Holloway v. Holloway*, 13 Beav. 209; *Stonebraker v. Stonebraker*, 88 Md. 268; *Browne*, Trade-Marks, 2d ed. § 420; *Munro v. Tousey*, 14 L. R. A. 245, 129 N. Y. 88; *Waterman v. Shipman*, 130 N. Y. 801; *International Trust Co. v. International Loan & T. Co.* 10 L. R. A. 758, 153 Mass. 271; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 87 Conn. 278, 9 Am. Rep. 324; *Hendriks v. Montagu*, 50 L. J. Ch. 456; *Fraser v. Fraser Lubricator Co.*

121 Ill. 147; *Merchants Detective Asso. v. Detective Mercantile Agency*, 25 Ill. App. 259; *Taylor v. Carpenter*, 2 Sandf. Ch. 604, 613, 7 L. ed. 721, 725; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Seizo v. Provezende*, L. R. 1 Ch. 193; *La Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 5 U. S. App. 112, 51 Fed. Rep. 941.

As a general rule the purchasers of kitchen soap are domestics who can be easily imposed upon, and this fact should be considered in the case at bar.

Munro v. Smith, 86 N. Y. S. R. 841.

Mr. Jesse Johnson, for respondent:

Every man has the right to use his own proper name to designate the product of his own ingenuity, skill or industry. It is appropriate and proper that he should do so.

Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173; *Kochler v. Sanders*, 9 L. R. A. 576, 123 N. Y. 65; *Caswell v. Hazard*, 121 N. Y. 484; *James v. James*, 41 L. J. Ch. 353; *Marcus Ward & Co. v. Ward*, 40 N. Y. S. R. 792.

General descriptive words, words which are the names of places or things, cannot be appropriated and made property under the trade-mark law.

Browne, Trade-Marks, §§ 191, 192; *Newman v. Alford*, 51 N. Y. 189, 10 Am. Rep. 588; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 811, 20 L. ed. 581; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 92; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247; *Leclanche Battery Co. v. Western Electric Co.* 23 Fed. Rep. 276.

Whether plaintiff's soap is known in the trade, either generally or sometimes, as "Higgins Soap" does not entitle the plaintiff to an injunction in this case.

An employé in any business requiring skill or ability, when he retires from that business (whether voluntarily or on compulsion), has a right to advertise that he is the person formerly in the other concern, and he has a right to whatever of custom or of trade may come to him from honestly stating the fact.

Van Wyck v. Horowitz, 39 Hun. 237; *Colton v. Deane*, 7 N. Y. S. R. 78; *Marcus Ward & Co. v. Ward*, 40 N. Y. S. R. 792.

Mr. Higgins simply uses his own name, and, if some one remembers who and what he was in the soap business, that does not present a case for an injunction.

The fact that the names here in controversy are the names of corporations, and not of persons, makes the rule still stronger in defendant's favor.

Employers Liability Assur. Corp. v. Employers Liability Ins. Co. of the U. S. 24 Abb. N. C. 888, 61 Hun. 552; *Farmers Loan & T. Co. v. Farmers Loan & T. Co. of Kansas*, 21

NOTE.—While the above case is not expressly made to turn on the effect of a transfer of the right to use a trade-name, it appears that the goodwill and trade-marks of the soap business conducted by Chas. S. Higgins were transferred by him to a corporation which took his name. As to the effect of such a transfer to carry the right to use a

trade-name, and as to right of an individual to use his own name in his own business after such a transfer, see *note* to *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462, also *Fish Bros. Wagon Co. v. Fish* (Wis.) 16 L. R. A. 453, and *La Page Co. v. Russia Cement Co.* (C. C. App. 1st C.) 17 L. R. A. 354.

Abb. N. C. 104; *Re United States Mercantile Reporting & Collecting Agency (Limited)*, 115 N. Y. 178.

Andrews, *Ch. J.*, delivered the opinion of the court:

The plaintiff seeks in this action to restrain the use by the defendant in this state of its corporate name, "Higgins Soap Company," in the business of manufacturing and selling soap, on the ground that such use is an unlawful invasion of the rights of the "Chas. S. Higgins Company," the plaintiff corporation. The corporate names of the respective corporations are not identical, but it is claimed in behalf of the plaintiff that there is a similarity between them which, in connection with other facts, is liable to and has produced confusion, and will enable the defendant to appropriate the trade of the plaintiff. The facts found show that in 1890, prior to the organization of the corporation defendant, under the laws of New Jersey, which took place in 1892, the plaintiff, a domestic corporation, organized by Charles S. Higgins and others, purchased from Charles S. Higgins and his partner, for the sum of \$810,000, in stock and bonds, the soap business originally established in Brooklyn by the father of Charles S. Higgins in 1846, to which business Charles S. Higgins succeeded on his father's death in 1860, together with the good-will, labels, trade-marks, and other property employed in the business. The business was very valuable, and the plaintiff and its predecessor expended, subsequent to 1879, in advertising, the sum of \$300,000, and the product was extensively sold in New York and other states, and was well known to the trade as "Higgins Soap," and the plaintiff corporation was sometimes known as the "Higgins Soap Company." The plaintiff and its predecessors manufactured a great variety of soaps, which were put up under different names, the leading article being known as "Chas. S. Higgins German Laundry Soap;" but, as we infer from the findings, all the soap so manufactured passed under the general name of "Higgins Soap." On the organization of the plaintiff corporation and the purchase of the business, it continued to carry it on in Brooklyn, where it had been originally established, and where it has ever since been carried on. Charles S. Higgins was a director of the plaintiff, and its first president, and so continued for a year after its incorporation, when he was displaced from his position as president, and ceased to be a director of the company. The ground of his discharge does not appear. Soon afterwards, in the summer of 1892, Charles S. Higgins, with his wife, his son, and two other persons, organized the defendant corporation, under the name of the "Higgins Soap Company," to carry on the soap business, and commenced the manufacture of soap, having its factory, principal office, and place of business outside of New Jersey, in the city of Brooklyn. Charles S. Higgins became the president of the defendant corporation, and, among other products, it manufactured and put up a soap in bars, on the wrappers of which appear the words

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"Higgins Soap Company, Original Laundry Soap, Charles S. Higgins, Prest.,"—and the bars were impressed with substantially the same words. It was shown on the trial that letters intended for the plaintiff, containing orders for goods, or relating to other business matters, had been sent addressed to the "Higgins Soap Company," "Chas. S. Higgins Soap Co.," and "Chas. Higgins Co.;" but, in general, the plaintiff's place of business was added to the address, and they were received by the plaintiff. There were produced twenty-eight letters and envelopes of this kind, written within four months after the organization of the defendant and the commencement of this action, and it was stated that these did not comprise all the letters of this description. The main ground upon which the plaintiff has been defeated in the courts below is that Charles S. Higgins or the members of his family, either separately or jointly, had the right to establish the soap business, and to use the name of Higgins in conducting it, and to designate the product as "Higgins Soap," and that no right of the plaintiff was invaded by giving to the corporation formed by them the name of "Higgins Soap Company."

The case of *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489, following other cases, is an authority upon the proposition that any person may use in his business his family name, provided he uses it honestly and without artifice or deception, although the business he carries on is the same as the business of another person of the same name previously established, which has become known under that name to the public, and although it may appear that the repetition of that name in connection with the new business of the same kind may produce confusion, and subject the other party to pecuniary injury. The right of a person to use his family name in his business is regarded as a natural right, of which he cannot be deprived, by reason simply of priority of use by another of the same name. In the bill of sale from Charles S. Higgins to the plaintiff the former consented that, so long as he should be allowed a salary of \$15,000 per year for his services, he would give to the company the full benefit of his receipts, processes, etc., and that, "so long as he may be employed at the salary aforesaid, he, said Higgins, would refrain from making or selling soap in the city of Brooklyn except for said company;" thereby, by implication, reserving the right to engage in the business if the plaintiff should terminate his employment. But the question as to the right of the defendant to assume the name of the "Higgins Soap Company," or to do business in that name, is not affected by any contract entered into between Charles S. Higgins and the plaintiff. The defendant is a distinct person in the law from Charles S. Higgins, one of its corporators and officers. It had entered into no contract with the plaintiff, nor does it derive any of its rights from Charles S. Higgins. It stands in respect to the question involved in this litigation in the same situation as if Charles S. Higgins had never been a corporator or stockholder.

It cannot appropriate the name or the trade-marks or the business of the plaintiff by any simulation or deceit, because the law prohibits such appropriation by any person, natural or artificial; but the fact that Charles S. Higgins was active in organizing the defendant, or that he may have been actuated in doing so by feelings hostile to the plaintiff or by a desire to injure its business, is, as we conceive, irrelevant to the case. The sole test of liability is whether the acts done, either in organizing the defendant or in the prosecution of its business subsequently, invaded any right of the prior corporation, or exceeded the boundaries of fair competition. On the other hand, we think it is equally clear that the defendant derives no additional immunity from the fact that the name of "Higgins," in its corporate name, was that of one or more of its corporators, or that Charles S. Higgins, or any one of that name, might engage in the soap business under the family name, or that Charles S. Higgins and the other corporators of the same name had consented to its use. The right of a man to use his own name in his own business, the law protects, even when such use is injurious to another who has established a prior business of the same kind, and gained a reputation which goes with the name. But in such cases the courts require that the name shall be honestly used, and they permit no artifice or deceit, designed or calculated to mislead the public and palm off the business as that of the person who first established it and gave it its reputation. *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 18 Beav. 209; *Russia Cement Co. v. Le Page*, 147 Mass. 206. It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual; and it will be protected against infringement by another who assumes it for the purposes of deception, or even when innocently used, without right, to the detriment of another; and this right, which is in the nature of a right to a trade-mark, may be sold or assigned. *Levy v. Walker*, L. R. 10 Ch. Div. 436; *Hozie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Bassett v. Percival*, 5 Allen, 345; *Russia Cement Co. v. Le Page*, *supra*; *Millington v. Fox*, 8 Myl. & C. 338. In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion, and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the state may affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive.

The names of corporations organized under general laws, and in most other cases, are chosen by the promoters, and it would be an easy way to escape from the obligations which are enforced as between individuals if a corporation were granted immunity by reason of their corporate character. The prin-

ciple upon which courts proceed in restraining the simulation of names which have become trade-marks, and have come to designate the business of a particular person or company, is stated in *Lee v. Haley*, L. R. 5 Ch. 155,—an action to restrain the use by the defendant of the name of the "Guinea Coal Company," in his business. "I quite agree [said Gifford, L. J.] that they [plaintiffs] have no property in the name [Guinea Coal Company], but the principle upon which the cases on the subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." The cases are not infrequent in which the use of corporate names has been restrained on the principle of the trade-mark cases. *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 33 Fed. Rep. 24; *Newby v. Oregon Cent. R. Co.* 1 Deady, 609, Fed. Cas. No. 10,144; *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* 11 Fed. Rep. 495; *Le Page Co. v. Russia Cement Co.* 2 C. C. A. 555, 51 Fed. Rep. 942, 17 L. R. A. 354, 5 U. S. App. 112.

Whether the court will interfere in a particular case must depend upon circumstances,—the identity or similarity of the names, the identity of the business of the respective corporations, how far the name is a true description of the kind and quality of the articles manufactured or the business carried on, the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy. Whether, upon equitable principles, the remedy should have been awarded in this case upon the facts proved and found is the question in this case. If the right of the plaintiff to relief depended exclusively upon the comparison of the corporate names of the parties, and the inferences to be drawn from such comparison alone, and without reference to any extrinsic facts, it might well be doubted whether the names are so similar that the court could find that confusion and injury would be likely to arise. But the case does not rest alone upon the inferences from such comparison. It would naturally be inferred from the names that both parties were corporations. The name of "Higgins" appears in each. The name of the plaintiff does not itself indicate the business of the plaintiff corporation, while the name of the defendant describes its business. But, while the plaintiff's name does not describe its business, its product has come to be known to the trade as "Higgins Soap," and to the public the name of the product identified the plaintiff as the manufacturer of this product, and the company came to be known and called, to some extent, the "Higgins Soap Company." The

use of the name "Higgins" in connection with the business was valuable, because of its use for a great number of years by the father of Charles S. Higgins, and subsequently by the son, under which a large business had been built up, and by reason of the large sums which had been expended in advertising the product. The name of the plaintiff in connection with these facts indicated to dealers in soap that the article known as "Higgins Soap" was manufactured by the plaintiff. The manufacture had been established for fifty years, and carried on in the same place. Among the labels which were transferred to the plaintiff was one containing the words "Higgins Soap," and the word "Higgins" was placed upon many of the labels. It cannot be doubted upon the findings that the reputation of "Higgins Soap," when the defendant corporation was organized, applied to, and designated to the trade, the soap manufactured by the plaintiff and its predecessors. The promoters of the defendant, knowing the history of the business established by Higgins, Sr., in 1846, its transfer to the plaintiff, that the product was known to the trade as "Higgins Soap," that the business had become very valuable, and that large sums had been expended in advertising it, proceeded to organize the defendant corporation under the name of the "Higgins Soap Company," and to manufacture soap in the same city where the plaintiff's business was carried on. The inference seems irresistible that the defendant assumed its corporate name so that it should carry the impression that it was the manufacturer of "Higgins Soap," so well known to the

public. But if the name was assumed in good faith, and without design to mislead the public and acquire the plaintiff's trade, the defendant, knowing the facts, must be held to the same responsibility as if it acted under the honest impression that no right of the plaintiff was invaded. The names are not identical, but, as said by Bradley, J., in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, *supra*: "Similarity, not identity, is the usual recourse where one party seeks to benefit himself by the good name of another." In that case the learned and experienced judge who sat therein expressed the opinion that the use of the corporate name of the defendant should be restrained, although there was a much greater dissimilarity between the names there in question than exists between the names of the parties here. As between these parties, the case is, we think, the same as if the word "Soap" was written into the plaintiff's name, and its corporate designation was "Chas. S. Higgins Soap Company." The evidence shows that confusion has arisen, and it is a reasonable presumption that, if the defendant is permitted to continue to carry on the business of soap-making under its present name, the public will be misled, and the plaintiff's trade diverted, the extent of such diversion increasing with the increase of the defendant's business.

We think the plaintiff, upon the facts found and proved, was entitled to relief by injunction.

The judgment should be reversed, and a new trial granted.

All concur, except Haight, J., not sitting.

WYOMING SUPREME COURT.

STATE of Wyoming, *as rel.* Louis MILLER,

Amos W. BARBER, Secretary of State.

(.....Wyo.....)

1. The duty of the secretary of state to countersign and affix the great seal of the state to commissions, official acts, and other instruments issued or done by the governor, under a statute saying, "he shall affix" the seal in such cases, is merely ministerial and may be compelled by mandamus.
2. The right of an officer to a commission, which has been issued to him by the governor, cannot be considered on an application for mandamus to compel the secretary of state to perform his ministerial duty to affix the great seal to such commission, notwithstanding the general rule that a clear legal right to the writ must be shown.

(December 1, 1893.)

Note.—For mandamus to secretary of state, see also *State v. Crawford* (Fla.) 14 L. R. A. 238.

For mandamus to governor, see *Greenwood Cemetery Land Co. v. Boutts* (Colo.) 15 L. R. A. 309; *Bovey v. State* (Ind.) 11 L. R. A. 703, and *note*, also *note* to *State v. Whitesides* (S. C.) 8 L. R. A. 777.

For mandamus to speaker of house, see *State v. Elder* (Neb.) 10 L. R. A. 795.
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PETITION for a writ of mandamus to compel defendant to countersign and affix the great seal of the state to a commission which had been issued to relator by the governor of the state authorizing him to act as fish commissioner. *Granted.*

The facts are stated in the opinion.

Mr. A. C. Campbell, for relator:

The duties of secretary of state are ministerial in their nature.

Laws 1890-91, chap. 69, p. 382.

It is his duty to affix the seal of the state and to countersign all commissions issued by the governor.

Laws 1890-91, chap. 69, §§ 7, 8, p. 383.

(a). Mandamus will lie to compel a secretary of state to attest a commission duly issued by the governor.

Mechem, Pub. Off. § 958; *Merrill*, Mandamus, § 102; *State v. Wrotnowski*, 17 La. Ann. 156; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346.

(b). The secretary of state cannot go behind commissions officially presented to him for authentication.

State v. Wrotnowski, *supra*.

(c). The governor is presumed, as a sworn officer, to have done his duty and the secretary has no right to presume that grounds

did not exist justifying the governor in issuing the commission.

Ibid.

(d). Appointments are intrinsically executive acts.

State v. Barbour, 58 Conn. 83, 55 Am. Rep. 65; *Territory v. Cox*, 6 Dak. 501.

And as the executive power is by our Constitution, article 4, section 1, vested in the governor, the secretary by refusing to affix the seal and countersign the commission issued by the governor usurps a power not delegated to him and places a veto power upon an executive act.

Const. art. 4, § 2, p. 46.

Messrs. Charles N. Potter, Atty-Gen., and Lacey & Van Devanter for respondent.

Clark, J., delivered the opinion of the court:

This is an original proceeding in mandamus, commenced in this court, under the provisions of article 5, section 8, of the Constitution, conferring original jurisdiction upon this court in cases of mandamus, as to all state officers. The relator, in his petition, substantially sets up the following facts: (1) That he is, and for more than two years last past has been, a resident citizen and a qualified elector of the state of Wyoming. (2) That respondent is the duly qualified secretary of state of the state of Wyoming. (3) That it is the duty of the said secretary of state to affix the great seal of the state and to countersign all commissions and other official acts required by law to be issued or done by the governor of the state. (4) That on the 9th day of February, 1898, the governor of the state duly nominated to the senate of the state the relator to the office of fish commissioner for the state of Wyoming, which nomination was duly received by said senate, and said senate thereafter, on the 18th day of February, 1898, adjourned *sine die* without either consenting to or disapproving, or in any manner acting upon, said nomination. (5) That thereafter, on the 17th day of March, 1898, the legislature not being in session, the governor of this state did duly appoint and commission relator as fish commissioner of the state of Wyoming, and did transmit said appointment and commission to the said secretary of state, with the request that he countersign the same, and affix thereto the great seal of the state; that the said secretary did refuse to so countersign and affix the said seal, and returned said commission and appointment to the said governor without having affixed thereto said seal, or countersigned the same. (6) That, by reason of such refusal, relator is kept out of the fees and emoluments of the office, etc.; that he is entitled to speedy relief, etc., and is entirely without relief, unless it be afforded by this court. (7) That Gustave Schnitger is now exercising the duties and receiving the emoluments of said office, wherefore, he prays for the writ of mandamus.

To this petition the respondent filed his answer, in which he admits all the statements of the petition, excepting only those

stated in the sixth paragraph, as above set forth, which he denies, and further sets forth as a defense herein: (1) That on the 24th day of January, 1891, the governor of this state, by and with the advice and consent of the senate, duly and regularly appointed and commissioned Gustave Schnitger fish commissioner of the state of Wyoming for a period of two years thereafter, and until his successor should have been duly appointed and qualified; that thereafter the said Schnitger duly qualified, and entered upon the duties of said office, and ever since has been, and still is, exercising and discharging the same. (2) That at the time the relator was appointed to said office, to wit, March 17, 1893, Gustave Schnitger was the lawful incumbent thereof; that there was then no vacancy in the office, and hence the governor of the state did not then have power or authority to appoint or commission relator thereto, nor was he then required or authorized by law to make such appointment, or to issue any such commission. (3) That defendant, as secretary of state, is not required by law to affix the great seal of the state or countersign any commission issued by the governor of the state, unless such commission is required or authorized by law to be issued by the governor. (4) That relator has not been appointed to the office by the governor, with the advice or consent of the senate; that he has not been appointed to fill any vacancy occurring or existing in the office, and is not entitled thereto. (5) That should the commission to relator be sealed and countersigned, as prayed for, the same would not authorize him to qualify as such officer, or give him any right or title to the said office.

To this answer relator demurred generally, and upon these pleadings, the petition, answer, and demurrer, the cause was submitted to the court.

The first question which meets us in the consideration of this cause may be thus stated: Is the secretary of state, under the constitution and laws of the state of Wyoming, a mere ministerial officer, as regards the countersigning and sealing by him of the official acts and instruments of the governor of the state, when such acts are presented to him, and he is requested by the governor to countersign the same, and affix the great seal of the state thereto? Or is he, under the constitution and laws of the state, vested with discretionary and supervisory power, which enables him, before executing the functions imposed by law upon him in this particular, to judge for himself whether such official acts or instruments as need his authentication are constitutional or unconstitutional, legal or illegal, and to affix or withhold from such acts or instruments, at his option, according to his discretion, his official signature, and the impress of the great seal of the state?

In our opinion, the duty of the secretary of state with respect to countersigning and affixing the great seal of the state to the commissions, official acts, and other instruments issued or done by the governor are simply and merely ministerial, and he has no power

or authority to legally go behind these acts issued or done by the governor in due form, and examine into the facts upon which the executive action was predicated. Laws 1890-91, chapter 95, defines the duties of secretary of state, and section 8 thereof is as follows: "Sec. 8. He shall affix the great seal of the state to and countersign all commissions and other official acts required by law to be issued or done by the governor, his approval or disapproval of the acts of the legislature excepted, and all other instruments when required or authorized by the governor." We have no doubt that the appointment of the relator to the office of fish commissioner, as set forth in the pleadings here, was an official act on the part of the governor, and such an official act as the law required to be evidenced by a written instrument executed by him. *People v. Murray*, 70 N. Y. 521. We do not think that, by any fair construction, it can be held that the section quoted means that the secretary shall be limited in his duty in this respect to those official acts, only, which are expressly authorized by law to be issued or done by the governor, but, on the contrary, that, in all cases in which the law requires that the official act of the governor shall be evidenced by some written instrument to be subscribed by him, it is then the duty of the secretary of state to countersign and affix the great seal of the state thereto, when requested so to do by the governor. The language of the act is imperative. It does not simply authorize the secretary to countersign and seal the instrument. It positively commands him to do so. "He shall," is the command; not, "He may, if, in his judgment, it is proper." The object of the statute is apparent. The great seal of the state, bearing a device prescribed by law, impressed upon a written instrument bearing the purported signature of the governor of the state, proves, in perhaps the best possible way, that the signature is genuine, and that the instrument is an official act of the governor. This is the only object and purpose of the requirement. After the countersigning and sealing by the secretary, it is still the official act of the governor, and of him alone, and in no degree whatever is it the act of the secretary. It is wholly and entirely immaterial whether the secretary approves or disapproves the act. Whether he assents to it or dissents from it, it is none of his concern. The governor is the responsible party, and he alone is responsible for his official acts in matters of this kind. Being the responsible party, and, by virtue of article 4, section 1, of the Constitution of this state, having the executive power vested in him, and in him alone, and being authorized by the act creating the office of fish commissioner to fill vacancies in that office (Laws 1890-91, chap. 69, § 1), and being expressly authorized by the statute (Laws 1890, chap. 80, § 47), to determine when a vacancy exist in an office which he has the power to fill by appointment, it follows that in all such cases he must determine for himself, at least so far as the executive department is concerned, from information communicated to him, when appointments become

necessary, and he is under no legal obligation to communicate, either to the secretary of state or to any one else, upon what information he acts. *State v. Wrotnowski*, 17 La. Ann. 156, 161; *State v. Harrison*, 118 Ind. 434; *Hill v. State*, 1 Ala. 561. In short, he is the governor of the state, placed in his position by the people of the state, and authorized by the constitution and laws of the state to perform certain acts; and acting, as he does, under the sanction of a solemn oath, his official acts are entitled to the respect of every one, because they are the acts of the proper department, and, prima facie, are presumed to be within the power and authority conferred upon him by law. *Hill v. State*, *State v. Harrison*, and *State v. Wrotnowski*, *supra*.

It does not follow from what has been said that the commission, when countersigned and impressed with the great seal of the state by the secretary of state, will entitle or authorize the relator to oust the incumbent of the office. What the effect of the commission may be upon the respective rights of the relator and the incumbent is a question which can be better determined in a controversy between them; and in this case we express no opinion whatever concerning that question, further than to say this: that in such proceeding between relator and the incumbent the question of the right and authority of the governor to make the appointment will be a judicial question and, as we now think, not concluded by the *ex parte* determination of the governor, upon which the commission was issued.

But it is urged upon us that inasmuch as the relator is not entitled to a writ of mandamus, unless he shows a clear legal right thereto, the question of his right under the commission is fairly before the court on the facts pleaded, and we must determine the law upon those facts before we can say that the relator has "a clear legal right" to the writ, because, if, upon the facts pleaded in the answer, it is clear that the commission confers no actual right to the office upon the relator, the writ will require the respondent to do a vain and useless act, which the law never requires. The following considerations are, in our opinion, a complete answer to this line of reasoning. Admitting, for the purpose of this question, the claim of counsel for respondent, that, under the facts demurred to, the action of the governor was wholly without authority of law, it does not follow that the secretary was at all justified in withholding his signature and seal from the commission, when presented to him, and request therefor made upon him by the governor. If such a conclusion should follow, it would be tantamount to declaring the law to be that the secretary might exercise his discretion in this case, and as in this case, so in every other case; and in our opinion the strongest possible grounds of public policy demand that such shall not be the rule. As was said by the supreme court of Louisiana in the case of *State v. Wrotnowski*, *supra*,—a case almost identical with this: "Were this right of supervision, which is almost equivalent to a veto power, in the secretary

of state, as it is seriously contended it is, it would indeed produce startling consequences. The secretary of state could paralyze at will constitutional appointments made by the executive. He, and not the governor, would control appointments, or nullify them." Again, in this case, as in the *Wrotnowski Case* cited, every fact stated in respondent's answer may be true, as we assume it is, and still there may be conditions existing which would have justified the governor in issuing the commission; and, such being the case, the presumption of legality which flows from the performance of an official act done by the highest executive officer of the state still obtains, and in this proceeding the court will not go behind the commission to inquire into the evidence on which it was issued. *State v. Wrotnowski, supra*. Nor does it clearly appear that the writ, if issued, would require the respondent to do a vain and useless act, even admitting all the claims of counsel for respondent as to the legal conclusion to be drawn from the facts pleaded by him, for with such admission it will still depend upon the future action of the present incumbent of the office, as to whether or not the commission would give relator a good title to the office. If relator should, with such commission, enter upon the office, and retain possession thereof, without objection on the part of the present incumbent, even under the law as it is claimed to be by respondent, he (the relator) would not only be *de facto* fish commissioner, but as well the *de jure* commissioner. *State v. Jones*, 19 Ind. 356.

Upon the argument and in briefs of counsel, the case of *People v. Forquer*, 1 Ill. 104, was strongly urged upon us as a case identical with this in principle, and announcing a different conclusion to that which we have reached. We have carefully considered the case, and are not at all inclined to follow it. There are two opinions in that case. In one of the opinions, that of Justice Lockwood, there is a dictum to the effect that the secretary had the right to determine whether or not the governor, in issuing a commission, was acting within the powers conferred upon him by law, and hence might suspend his action on the request of the governor to countersign and seal such commission until that question was determined. We denominate this declaration a dictum for this reason: The facts, as stated in the opinion of Justice Smith, at page 113, show that the reason of the secretary's refusal to countersign and seal the commission was the fact alleged by him, that A. F. Hubbard, who issued the commission, was not the governor of the state of Illinois at the time the commission was issued, but, on the contrary, one Edward Coles was, and for some time prior to the date of the commission had been, the governor of said state, and in the discharge of the duties of his office as such. Under such facts, we have no doubt that the court decided correctly in refusing the mandate; but we have difficulty in finding any necessity for the expression of opinion as to the discretion of the secretary, to be found in Justice Lockwood's opinion, at page 109. The language

of the opinion upon the point referred to is: "The secretary of state is a constitutional officer, as well as the governor, and his duties are pointed out by law. I think he may refuse to sanction an unconstitutional or illegal act." Whatever may have been the state of the law of the state of Illinois at the time the case mentioned arose, with respect to the powers and duties of the secretary of state in countersigning and sealing commissions and other official acts issued or done by the governor of that state, we are entirely satisfied that, in the state of Wyoming, the secretary of state, in performing such acts, in no way whatever compromises himself. He does not "sanction," nor is he called on to "sanction," the official acts of the governor, in any way or degree whatever, for the simple reason that he has no "sanction" either to bestow or to withhold.

It is the unanimous opinion of this court that the secretary of state has not shown any valid and legal reason why he should not countersign and affix the great seal of the state to the commission issued by the governor of the state, and appointing Louis Miller fish commissioner of the state of Wyoming, and that mandamus is the proper remedy to oblige him to do his duty in this particular.

It is therefore ordered and adjudged by the court that a peremptory writ of mandamus be issued, directed to the respondent herein, requiring him to do as prayed for in relator's petition, at once, upon the presentation of the said commission to him for that purpose.

Groesbeck, Ch. J., and Conaway, J., concur.

Rehearing denied.

Mary E. McFARLAND

RAILWAY OFFICIALS & EMPLOYEES' ACCIDENT ASSOCIATION of Indianapolis, Indiana.

(.....Wyo.....)

The time of death by accident and not the time when the cause of action accrues on a policy of accident insurance, is the time from which is to be computed the period of "one year from the date of the happening of the alleged injury" within which suit must be brought by the terms of the policy, although the right of action on the policy did not accrue until the expiration of ninety days after proof of the injury.

(November 14, 1894.)

QUESTIONS reserved by the District Court for Laramie County, for the opinion of the Supreme Court in an action brought to recover the amount alleged to be due on a policy

NOTE.—The conflict of decisions on the question involved in the above case gets very extensive review in the brief and opinion. See on this point *Hart v. Citizens Ins. Co. of Pittsburgh, Pa.* (Wia.) 21 L. R. A. 743, and *Travelers Ins. Co. v. California Ins. Co.* (N. Dak.) 8 L. R. A. 709, and note.

of fire insurance. *Questions answered in defendant's favor.*

The facts are stated in the opinion.

Messrs. A. C. Campbell and R. W. Breckons for plaintiff.

Messrs. Lacey & Van Devanter, for defendant.

Statutes of limitations have been uniformly held to mean exactly what they say, and the time of the running of such statutes is uniformly held to be the time stated in the statute.

The statute limiting actions for death caused by wrongful acts read "two years after the death of such deceased person."

Wyo. Rev. Stat. § 2364.

It is uniformly held that the limitation begins to run, according to its words, "from the death," and not from the time the cause of action accrues.

George v. Chicago, M. & St. P. R. Co. 51 Wis. 603; *Rugland v. Anderson*, 80 Minn. 386; *The Harrisburg v. Rickards*, 119 U. S. 199, 80 L. ed. 368; *Cacanagh v. Ocean Steam Nav. Co. Limited*, 18 N. Y. Supp. 540; *Taylor v. Oranberry Iron & Coal Co.* 94 N. C. 525; *Best v. Kinston*, 106 N. C. 205; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629; *Hill v. New Haven*, 87 Vt. 501, 88 Am. Dec. 618; *Benjamin v. Eldridge*, 50 Cal. 612.

Such provisions in policies are valid and binding upon the parties.

Riddleberger v. Hartford F. Ins. Co. of Hartford, Conn. 74 U. S. 7 Wall. 386, 19 L. ed. 267; *Hart v. Citizens Ins. Co. of Pittsburgh, Pa.* 21 L. R. A. 743, 86 Wis. 77.

In *Hart v. Citizens Ins. Co. of Pittsburgh, Pa.*, *supra*, the question here at issue between the plaintiff and defendant came squarely before the court.

The court said plain unambiguous words which can have but one meaning are not subject to construction. "Twelve months next after the fire" has one certain meaning and but one. It can have no other.

State Ins. Co. v. Meesman, 2 Wash. 459; *McElroy v. Continental Ins. Co.* 48 Kan. 200; *State Ins. Co. v. Stoffels*, Id. 205; *Johnson v. Humboldt Ins. Co.* 91 Ill. 93, 33 Am. Rep. 47; *Semmes v. Hartford Ins. Co.* 80 U. S. 13 Wall. 158, 20 L. ed. 490; *Travelers Ins. Co. v. California Ins. Co.* 8 L. R. A. 769, 1 N. Dak. 151; *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Virginia Fire & Marine Ins. Co. v. Wells*, 88 Va. 736; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Bowen v. National Life Assn.* 63 Conn. 460; *King v. Watertown F. Ins. Co.* 47 Hun. 1; *Fullam v. New York Union Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462; *Glass v. Walker*, 66 Mo. 32; *Owen v. Howard Ins. Co.* 87 Ky. 571; *Blanks v. New Orleans Hibernia Ins. Co.* 36 La. Ann. 599; *Tasker v. Kenton Ins. Co.* 58 N. H. 469; *Wilson v. Athina Ins. Co.* 27 Vt. 99; *Lau v. New England Mut. Acc. Assn.* 94 Mich. 266; *Lentz v. Teutonia F. Ins. Co.* 96 Mich. 445; *Farmers Mut. F. Ins. Co. v. Barr*, 94 Pa. 845; *Universal Mut. F. Ins. Co. v. Weiss*, 106 Pa. 20; *Hocking v. Howard Ins. Co.* 130 Pa. 170; *Schroeder v. Keystone Ins. Co.* 2 Phila. 286; *Thompson v. Phoenix Ins. Co.* 25 Fed. Rep. 296; *Steel v. Phantia Ins. Co. of Brooklyn*, 47 Fed. Rep. 863.

37 L. R. A.

Conaway, J., delivered the opinion of the court:

This action was brought on a certificate of membership of the defendant association, in the nature of a policy of accident and life insurance, whereby defendant insured the life of William W. McFarland for twelve months, commencing June 10, 1891, against death by external, violent, and accidental means, in the sum of \$2,000, payable to plaintiff, wife of the insured, should death result within ninety days from the time of the injury. On May 1, 1892, the insured received injuries such as he was insured against by virtue of the certificate or policy mentioned, from which injuries he died the same day. Deceased was also insured in the same instrument against injuries not resulting in death, but this branch of the subject it is not necessary to consider. The certificate contains the following provision: "No suit in law or equity shall be maintained on this certificate, on any accidental injury or death, unless such suit be brought within one year from the death of the happening of the alleged injury; and failure to bring suit within one year shall be taken and deemed as conclusive evidence against the validity of such claim, and of forfeiture of all right under this certificate." Suit was not brought on this policy or certificate within one year from the date of the happening of the injury to and the death of the insured, but was brought a little more than thirteen months after. Plaintiff admits that it was competent for the parties to limit the time for bringing suit by a provision inserted in the certificate by the association, and accepted by the insured; but plaintiff insists that under the conditions of the certificate the time of the limitation should not run "from the date of the happening of the alleged injury," but should run from the time the cause of action accrued, or, in other words, from the time when the company might be sued. This could not be done until the expiration of ninety days after the claimant had furnished verified affirmative proof in writing of the injury, which proof was required to be furnished within seven months from the happening of such injury.

It appears that proofs of death were furnished by plaintiff on August 24, 1892,—less than four months after the injury to and death of the insured. It further appears that defendant finally denied its liability, and refused to pay plaintiff's claim, on September 1, 1892,—just four months after such death and injury. By written stipulation of the parties filed in the cause, it is, in effect, agreed that, if the court should be of the opinion that the suit is not barred by the limitation contained in the certificate, judgment shall go in favor of the plaintiff; otherwise, in favor of the defendant. Under these facts and conditions, the district court finds that three difficult and important questions arise, upon which it reserves a decision, and sends the cause to this court for its decision of the question, under the statute authorizing this course of procedure. The questions so reserved are these: "(1) Under the allegations contained in the pleadings herein, was

this action commenced in time, or was the claim of the plaintiff barred at the commencement of this action by reason of the provisions of the policy sued upon, as set forth in the pleadings? (2) Under the pleadings herein, did the limitation named in the policy begin to run at the death of the insured, or at the expiration of ninety (90) days after the receipt by defendant of proofs of death, or at the time when the defendant refused to pay the plaintiff's claim? (3) Under the written stipulation of the parties herein, should judgment be rendered for the plaintiff, or for the defendant?"

The district court asks, "Was this action commenced in time?" The answer to this question must determine what the judgment shall be. But, to answer this and the other questions reserved and submitted, we must consider and determine from what date the limitation runs. Three dates to be considered are indicated in the questions of the court and in the briefs and oral arguments of counsel: First, the date of the death of the insured, May 1, 1892; second, the date of the final refusal of defendant to pay the claim of plaintiff, September 1, 1892; and, third, ninety days after proofs of death were furnished, the expiration of the ninety days occurring November 24, 1892. The question of the date from which the limitation runs is an important one, involving, as it does, leading and elementary principles in the construction of contracts, and being a question of first impression in the courts of this state. And it must be considered a difficult question, since eminent courts are in conflict in their views of contracts of insurance similar to the one under consideration. These conditions require a careful consideration of the question, and a careful scrutiny and weighing of the authorities on both sides.

The main contention of plaintiff seems to be that the limitation of the time for bringing suit to "one year from the date of the happening of the alleged injury" shall be held to mean one year from the date when the cause of action accrues. The doctrine upon which the contention is based is stated in Wood on Insurance (second edition), changing the language used in the first edition to these words: "Sec. 469. It is held in some of the cases that when a policy stipulates that no action shall be brought, unless commenced within a certain time after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of the loss have been served, the limitation does not attach until after the period which the company has in which to pay the loss has expired. The limitation does not apply until the right of action has accrued, and, until the period has expired which the company has to pay the loss in, no right of action exists." Cases from New York, Michigan, and West Virginia are cited in a note to support this view. The note continues, "But a contrary doctrine is held in some of the states," citing cases from New Hampshire, Connecticut, Massachusetts, Vermont, and Illinois. The exhaustive researches of counsel have resulted in the col-

lection of a large number of cases from nearly half of the states in the Union, as bearing more or less directly upon the question under discussion. It is admitted by plaintiff that it is lawful for the parties to a contract of insurance to limit the time within which an action may be brought upon such contract by a provision inserted therein. So cases cited to establish this proposition will not be mentioned in this discussion. It is only necessary to consider cases which hold that provisions for occupying a portion of the time limited in the performance of conditions precedent to the right of action do or do not extend this time beyond the limit specified. It is admitted by the defendant that if the time allowed for, or necessarily occupied by the claimant, under contract of insurance, in performing such conditions precedent, should include all the time specified within which suit must be brought, or should not leave a reasonable time for that purpose, the right of action would not be lost by the lapse of the time specified. Neither if the bringing of the action was delayed beyond the time limited by the conduct of the insurer. So cases cited to these propositions will be eliminated from this discussion. The most of the cases bearing upon the question of extending the time limited for commencing suit by holding the limitation to run from a later date than that specified in the policy are cases of fire insurance which limit the time to a certain number of months after the loss or after the fire, and further require proofs of loss to be furnished, or other conditions precedent to the right of action to be performed, for which time is allowed, or which necessarily consume time. So far as the question has been before the federal courts, the decisions are conflicting. *Judges* Thayer, Bunn, Hawley, and Gilbert have held, in favor of the position of plaintiff, that the limitation runs only from the time the cause of action accrues, although the policy reads a certain number of months after the loss or after the fire. *Judges* Deady and McKenna, and the court of appeals of the District of Columbia, hold directly the reverse. See *Steel v. Phoenix Ins. Co. of Brooklyn*, 2 C. C. A. 463, 51 Fed. Rep. 715; *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Friezen v. Alemania F. Ins. Co.* Id. 853; *McElhons v. Massachusetts Ben. Assn.* 22 Wash. L. Rep. 157. Coming to the states, we find five states and one territory holding, by their courts of last resort, that a limitation of a certain time for beginning action after the loss or after the fire shall not run from the date of the loss or of the fire, but from the time the cause of action accrues. We find a considerably larger number where the decisions are directly to the contrary effect, and a number where they are somewhat equivocal, and claimed by both parties, and some make a distinction between the meaning of the phrases "after the loss" and "after the fire." So, if we were to decide this case according to the number of the authorities, we should be compelled to decide it in favor of the defendant. But this is not a satisfactory way of determining a question of the construction of the language either of a contract

or of a statute. An examination of the decisions, with the reasons assigned for them, is preferable.

The case of *Barber v. Fire & Marine Ins. Co. of Wheeling*, 16 W. Va. 658, 37 Am. Rep. 800, was an action on a policy of fire insurance, which made the loss payable sixty days "after due notice and proof of the same," but specifying no time within which such notice and proof should be made, and limiting the time for bringing action to "six months next after the loss should occur." The court calls the time which must elapse before suit can be brought an indefinite time, because the claimant was not required to furnish his proofs of loss within a specified time, and holds that in such cases the six-months' limitation runs from the time when the cause of action accrues and not before, and expires in this instance six months and sixty days after proofs of loss were furnished, and finds that this was "the intent of the parties." The later case of *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 7 L. R. A. 572, was an action on a policy of insurance which limited the time for bringing action to six months from the date of the loss, and requiring proofs of the loss within thirty days thereafter, and allowing the insurer sixty days after proof of loss in which to make payment. The court quotes from *Barber v. Fire & Marine Ins. Co. of Wheeling*, *supra*, that the "intent of the parties to the contract was that the six-months' limitation should commence to run when the cause of action accrued, and not before." And the court concludes: "So that case is authority for the position (1) that the limitation does not begin until the cause of action accrues; and (2) that it does not begin from the actual loss,—thus departing from the letter of the policy." In Iowa the doctrine is firmly established that under a policy of insurance limiting the time for bringing action upon it, and requiring the performance of conditions precedent which must occupy a portion of that time, the limitation does not commence to run until the right of action accrues. See *Matt v. Iowa Mut. Aid Assn.* 81 Iowa, 135; *McConnell v. Iowa Mut. Aid Assn.* 79 Iowa, 757; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 808; *Quinn v. Capital Ins. Co.* 71 Iowa, 615. Two reasons for this line of decisions are given in the different cases in Iowa: One reason is the assumption, made in the West Virginia cases, that such was the intent of the parties, and a statement of it is found in *Ellis v. Council Bluffs Ins. Co.*, *supra*,—a case of fire insurance,—in these words: "Now, it is apparent that, if the literal construction of the provision in question contended for by defendant obtains, it might frequently happen that the right of action would be barred by it before such right had accrued to the assured under the other provision. It is very clear that the parties never intended that such a result should be accomplished." The time limited in this case was "six months next after the loss shall occur." The other reason, as held in Iowa, is that there is a rule of construction of limitations, both by statute

and by contract, that the limitation runs only from the time when the right of action accrues. It is stated in *McConnell v. Iowa Mut. Aid Assn.*, *supra*,—a case of life insurance,—in these words: "It is a familiar and just rule, recognized by the courts, that a bar created by statute or by contract to an action for a breach of its conditions, by reason of the lapse of time, will not commence to run until the right of action accrues; that is, the plaintiff must have the full time given by the statute or contract after his right of action arises, in which to commence his suit." The limitation in this case was six months after the death of the assured. As to this case, it is sufficient to say that no case has been cited by counsel, and none has occurred to us, which holds that a period of limitation fixed by statute has ever been changed by a court by construction. And by all the authorities the rule of construction is the same for contracts as for statutes,—that the true meaning and intent of the language is to be sought. The authority of the supreme court of Nebraska is in favor of plaintiff. *German Ins. Co. v. Fairbank*, 32 Neb. 750, was an action on a policy of fire insurance limiting the time for bringing action to "six months after the loss or damage shall occur," and requiring proofs to be made in thirty days after such loss or damage, and payment to be made within ninety days after proofs furnished. The court says, "The fair and reasonable interpretation of the provisions of the policy, when construed together, is that the limitation did not begin to run from the date of the loss, but from the time the suit could have been brought." This case is followed by the same court in *Fireman's Fund Ins. Co. of California v. Buckstaff*, 38 Neb. 150. The case of *Hong Sing v. Royal Ins. Co.*, 8 Utah, 135, is in favor of the plaintiff's theory of construction. It is an action on a policy of fire insurance limiting the time for bringing action for loss or damage by fire to "twelve months from the date of said fire," and requiring proofs of loss within thirty days after, and payment within sixty days after, proof, and requiring arbitration before suit. The court holds that the action may be brought within twelve months after the cause of action accrues, and that this is what the parties intended and understood by the words, "within twelve months from the date of said fire," because all that time might be necessarily consumed by plaintiff in performing the conditions precedent to the right of action. The court of appeals of New York holds that the word "loss," in the limitation clause of a policy of fire insurance, has reference to the time when the loss becomes payable by the insurer, and when the right of action accrues. *Hay v. Star F. Ins. Co.* 77 N. Y. 235. The supreme court of Arkansas also takes this view. *Sun Ins. Co. v. Jones*, 54 Ark. 376. These are all the states, so far as we are at present advised, that hold unequivocally in favor of plaintiff. There are a few others whose courts have used language claimed by plaintiff to favor this view, but which is at least doubtful, which will be considered presently.

As already stated, the great preponderance

in numbers of decisions is against this view. But the courts taking this view are courts of eminence, and they are entitled to respect; and, if their position is sustained by convincing reasons, mere numbers should not be allowed to prevail against them. Their number is sufficient to make a very respectable array. But the weight of these decisions as authority is greatly reduced by the fact that they do not agree as to the basis or reason upon which they rest. All of the courts which we have mentioned cite New York cases as sustaining them; so it is somewhat important to determine just how far the New York cases do sustain them. *Hay v. Star F. Ins. Co.*, *supra*, was a suit upon a policy of fire insurance requiring proofs of loss to be furnished as soon as possible after the fire, providing that the loss should be paid within sixty days after proof, and limiting the time for commencing action to twelve months. The court (one judge dissenting) says: "The loss should be deemed to occur when the company pays it, or may be lawfully called upon to pay it. The loss then, and not until then, practically occurs to it. These words may in some clauses refer to the destruction of the property, but it does not necessarily follow that they do in this." It is to be remarked that, of the states we have mentioned as citing New York cases as authority in their decisions, none but Arkansas adopts this reason for a decision. The West Virginia court makes a similar decision under a similar policy, but characterizes its decision expressly as "departing from the letter of the policy." If the word "loss," in the limitation clause, meant the loss to the company by its incurring a liability to suit so many days after proofs of "loss, then the decisions followed strictly the letter of the contract. The Iowa supreme court says that, under a literal construction of such provisions, the right of action might be barred before it accrued. This, of course, is inconsistent with the idea that the loss is the accruing of the right of action, as the New York and Arkansas courts hold. The Nebraska court makes the distinction expressly between "the date of the loss" and "the time the suit could have been brought," but holds that the latter is meant when the former is expressed. The case of *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135, was an action on a policy limiting the time for bringing suit to twelve months from the date of the fire, and it cites a number of New York cases as holding to this latitudinarian construction, but the New York courts never held so. When a policy of fire insurance says "next after the fire," the New York courts hold that it means next after the fire. The New York cases which favor plaintiff's position turn upon the meaning of the word "loss." See *King v. Watertown F. Ins. Co.* 47 Hun, 1. But it must be allowed that when a policy requires proof of loss by fire to be made immediately or within a certain time after the fire which caused the loss, and payment of such loss to be made within a certain time after the submission of the proofs of the same, and that any suit is barred unless brought within a certain longer time after the loss occurs or accrues, the New York and

Arkansas courts hold that the word "loss," in each place where it occurs, except the last, means the loss to the insured by fire, which he was insured against, but in the last place it means the loss to the insurer by the accruing of a right of action. So far as we are at present advised, no courts, except those of New York and Arkansas, have taken this view. A large proportion of the courts of the states have held differently. Some, as the courts of West Virginia and Iowa, have confessedly departed from the letter of a literal construction of the contract in order to make the insurers liable.

Cases in favor of the contention of defendant are numerous. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92, 33 Am. Rep. 47, was an action on a policy of fire insurance which provided that the loss or damage should be estimated according to the actual cash value of the property at the time of the loss, and paid sixty days after proofs of the same made by the assured, unless the property were replaced, or the company had given notice of its intention to repair or rebuild the damaged premises, and that no suit should be brought until after award obtained in a manner specified, nor unless "commenced within twelve months next after the loss shall occur." Few policies are more burdened with conditions to be performed, and requiring time for their performance, before a right of action accrues, than this. The court, after stating the general and universally accepted principle controlling the construction of laws and contracts, that the intention, as expressed, must govern, proceeds: "When did the loss occur? Manifestly, at the time the fire destroyed the property. In what consisted the loss? Obviously, in the destruction of the building by fire. We are wholly unable to perceive that language could have been used that could have rendered the meaning plainer." And the action, not having been commenced within twelve months next after the destruction of the building by fire, was held to be barred by the limitation of the policy requiring it to be "commenced within twelve months next after the loss shall occur." *Bradley v. Phoenix Ins. Co.*, 23 Mo. App. 7, was an action upon a policy of fire insurance which limited the time for bringing action upon it to "six months next after the loss shall occur." The policy also provided that the amount of the loss or damage was to "be estimated according to the actual cash value at the time of the loss, and to be paid sixty days after the proofs of the same shall have been made by the assured," etc. In the opinion appears the following: "When did this loss occur? Certainly, on the day, at the instant, when the property was destroyed by the fire. The term employed in the contract is apt and unambiguous." And the court held that the six-months' limitation ran from the date of the fire. *Chambers v. Atlas Ins. Co.*, 51 Conn. 17, 50 Am. Rep. 1, was an action on a policy making losses payable sixty days after proofs furnished, and limiting the time for bringing action to "twelve months next after any loss or damage shall occur." The court says: "This limitation is lawful and reasonable. In words of common use and

plain meaning, an event is referred to as a starting point; that is, the destruction of or injury to the plaintiff's property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure or the subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of the suit. The contract keeps the day upon which a fire occurs entirely distinct from the day upon which the right to sue for indemnity accrues. Each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement." And "twelve months next after any loss or damage shall occur" was held to mean twelve months next after the destruction of or injury to the insured property by fire. *Virginia Fire & Marine Ins. Co. v. Wells*, 83 Va. 786, was an action upon a policy making any loss or damage insured against payable sixty days after receipt of proofs of loss, and limiting the time for bringing action to "six months next succeeding the day upon which the loss or damage is alleged to have taken place." The court says: "It is undeniable that a policy must be construed with reference to all its provisions, like any other contract. And it may not be gainsaid that the condition of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that, 'when the terms and stipulations in a contract are plain and clear, we are bound to adhere to the terms, as the only authentic expression of the intention of the parties.' None would be rash enough to claim that there is obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next succeeding the time when the loss is alleged to have taken place. The position is that the sixty days during which the company is entitled to delay the payment of the loss incurred by the fire should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in its terms, to indicate any such intention." And the court held that the limitation ran from the date of the fire. The case of *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151, 8 L. R. A. 769, required the judicial construction of a policy of fire insurance, which limited the time for bringing action upon it to "twelve months next after the loss shall have occurred." The policy contained the familiar provision requiring proofs of loss before bringing suit. The court says: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to

sue after the right of action has accrued, although more than the limited time has elapsed since the loss has occurred. We cannot assent to the doctrine of these cases. They rest upon the alleged necessity of harmonizing conflicting provisions." In language convincing, and which seems truly unanswerable, the court shows that such provisions are not conflicting, unless they are such as to deprive the insured of a reasonable time in which to sue. But the court is in error in saying that the majority of the adjudications are contrary to its views. In *Blanks v. New Orleans Hibernia Ins. Co.*, 86 La. Ann. 599, negotiations were protracted until the limitation was within two months of its close. This was held to be sufficient time for bringing suit. *Fullam v. New York Union Ins. Co.*, 7 Gray, 61, 66 Am. Dec. 462, was an action upon a policy of fire insurance allowing the claimant one month in which to furnish proofs of loss, and giving the insurer three months after proofs furnished in which to pay the loss, and limiting the time for bringing action to "six months next after any loss or damage shall occur." The action, not having been commenced until after the expiration of six months from the date of the fire, was held to be barred, and judgment was ordered for the defendant. It is somewhat remarkable that the cases which hold to a contrary doctrine—all recent, and evidently tending to a new departure in the construction of contracts—have, it seems, all ignored this earlier case, decided by the supreme judicial court of Massachusetts, without dissent, when the Hon. Lemuel Shaw was chief justice of that tribunal.

The cases which hold that the phrase "next after the fire," in the limitation clause of a policy of fire insurance, means "next after the cause of action accrues," are few. They are *Hong Sing v. Royal Ins. Co.*, *Steel v. Phoenix Ins. Co. of Brooklyn*, *Vette v. Clinton F. Ins. Co.* and *Friezen v. Allemania F. Ins. Co. supra*. These decisions reach results more clearly in opposition, if such a thing be possible, to the meaning and intent of the parties, as expressed in the language used, than do the cases which hold the words "after the loss occurs" to mean "after the cause of action accrues." They have not in their favor even the argument of the New York court, that the loss meant is the loss to the insurer by the accruing of a cause of action against him, and not the loss by fire of the property insured. And this argument, such as it is, is thoroughly refuted, if, indeed, it should not be said, utterly overwhelmed, by the foregoing citations. It is incredible that, when the parties say six or twelve months next after the fire, they mean six or twelve months after some other date or event. To this effect are the following additional cases: *State Ins. Co. v. Meesman*, 2 Wash. 459; *McElroy v. Continental Ins. Co.* 48 Kan. 200; *State Ins. Co. v. Stoffels*, Id. 205; *Allemania Ins. Co. v. Little*, 20 Ill. App. 481; *Owen v. Howard Ins. Co.* 87 Ky. 571; *Hocking v. Howard Ins. Co.* 180 Pa. 170.

California cases are cited, but they are not in favor of plaintiff. *Garido v. American Cent. Ins. Co. of St. Louis* (Cal.) 8 Pac. Rep.

512, was an action on a policy which limited the time for bringing action to "twelve months next after the loss." The property insured was destroyed by fire on February 15, 1880. The action was commenced November 1, 1881. Negotiations for settlement were continued until January 21, 1881. The court says, "This was ample time to commence suit." And the judgment of the lower court in favor of the plaintiff was reversed because the action was not begun within the time limited. It will be observed that the "ample time" was twenty-five days. This case has never been overruled. The later case of *Case v. Sun Ins. Co.*, 83 Cal. 478, 8 L. R. A. 48, is distinguished from this case by the court; the time having been occupied by the claimant in performing the conditions of the policy, presumably with reasonable diligence, until three months after the twelve-months' limitation had expired.

Lente v. Teutonia F. Ins. Co., 96 Mich. 445, was an action on a policy of fire insurance making any loss payable sixty days after proof of the same, and limiting the time for bringing suit to "six months next after the loss shall occur." An action brought six months and twelve days after the fire which caused the loss, the court held to be barred; following *Law v. New England Mut. Acc. Assn.*, 94 Mich. 266, and distinguishing *Voorheis v. People's Mut. Ben. Soc. of Elkhart*, 91 Mich. 469.

Chandler v. St. Paul Fire & Marine Ins. Co., 21 Minn. 85, 18 Am. Rep. 885, was an action on a policy of fire insurance, loss insured against to be paid within sixty days after proof, and containing a limitation clause in the following words: "It is expressly covenanted by the parties hereto that no suit or action against the company, for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur; and, in case such suit or action shall be commenced against the company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding." The court finds in this language two inconsistent limitations, and, of course, enforces the one most unfavorable to the company, whose language it is. The time "when any claim shall occur" is held to be not earlier than when proofs are furnished, or when the company becomes liable to suit, sixty days thereafter. But the time when the "loss or damage shall have occurred" is considered to be the date of the loss of the insured property by fire. So this is another case in opposition to the doctrine of the New York supreme court, that the word "loss," in the limitation clause of such a policy, does not mean the loss of the insured, by the destruction of his property, but does mean the loss to the insurer, by having to pay to the insured the whole or some portion of his loss. The court says of the limitation clause quoted: "The first branch of this condition clearly

sustains the plaintiff's contention. The expression 'claim shall occur' obviously means shall 'arise' or 'accrue.' No claim occurs or arises to the assured upon the mere happening of the loss. The giving of notice and the furnishing of satisfactory proofs are conditions precedent to be performed by the assured before they are entitled to claim the stipulated indemnity, and not until sixty days after the performance of the last of these conditions can their claim be enforced by suit. It is unnecessary to determine in this case whether, by the first branch of the condition, the time of limitation begins to run from the furnishing of proofs, or sixty days thereafter. It would seem, however, that the claim exists when notice has been given and proofs furnished, although it is not payable until the expiration of sixty days." With all due respect, we must suggest that if the assured had no claim he had no occasion to give any notice or proof. To do so would put him in the attitude of saying, "I claim nothing, and here is my notice and proof of the fact." To make a claim is one thing; to establish it by proof is quite another. The claim may be a thousand dollars; the recovery, a hundred. The claim may never be realized at all, as a crop of wheat standing in the field will be lost unless harvested. He would be a rash man who would decline to file a claim against the estate of a decedent until after the time limited for filing claims because the debt of the decedent to him would not sooner become due and ready to bring suit upon. And it would be inaccurate, at least, for a court to say that the wheat lost for want of harvesting was not wheat at all, because lost and never measured. The court proceeds: "The second branch of the condition as clearly provides that, unless suit is brought within one year after the occurrence of the loss, the lapse of time shall be conclusive evidence against the validity of the claim. These two limitations cannot stand together." We have quoted at some length from this case, as it differs from all of the others, in having the words "next after any claim shall occur" to construe, whereas others had the words "next after the loss," or "next after the fire." Were it necessary to the decision of the case at bar, we should hesitate long before concurring in the view that the claim does not arise from the loss of the property insured, and at the time of the loss. It would seem that, if the assured has no just and valid claim, then he never can have, and that the notice and proof required is to fix the amount he should receive in satisfaction of such claim, and to give the insurance company an opportunity to ascertain such amount, and to pay it without suit. All this work is to be done upon a claim arising from the destruction by fire of the property insured, though the claim is not yet due, and the amount not settled. All authorities agree that the object to be attained in construing a contract is to ascertain the meaning and intent of the parties, as expressed in the language used; and we should again hesitate long before holding that the parties intended to introduce two inconsistent limitations in the single sentence constituting the limitation clause of this contract of

insurance. Such an improbable conclusion should not be tolerated, if it can be avoided by any reasonable construction of the language employed. And it seems to be clear enough that by the two expressions, "in one year next after any claim shall occur," and "one year next after such loss or damage shall have occurred," the parties intended to indicate one and the same identical period of time. The weight of authority is not, as some courts have said, in favor of the proposition that the date from which the limitation of the time for bringing action on a contract of insurance is to run may be changed by construction. Neither is the weight of authority in favor of the proposition that such a period next after the loss or next after the fire shall mean next after the cause of action accrues. The authorities to sustain either of these propositions are comparatively few in number, and conflicting and unsatisfactory in the reasons assigned. In no kind of contracts, except contracts of insurance, have such constructions been given to similar language, or such departures from the meaning of words been tolerated. No such construction of statutes has been made. The decisions to the contrary effect are numerous, and they are consistent and convincing in their reasoning, because they merely adhere to the obvious meaning of plain and unambiguous language.

But could we hold that "next after the fire," or "next after the loss," means next after a cause of action accrues, it would not be decisive of the case at bar. The cases of fire insurance have been discussed merely as showing how far courts have gone, or refused to go, in construing the limitation clauses in policies of fire insurance. But such cases are only remotely related to the case at bar. The insurance in this case was against physical injury resulting in disability or death. The limitation clause requires that any action shall be brought "within one year from the date of the happening of the alleged injury." Even the New York courts do not hold that the injury meant is an injury to the company by the accruing of the cause of action. The case of *Cooper v. United States Mut. Ben. Assn.*, 132 N. Y. 334, 16 L. R. A. 188, was an action on a certificate containing a limitation similar to that in the case at bar. The court says: "The accident received by Cooper did not injure the plaintiff, or give her a right of action, until death ensued. So far as he is concerned, the infliction of the wound is but the beginning, and the death is the completion, of the injury. Her suit must be commenced within one year from the date of the alleged accidental injury; in other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident." It is admitted that it is competent for the parties to a contract of insurance to reduce the time within which an action may be brought on such contract. It seems immaterial whether such reduction is made by cutting off some years of the end of the term, or some months from the beginning, or both; neither whether such reduction of time is made directly, in express words, or by appropriating a portion

of the time to other purposes, provided a reasonable time remains for bringing the suit. In the case at bar, plaintiff had more than five months in which to commence suit within the time limited after the cause of action had matured, and just eight months after the defendant company had denied its liability.

To the questions of the trial court, we answer:

1. This action was not commenced in time, and the claim of plaintiff was barred before the commencement of the action.

2. The limitation began to run at the death of the insured.

3. Judgment should be rendered for the defendant.

Groesbeck, Ch. J., concurs. Corn, J., did not sit in this case.

A petition for rehearing was subsequently filed in response to which on December 26, 1894, Conaway, J., delivered the following opinion:

No decision of the supreme court of the United States is cited in the brief of plaintiff as to the date from which the limitation of the time for bringing action runs under a policy of insurance such as the certificate sued on in this case; but, in the oral argument on the petition for a rehearing, much stress is laid by plaintiff's counsel upon the case of *Steel v. Phenix Ins. Co. of Brooklyn*. This case has been twice before the Supreme Court of the United States,—first under the title of *Thompson v. Phenix Ins. Co. of Brooklyn*, N. Y. 136 U. S. 287, 34 L. ed. 408. Thompson was a receiver who brought the action, and Steel, after one or two changes, succeeded to the receivership and was substituted as plaintiff in the action. The Supreme Court of the United States on this hearing declined to express any opinion upon the limitation clause of the policy, but held that the limitation was waived by the company by accepting the premium after the fire, by assuring plaintiff that no question could be made as to the loss or its payment, and that payment would be made as soon as action could be taken. On the second appeal it appears, from an unofficial report, that a judgment of the circuit court of appeals in favor of plaintiff was affirmed by an equally divided court. 88 L. ed. 1064. The effect of such an affirmation has long been settled by the Supreme Court of the United States. In such case the court hands down no opinion, and the decision is not to be considered as settling any principle. *Benton v. Woolsey*, 37 U. S. 12 Pet. 27, 9 L. ed. 987; *Elling v. Bank of United States*, 24 U. S. 11 Wheat. 59, 6 L. ed. 419. This court cannot be expected to give to such affirmation by the Supreme Court of the United States greater weight as authority than that court gives it, and that court has not yet given an opinion upon the limitation clause of the policy. But we are disposed to render to the decision of the circuit court of appeals all due respect. The case went up to the Supreme Court of the United States the last time from the circuit court of appeals, ninth circuit, McKenna and Gilbert, circuit judges, and Hawley district judge, sitting. The action was on a policy of fire insurance limiting the time

for bringing action to twelve months "next after the date of the fire," and making the amount of loss or damage payable sixty days after proofs of the same made by the assured and received by the company at the office in Chicago. The majority of the court, opinion by Hawley, hold that the twelve months' limitation does not run from "the date of the fire," but from "the expiration of sixty days after the proofs of loss were furnished." 2 C. C. A. 463, 51 Fed. Rep. 719. McKenna, circuit judge, in a dissenting opinion, says: "The provision of the policy is as follows: 'It is expressly provided and mutually agreed that no suit or action . . . shall be sustainable . . . unless such suit or action shall be commenced within twelve months next after such loss shall occur.' This pro-

vision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so." It would seem that these few words more than answer all that is said in the majority opinion upon the question of limitation, and that they are, in themselves, unanswerable. In the case at bar the limitation is "one year from the happening of the alleged injury." This court is asked to say that this means one year and ninety days from the furnishing of proofs of such injury. It seems clear that this far transcends the bounds of construction. It is making a contract for the parties different from the contract which they made for themselves. The petition for a rehearing is denied.

Greesbeck, *Ch. J.*, and Cora, *J.*, concur.

PENNSYLVANIA SUPREME COURT.

Annie ENDERS, *App't.*

William J. ENDERS *et al.*, *Exrs.*, *etc.*, of
William Enders, Deceased.

(164 Pa. 283.)

A contract by a grandfather to pay a certain sum to his son's wife, living apart

from her husband, and a further sum to his grandson on his coming of age, if she will allow him to take the boy into his family until he is of age, and educate him, giving her the privilege of visiting the child and having him at her home whenever convenient, is not against public policy as an attempt to shift the burden of parental obligation by mere sale of the child.

(October 1, 1894.)

NOTE.—*Validity of contract for transfer of parental responsibility or authority.*

ENDERS v. ENDERS is decided by the court in favor of the person seeking to uphold the contract, upon the ground that the contract was not in fact one for the severance of the parental relation or the extinguishment of parental obligation. Contracts merely for a change of the child's residence have been upheld in other cases, as will be seen from the cases cited *infra*. But no other case has been found in which an attempt has been made to collect pecuniary consideration for consenting to such change.

Parent cannot relieve himself of his obligations.

Public policy forbids a parent to attempt to shirk his responsibility for the support, education, and training of his children, and declares void any contract having such an object. The result of declaring the contract void was formerly to permit the parent to assert his corresponding right to the custody of the child, and to regain possession of it at any time. The tendency of later cases has been, however, while giving no more countenance to the parent's efforts to divest himself of responsibility, to refuse to permit him to assert his rights, if he has tried to avoid his responsibilities, if such assertion would not comport to the best interests of the child.

A covenant by a father that he will abstain from taking and exercising any control over his children is bad, because it is against the policy of the law which holds that it is desirable that a father should exercise superintendence over his children, and that he cannot by contract deprive himself of this inherent right and duty imposed on him by nature. *Swift v. Swift*, 84 Beav. 268, 84 L. J. Ch. 208, 11 Jur. N. S. 143, 11 L. T. N. S. 697, 18 Week. Rep. 573, affirmed on appeal, 84 L. J. Ch. 394, 11 Jur. N. S. 453, 12 L. T. N. S. 433, 18 Week. Rep. 781; *Van Sittart v. Van Sittart*, 4 Kay & J. 63, 27 L. J. Ch. 223, 4 Jur. N. S. 270, affirmed in 2 De G. & J. 249, 27 L. J. Ch. 280, 4 Jur. 27 L. R. A.

N. S. 519; *Walrond v. Walrond*, 1 Johns. 27, 28 L. J. Ch. 97, 4 Jur. N. S. 1099.

In *Hamilton v. Hector*, L. R. 13 Eq. Cas. 511, 2 Moak's Notes, 368, an executed agreement between husband and wife as to the custody of the children was allowed to stand. But that case was reversed on appeal on the ground that the law of England regards a father as a person who has duties which he cannot renounce—the duties of caring for and looking to the due education of his children; although the court says that the agreement in that case, which was simply as to where the vacations of the children should be spent, was not an infringement of the rule. *Hamilton v. Hector*, L. R. 6 Ch. App. 705, 40 L. J. Ch. 632, 19 Week. Rep. 990.

In *Westmeath's Case*, Jac. 251, note, the children were returned to the possession of the father, although he had entered into a deed providing that they should remain with their mother.

The father cannot make a valid antenuptial agreement as to the religious training of his children. *Re Agar-Ellis*, L. R. 10 Ch. Div. 42, 43 L. J. Ch. 1, 39 L. T. N. S. 380, 27 Week. Rep. 117.

In *People v. Mercen*, 3 Hill, 410, 38 Am. Dec. 644, the court in considering the validity of an agreement by the father to transfer the custody of the child to its mother, says: "These [children] he holds under a duty of personal trust inalienable even to another who is *not juris a fortiori* to his wife with whom he can make no contract whatever."

The care and custody of minor children is a personal trust in the father and he has no general power to dispose of them to another. *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 397.

A mother is not bound by her consent that a child should live with another. *State v. Clover*, 16 V. J. L. 412.

A father cannot by contract other than such as are provided for by statute confer upon another irrevocably and absolutely as against himself a right to the custody of his minor child. *Weir v. Darley*, 6 L. R. A. 673, 99 Mo. 484.

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Dauphin County in favor of defendants in an action brought to recover the amount due on a contract by which plaintiff permitted her child to reside during his minority with his grandfather for a stipulated price. *Reversed.*

The facts sufficiently appear in the opinion. *Meers. S. J. McCarrell, Robert Snodgrass, and Ermentrout & Ruhl, for appellant.*

By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.

Greenhood, Public Policy.

Tested by this rule there is nothing in the contract under consideration here, which is in violation of it.

The true test to determine the validity of this contract is, whether, having regard to the parties, their relations to each other, and the circumstances attending the making as well as the terms of the contract itself, the welfare of the child was the object sought to be attained thereby, and if so, no rule of public policy is

violated and it cannot, therefore, be void on that account.

When the contract was made the plaintiff was entitled to the benefits of the Act of May 4, 1855, and therefore had the right to exercise sole control over the child, receive his earnings, etc. She could have indentured him as an apprentice.

Brotzman v. Bunnell, 5 Whart. 128, 84 Am. Dec. 587.

If there were any question of consideration to support the contract involved here, the authorities to sustain the affirmative of the issue are clear and explicit.

Neal v. Gilmore, 79 Pa. 427; *Burkholder's App.* 105 Pa. 81.

All that the plaintiff was to do, she has done; all that she was to give she has given. So far as her agreement is concerned, it has been fully performed, and it remains but for the representatives of William Enders, who are mere volunteers, to do what on his part he covenanted to do.

The claim that contracts like this are void as against public policy, because looking to a future separation tend to encourage domestic feuds and broils, was not well taken.

Wyant v. Leasher, 28 Pa. 388; *Van Dyne v. Vreeland*, 11 N. J. Eq. 871; *Van Dyne v. Free-*

A father owes a duty to nurture, support, educate, and protect his child, and the child has the right to call upon him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy for the good of society will not permit or allow the father to irrevocably devert himself of or to abandon them at his mere will or pleasure. *Re Scarritt*, 76 Mo. 555, 43 Am. Rep. 768.

A child is not in any sense subject-matter for an irrevocable gift. The father cannot by merely giving away the child release himself from the obligation to support it, nor be deprived of the right to its custody. *Chapaky v. Wood*, 26 Kan. 650, 40 Am. Rep. 33.

A mere agreement to leave the child in the custody of another is void for the want of mutuality. *Foulke v. People*, 4 Colo. App. 519.

The custody of a child is not the subject of gift or barter. A father cannot by mere gift of his child release himself from his obligation to support it or deprive himself of the right to its custody. Such agreements are against public policy and not strictly enforceable. *Washaw v. Gimble*, 50 Ark. 351.

In *Re Andrews*, L. R. 8 Q. B. 158, 23 L. T. N. S. 853, 21 Week. Rep. 490, 4 Moak's Notes, 261, sub nom. *Re Edwards*, 43 L. J. Q. B. 90, it is said: "In dealing with questions of this nature, courts of chancery exercising the prerogative of the sovereign as *parens patrie*, have assumed a more extensive authority than that exercised by the common-law courts, and although the court in making an order as to the custody or education of an infant, pays in general the utmost regard to the rights and wishes of the father, still in carrying out what is conceded have been the true interests of the child, an agreement which has been made by the father has been upheld. The courts of common law, however, have always declined to give effect to any mere agreement or consent on the part of the father disposing of the custody of the infant child, and have felt bound notwithstanding to enforce the right of the father when asserted.

The controversy in that case subsequently came before the chancery court and it was held that although the father can make no agreement as to the

education of his child, yet his course of conduct may be such as to abandon his right, when the course will be pursued which will be most to the advantage of the child. *Andrews v. Salt*, L. R. 8 Ch. 622, 23 L. T. N. S. 855, 21 Week. Rep. 431.

And the same principle is recognized in *Hill v. Hill*, 10 Week. Rep. 400, 31 L. J. Ch. 605, 8 Jur. N. S. 609, 6 L. T. N. S. 99.

The custody cannot be irrevocably transferred. *Albert v. Perry*, 14 N. J. Eq. 540; *People v. Lorman*, 17 Abb. Pr. 395, note; *Kennedy v. May*, 7 L. T. N. S. 819, 11 Week. Rep. 358.

The lack of power to transfer the custody of the child was recognized in *Johnson v. Terry*, 34 Conn. 250; *Rust v. Van Vacter*, 9 W. Va. 600.

The mother's right of guardianship cannot be assigned. *Cook v. Bybee*, 24 Tex. 278.

The father cannot assign his guardianship. *Byrne v. Love*, 14 Tex. 81.

The mother cannot transfer her right of guardianship, but may be estopped by her deed to claim relief from the court, but the relief may be granted on petition of the children. *Villareal v. Mellish*, 2 Swanst. 537.

In *State v. Richardson*, 40 N. H. 272, the court expressly refused to express an opinion upon the subject.

Exceptions.

Some courts in looking at the rights of the parent rather than at his obligations have, in analogy to cases in other jurisdictions which guard the interests of the child, held that the parents' rights may be transferred.

In *Ellis v. Jesup*, 11 Bush. 403, it is said if the authority of the parent over his child arises from the duty he is under to maintain, protect, and educate it, it would seem that when the father had surrendered his child to a third person to discharge these natural duties for it, and such third person had actually performed them, that the authority of the father over the child would cease, and pass to the person standing *in loco parentis*.

In *Coffee v. Black*, 82 Va. 567, the court says: "A parent may emancipate his minor child or may forfeit his right by improper conduct. Why, then, may he not transfer to another this right of cus-

land, 12 N. J. Eq. 142; *Farnum v. Bartlett*, 53 Me. 570; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 899.

Messrs. Casper S. Bigler and Frederick M. Ott, for appellee:

The decisions of the English courts and those of our various state courts as well as those of the United States courts, are all in harmony in declaring the invalidity of contracts by parents seeking to exercise a chattel ownership over their offspring.

The contract alleged by the appellant is void because it is against public policy. Courts will not lend their aid to enforce the terms of transactions in which parents seek to evade the obligation of care and nurture of their offspring.

Greenhood, Pub. Pol. 806; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 821; *State v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 389; *State v. Clorer*, 16 N. J. L. 419; *People v. Mercein*, 8 Hill, 408, 38 Am. Dec. 644; *Westmeath's Case*, in note to *Lyons v. Blenkin*, 1 Jac. 251; *Hamilton v. Hector*, L. R. 6 Ch. App. 705; *Re Lewis*, 88 N. C. 81; *Vansittart v. Vansittart*, 2 De G. & J. 249; *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768; *Roberts v. Hall*, 1 Ont. 388; *Chambers, Infants*, 59; *Schouler*, Dom. Rel. 343; 1 *Addison*, Cont. 258; 17 Am. & Eng. Encyclop. Law, p. 878; *Pollock, Contracts*, 804; *Johnson v. Terry*, 84 Conn. 359; *Torrington v. Norwich*, 21 Conn. 543.

tody, which he may thus abandon or forfeit, especially when the interests of the child are not prejudiced by the assignment; and how can the court pronounce that custody which is held by a fair agreement with the parent and not injurious to the child an illegal restraint? We think that no consideration should be allowed whatever which relates to the rights of the father to the services of the child under such circumstances. The main consideration should be as to the best interests of the child."

In *People v. Brown*, 35 Hun, 324, the court in considering the question of returning the child to its father said: "If the subject were anything but a child it would not be averred to be the correct and legal thing to avoid the engagement because it was against public policy and against the paternal right. I do not think these cases call for such a rule." It is then decided that the interests of the child are paramount upon the question and that evidence upon that question must be admitted.

In *Bonnett v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, the court states that the weight of authority sustains the position that a parent can by agreement surrender the custody of his child so as to make the custody of him to whom he surrenders it legal. And when the parent has by contract surrendered his present legal right to the custody of the child in all controversies subsequently arising respecting its custody, the matter of primary importance is the interest and welfare of the child. To this the right of the parent must yield.

In *Marshall v. Resma*, 83 Fla. 499, the court says that the mother of an illegitimate child has a legal right to transfer the custody of it to another. But in that case the transfer was made just prior to the mother's death, so that it was not necessary to make the statement as broadly as it was made.

Some cases have, moreover, made a distinction between parol contracts and specialties. Thus in one New Hampshire case it is stated that the rights and duties of a father cannot be transferred permanently to another except by deed. *State v. Libbey*, 44 N. H. 321, 33 Am. Dec. 223.
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The question of the validity of the contract does not depend upon the circumstances whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public.

Holladay v. Patterson, 5 Or. 177; *Richardson v. Orandall*, 48 N. Y. 348; *Webb v. Districh*, 7 Watts & S. 401; *Chorpenning's App.* 32 Pa. 815, 72 Am. Dec. 789.

The contract in question in this case is not aided by the fact that the policy of the law of Pennsylvania is favorable to the transfer of the custody of infants to strangers in certain cases, as evidenced by the statutes regulating adoption and apprenticeship. Such statutes are in derogation of the common law, and their provisions must be strictly complied with.

Com. v. Moore, 1 Ashm. 128; *Respublica v. Keppels*, 2 U. S. 2 Dall. 197, 1 L. ed. 347; *Brown v. Barry*, 3 U. S. 3 Dall. 865, 1 L. ed. 638.

The law does not recognize the rights, so called, of a parent to his offspring, as a right of property.

Com. v. Addicks, 5 Binn. 520, 2 Serg. & R. 174; *Com. v. Gilkeson*, 5 Clark, 80; *Com. v. Nutt*, 1 Browne, 148; *Dumain v. Gwynne*, 10 Allen, 270.

If a child is not property, there is no consideration for the sale of the child.

In *State v. Barrett*, 45 N. H. 18, the court held that the father could bind himself by a deed assigning the custody of his minor child, placing the decision upon the analogy of the case to those in which he is permitted to apprentice his child or place him in the custody of a tutor for education.

In *Curtis v. Curtis*, 5 Gray, 585, it was held that an indenture made by the mother after the death of her husband committing the custody of her child to a third person was binding on her either as a contract or as an estoppel, whether it was sufficient according to the laws of the state where made or not to legally transfer the custody of the child; but the court further remarks that if the child should object it should be obliged to regard the provisions of the indenture with greater care and ascertain its legal force and effect in the state where it was made.

In *Dumain v. Gwynne*, 10 Allen, 270, the court states that it is the present policy of the law of Massachusetts to regard any reasonable arrangement of a mother left in such circumstances as not to be able to care for her children, by which they will be cared for, as valid, and they refused to permit her to recover possession of children whom she had by written contract placed with a public institution for adoption. The court says: "Without holding that the rights of the parent in respect to the children are absolutely lost, we must nevertheless hold that they are subject to the rights of that other party to the contract, it having been freely and favorably made. But the rights of the corporation under it depend upon their fulfillment in good faith on their part and on the part of the person to whom they have transferred the custody of the child."

But in *Re Lewis*, 88 N. C. 31, it is questioned whether or not a transfer may be made in North Carolina, which would be valid, even by deed.

Right to revoke.

The effect of holding the agreement void was to give the parent the right to revoke.

An agreement as to the custody may be revoked at any time. *Queen v. Barnardo*, L. R. 24 Q. B. Div.

Whatever right a father has to the custody of his infant child depends upon, and grows out of the duties which he owes to that child; and the law only recognizes such right as a means of enforcing such obligation.

Com. v. Gilkison and Dumain v. Gwynne, supra; Heinemann's App. 96 Pa. 112, 42 Am. Rep. 533.

A mother is not bound at law to maintain her minor child and is therefore not entitled to the correlative right of service.

Fairmount & A. Street Pass. R. Co. v. Stutler, 54 Pa. 375, 93 Am. Dec. 714; *Burrell Top. v. Pittsburg Guardians of the Poor*, 63 Pa. 472, 1 Am. Rep. 441.

Where a claim is made against the estate of a dead man the testimony in support of the claim must be clear, distinct, positive and specific.

Hefner's Estate, 184 Pa. 436; *Thompson's App.* (Pa.) May 7, 1888; *Graham v. Graham*, 34 Pa. 475; *Harbold v. Kunts*, 16 Pa. 210.

Dean, J., delivered the opinion of the court:

About the year 1868, Annie Enders, the plaintiff, was married to Emanuel Enders, son of William Enders. Two years after their marriage, a son, William J. Enders,

was born to them. At that time they lived at Cornwall, Lebanon county. Two years after the birth of the son, on account of her husband's ill treatment and neglect to support her, the wife left him, and, with her child, took up her home with her father, at Berkley, in Berks county. Some months after leaving her husband, and while living with her father, on 7th November, 1872, William Enders, the father of her husband, visited her. Her boy was his only grandson, and he was desirous that he should have a better education than his mother could afford him. The subject of the boy's future was discussed between her and both grandfathers and others of the wife's family, at this visit. The grandfather Enders proposed to her, if she would permit him to take her son and educate him, the boy to make his home with him until he was of age, she to have the privilege of visiting her child when she desired, and to have him at her home whenever convenient, he would give the mother \$20,000, and the boy \$10,000, when he came of age. The mother consented, and thereafter the home of the boy was with his grandfather, the mother and son visiting each other frequently. About the 25th November, 1891, soon after the boy came of age, the grand-

228; *Beg. v. Smith*, 16 Eng. L. & Eq. 221, 17 Jur. 24, 29 L. J. Q. B. 116; *State v. Banks*, 25 Ind. 406; *Child v. Dodd*, 51 Ind. 424; *McGlennan v. Margowski*, 90 Ind. 150; *Hunt v. Hunt*, 4 G. Greene, 216.

The gift of a child will not deprive a parent of the right to re-take it at any time. *Dalton v. State*, 6 Blackf. 357.

The mere surrender of a child to a public institution will not prevent the revocation of it at any time. *Wishard v. Medaris*, 34 Ind. 168.

The rule that the parent may revoke his transfer was recognized in *State v. Reuff*, 20 W. Va. 751; *DeJarnett v. Harper*, 45 Mo. App. 415.

Contract not enforced.

A mere oral gift of a child cannot be enforced. *Burger v. Frakes*, 67 Iowa, 400.

A contract by which a man agrees to part with his children will not be enforced in equity and it may be rescinded if the other party to the contract has not shown a disposition to comply with his contract in good faith. *Beller v. Jones*, 22 Ark. 92.

Children restored.

In *Barlow v. Kennedy*, 17 Lower Can. Jur. 258, the custody of the child was restored to the father, who being a Catholic had upon the death of his wife given the child to a Protestant, because of his own inability to support it, although the father during the four years that the child was out of his possession paid nothing for its support and was in no better circumstances at the time of making application for its return, while the other person was amply able to support it.

In *Bustamento v. Analla*, 1 N. M. 255, the child was at the petition of its mother discharged out of the custody of one to whom it had been given by a third person, to whom the mother had contracted to give it in consideration of the release of a debt, and of his promise to bring it up and educate it as his own, but the decision is placed more upon the ground of the breach of contract than on the invalidity of the contract.

When the time for which the agreement was to extend expires the child will be restored to its parents if its best interests so dictate. *Shaw v. Nachtwey*, 42 Iowa, 652.

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Right under statute.

Under the Maine statute the right of the parent could be transferred. *State v. Smith*, 6 Me. 462.

The New York Act of 1871 declares that every father may by deed or last will duly executed dispose of the custody and tuition of any living child or one likely to be born, during its minority, or for any less time, to any person or persons in possession or remainder. *Fitzgerald v. Fitzgerald*, 24 Hun, 370.

In *Thomson v. Thomson*, 55 How. Pr. 494, the court in considering the statute permitting the father to appoint a guardian, says the power of the father to dispose of the custody and tuition of his children during their minority is derived from the statute.

In *Re Murphy*, 12 How. Pr. 512, it is said the statute of guardianship declares that every father of a child may dispose of its custody and tuition during its minority or for a less time to any person; that ordinarily a deed or will is necessary for that purpose; but it is asked, Do not nine years of undisputed possession on the one part and of uninterrupted acquiescence on the other constitute as good evidence of the understanding of the parties as a written instrument?—and the agreement was held to be binding.

In *Miller v. Wallace*, 75 Ga. 479, it is said that it is indisputable that the father has the control of his minor child and that this can be relinquished or forfeited only in one of the modes recognized by law. But the Georgia Code, § 1793, expressly states that the control of the child may be lost by voluntary contract releasing the right to a third person. And the court says that where it is insisted that the father has relinquished his right to the custody of the child to a third person by contract the terms of the contract to have the effect of depriving him of its control should be "clear, definite, and certain."

An agreement to care for the child and the fact that it is taken when sick and nursed into health and supported properly for five years are sufficient considerations to support the contract. *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399.

If the father releases his right, such release can-

father died, but he had not paid, nor had he made any provision by will or otherwise for payment of, the \$20,000 to the mother, Annie Enders. Thereupon, she brought suit against his executors. At the trial the defendants contended: (1) That the contract, even if proven, was void, because against public policy; (2) there was no sufficient consideration to support the alleged promise. The court submitted the testimony as to whether the contract was made as averred by the plaintiff to the jury, who found for the plaintiff; at the same time reserved the questions of law raised by defendants, and afterwards entered judgment in favor of defendants *non obstante veredicto*. From that judgment, plaintiff brings her appeal.

The court having decided the consideration was sufficient, the sole question here is whether the contract was against public policy, and therefore void. The learned judge

of the court below was of opinion that it was, and refers to many cases holding that the parent cannot divest himself of the custody of his child by any agreement or contract; that, notwithstanding such agreement, his obligation as a parent remains, as well as the right of custody and guardianship. It is admitted in the opinion that none of the cases cited raise the precise question on which this case, because of its peculiar facts, turns. Public policy in the administration of the law by the court is essentially different from what may be public policy in the view of the legislature. With the legislature it may be, and often is, nothing more than expediency. The public policy which dictates the enactment of a law is determined by the wisdom of the legislature. If the legislature declared by statute that it was injurious to public interests, under any circumstances, for a parent to surrender the custody of a

not be revoked without some adequate consideration. *James v. Clegborn*, 54 Ga. 2.

Rights of third person.

As against a stranger a parent may make a third person custodian of her child. *Jones v. Harmon*, 27 Fla. 238.

Where a father and mother living apart have agreed to transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care and provide for them, and he acts in pursuance of such agreement, the custody of the grandfather is lawful, and he may maintain an action against one who wrongfully takes them from his custody. *Clark v. Bayer*, 32 Ohio St. 229, 30 Am. Rep. 563.

Estoppel of parent.

Although the parent will not be permitted to relieve himself of his obligations to care for the child, yet he may estop himself from claiming its custody.

The father may permit such a state of things to arise in respect to the relation between the child and its foster parents, that he will not be permitted to reclaim the child. *Pool v. Gott*, 14 Law Rep. 289.

If the father has permitted a condition of things to grow up so that the child cannot be remanded to his custody without harm to her, he will not be permitted to obtain possession of her. *Verser v. Ford*, 37 Ark. 27.

A father who upon the death of his wife, gave his three-year-old child to his aunt, where it remained for six years, and he visited it but once a year and contributed nothing to its support, is not entitled to reclaim the child. *Com. v. Dougherty*, 1 Pa. Legal Gaz. 63.

A parent who agrees that his child may be brought up by another cannot, after the agreement has been acted upon for several years, rescind the agreement and recover possession of the child. *Com. v. Gilkeson*, 1 Phila. 194, 5 Clark, 30.

If the agreement of transfer has been acted upon to the manifest interest and welfare of the child the custody will not be restored to the father, unless he can show that a change of custody will materially promote the child's welfare. *Green v. Campbell*, 35 W. Va. 698; *Cunningham v. Barnes*, 37 W. Va. 746.

The parent by transplanting his off-spring into another family and surrendering all care of it for so long a time that its interests and affections all attach to the adopted home, may thereby seriously impair his right to have back his custody by judicial decree. In a controversy over its possession, its welfare will be the prominent consideration in 27 L. R. A.

controlling the discretion of the court. *Richards v. Collins*, 45 N. J. Eq. 283.

In *Re Gates*, 95 Cal. 461, the court says that under the circumstances of that case it would be nothing less than an act of extreme cruelty to tear the child from the only home she has ever known, even for the purpose of placing her under the care of her own mother, and it decides that since the material interests of the child will be promoted by leaving her where she is and chooses to remain, the only order that will be made is one that the child be freed from all legal restraint and left free to go to the home of her choice.

When the gift of a child has once been made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then whether the court will enforce the father's right to the custody of the child will depend mainly upon the question whether such custody will promote the welfare and interest of the child. If immediately after the gift reclamation is sought and the father is not what may be called an unfit person the courts will pay little attention to any mere speculations as to the probability of benefit to the child by leaving or returning it. But on the other hand when reclamation is not sought until a lapse of years when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. *Chapeky v. Wood*, 26 Kan. 660, 40 Am. Rep. 321.

There may be cases when the father's contract is such as by permitting tacitly or by express agreement another to assume and discharge for many years the duties of parent to his child with the understanding that the relation was to be permanent, he cannot afterwards attempt to reclaim his child in good faith, nor without subjecting to serious hazards its interest and happiness. In such case the award of custody of the child will not be consistent with the exercise of a sound judicial discretion; but at the same time the court will not be justified in withholding from him that custody upon the ground merely that there had been a parol gift of the child, or an agreement for its adoption by another but without subsequent formation of ties under it or change of condition that would cause the resumption of the paternal authority to jeopardize the interests and happiness of the child. *State v. Libbey*, 44 N. H. 321, 32 Am. Dec. 223.

A verbal agreement by the father that another may have the care and custody of the child during its minority will not estop him thereafter from

child during minority to a grandfather, that would be the end of discussion on that question. It has declared the parent can apprentice his child; can, by certain proceedings in court, permit its adoption by another; and that it can take away, for misconduct, the right of testamentary guardianship. But, in the absence of any statute forbidding such a contract as the jury have here found, we must find as a fact that such contracts have a tendency to injure the public, or are against the public good; or, as is said in *Burke v. Child*, 88 U. S. 21 Wall. 448, 23 L. ed. 624, a contract, to be void on this ground, "must be inconsistent with sound policy and good morals as to the consideration or thing to be done." If by well-settled judicial precedent the law has determined that such a contract as this tends to the injury of the public, or is inconsistent with sound morality, we would feel bound to follow the law thus declared, without regard to our own notions of

the tendency of the contract. As to what the contract was here, that has been definitely settled by the verdict on a full and impartial submission of the evidence. It is precisely the contract averred by plaintiff. Many of the cases cited by appellee bear on some features of evidence adduced in denial of this contract, which the jury found as a fact to have been made. It does not help us, in the determination of the question, to allege the wife maliciously deserted her husband and child, and had no marital right, as against her husband, to its custody. Whatever may be the law applicable to such a state of facts, they are not the facts here. She had the custody when the grandfather made the promise, and he conceded her right to and authority over it. This is a necessary inference from the verdict.

We cannot find in the cases cited that a contract such as this one has ever been declared void as against public policy, nor is the

claiming that custody. *Brooke v. Logan*, 113 Ind. 183.

The rule that the custody of the child will not be restored to a parent who has given it away, when the affections of the child have become fixed in its new home, does not apply when the child has been placed in the custody of a public charitable corporation. *Lovell v. House of Good Shepherd*, 9 Wash. 419.

Child's welfare will be regarded.

In *Lyons v. Blenkin*, 1 Jac. 287, it is said: "If when a child is young I give her a considerable maintenance during her infancy, which you could not have supplied and a large fortune afterwards, and you the father permit her to derive advantage of that education which could not have been afforded but through my gift, could you afterwards stop short and say that she could no longer have the advantage? Under such circumstances, the court would inquire what was most for her benefit."

In *McKenzie v. State*, 80 Ind. 547, the court says that upon the question whether or not the parent is a proper person to resume the control of the infant, inquiries may properly be made as to what apparently is for the best interests of the child.

In *Sturtevant v. State*, 15 Neb. 459, 8 Am. Rep. 849, in which there appeared to be nothing more than mere acquiescence of the father to the taking of the child by its grandparents, the court ruled that the best interests of the child alone will be considered in determining the question of its custody.

If the father has placed his children or permitted them to be placed in the custody of another, they will not be restored to him unless he shows that he is a fit person to care for them. *People v. Erbert*, 17 Abb. Pr. 306; *Re Leshier*, 17 Abb. Pr. 395, *note*.

The cardinal point is to regard the welfare of the infant. *Jones v. Darnall*, 103 Ind. 599, 53 Am. Rep. 545.

Although the agreement of the father surrendering the custody of his child to another is not absolute and irrevocable, yet if a contest arises over it in the courts all considerations will be subordinated to the interest and welfare of the child viewed in the light of the character and habits of the contending parties, the facts whether the reclamation is sought within a short time or after the lapse of years, and the other circumstances of the particular case. *People v. Porter*, 29 Ill. App. 199.

The courts will not always aid the father in re-

voking his consent and retaking the custody of the child. In such cases the child's welfare is the cardinal point of inquiry. *Washaw v. Gimble*, 50 Ark. 351.

The interests of the child will be consulted. *Merritt v. Swimley*, 83 Va. 438; *Sheers v. Stein*, 5 L. R. A. 781, 75 Wis. 44; *Drumb v. Keen*, 47 Iowa, 436; *Com. v. Barney*, 4 Brewst. (Pa.) 406; *Com. v. Ashton*, 8 W. N. C. 563, 22 Alb. L. J. 183.

The interests of the child may control the rights of the parent. *Hoxzie v. Potter*, 16 R. L. 374.

Effects of child's choice.

The choice of the infant, if of sufficient age, should control the question. *Ellis v. Jesup*, 11 Bush, 408.

Child may enforce contract.

After the child has been permitted to grow up in a family of a third person as his son, such person cannot raise the objection that the agreement was not binding because he could not have enforced it against the child's father for the purpose of avoiding his liability under the contract to provide for the child as his son. *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, affirmed, *Van Dyne v. Vreeland*, 12 N. J. Eq. 142.

A sealed contract by which a mother agrees to relinquish her child to a third person, who on his part agrees to adopt her, is after the mother and child have performed their part of the contract enforceable by the child or its heirs against such third person. *Healey v. Simpson*, 113 Mo. 340. In that case the court says, the surrender by the mother of all control of the child and the services and companionship of the latter constitute valuable considerations for the promise of adoption.

Agreement as to residence of child.

In *Allen v. Affleck*, 64 How. Pr. 380, upon an agreement for a separation between the father and mother, the child was placed in her custody at the expense of the father, with permission to him to visit it at stated times. The court said: "I see nothing in this agreement that is against public policy. So far from indicating an intention on the part of the husband to abandon his paternal duties, its provisions are carefully drawn to secure, so far as was compatible under the unhappy circumstances of a separation like this, that intercourse between parent and child which is essential to the paternal influence; and also the exercise on his part of that care and watchfulness in the event of sickness which grows out of paternal anxiety and his duty as a parent."

H. P. F.

principle announced in any case holding the contract void applicable to these somewhat peculiar facts.

At the time the contract was made the child was about two years old. The mother was living with it at her father's, apart from her husband. She and the child were dependent on the bounty of her father, who was in moderate circumstances. Obviously, whether this situation was brought about by marital discord or the father's viciousness, the future welfare of the helpless child was in peril. A deserted or deserting wife, without means, cannot give much of advantage in the way of education and comfort to the child. The grandfather, conscious of this, and being of ample fortune, with a view to his grandson's future and the gratification of his own family pride and affection, proposed to take the boy, give him a home, and educate him. While no severance of the maternal relation was contemplated, a personal separation was involved. By the arrangement, the grandfather secured the constant companionship of the boy, and the mother relinquished it. No parental duty or obligation on the part of the mother was cast off, nor was there any such intention. Nor was the arrangement prompted by self-seeking on the part of the mother. The proposition was made by the grandfather, and she, out of regard for the advantage accruing to the child, reluctantly consented. The grandfather did all he agreed to do. The grandson received all the advantages expected by the mother. She suffered the deprivation of his constant society for 19 years. The grandfather enjoyed the presence of his grandson. Without alienation in affection, the mother relinquished the benefit of his personal service and the comfort derived from a son's personal attention. For this she was to receive \$20,000 when the son came of age. She has a right to recover it, unless the contract was against public policy. We concede the authorities establish that the contract of a parent, by which he bargains away for a consideration the custody of his child to a stranger, he attempting to relieve himself from all paternal obligation and place the burden on another, who is to shoulder it, without natural affection or moral obligation to prompt to the performance of parental duty, but only because of a bargain, is void as against public policy. Such a contract would be the mere sale of the child for money. But this was a family compact. The pride of the grandfather centered on the child as his only living male descendant, in whose future there was promise. He was called by his name, and without question, both in blood and af-

fection, he stood near to him. Nor was his relation to the child wholly without legal responsibility. In the case of poverty on the part of one and ability on the part of the other, by the Act of 1836 there was a legal liability on the part of each to support the other. These are the circumstances under which this contract was made. We concede that because the event showed this contract did promote the child's welfare, that is not sufficient to warrant us in saying the contract was not against public policy. The particular instance does not determine public policy, but only the probable or natural tendency of such contracts. But we are clearly of the opinion that the tendency of such contracts between grandparents of good character and ample estate and parents in reduced circumstances, where parental solicitude and affection are not to be extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor to good morals. In *Van Dyne v. Vreeland*, 11 N. J. Eq. 871, and *Hill v. Gomme*, 1 Beav. 541, the contract of the parents was decided not to be against public policy, although made with strangers to the blood, because of the special facts, and on the ground that the contract was for the welfare of the child. In *Neal v. Gilmore*, 79 Pa. 427, the contract was made by the father, who was intemperate, he relinquishing the custody of his two boys, respectively two and six years of age, to a childless couple, relatives of his, until the children were of age. It was held that, if the contract had been proven, there was sufficient consideration to support and enforce it, but that the proof was not sufficient to establish the contract. The point was not even made that such a contract was against public policy. The payment to be made the mother was, by the contract, fixed at the majority of the child, but there never was a time during its existence that the law would have declared it void as against public policy, because it contemplated no severance of the parental relation, no extinguishment of parental solicitude, and was wholly for the welfare of the child. Such custody as was necessary to gratify the pride and affection of the grandfather, and further the boy's education, was relinquished; a custody not unlike that which she would have surrendered had she placed him in a boarding school for several years.

As we see nothing in this contract which should prevent its enforcement, the judgment of the court below is reversed, and judgment is now entered on the verdict for plaintiff.

MARYLAND COURT OF APPEALS.

CENTRAL R. CO., *Appt.*,

v.

Elias BREWER.

(.....Md.....)

1. A corporation is not responsible for unauthorized and unlawful acts of its officers, though done *colore officii*.
2. The superintendent of a street railway company has no implied authority to cause the arrest of a passenger for placing in the fare box a counterfeit coin in payment of fare, so as to make the company liable for false imprisonment in case of such arrest without proof of precedent authority or subsequent ratification of his act.
3. Ratification of the act of a street railway superintendent in arresting a passenger for putting counterfeit coin in the box for his fare is not shown by the fact that the president of the company, the superintendent and the driver of the street-car gave evidence against the person arrested.
4. A person acting upon appearances in making a criminal charge is justified, if the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was innocent.

(January 12, 1894.)

A PPEAL by defendant from a judgment of the Baltimore City Court in favor of plaintiff in an action brought to recover damages for alleged malicious prosecution and false imprisonment. *Reversed.*

The facts are stated in the opinion.

Messrs. T. Wallis Blackstone and George Blackstone, for appellant:

Before the plaintiff could recover, he was bound to prove affirmatively that there was both malice and want of probable cause for the arrest.

Even if there had been the most express malice, want of probable cause could not be inferred from it.

Boyd v. Cross, 85 Md. 196; *Thelin v. Dorsey*, 69 Md. 544.

It must be affirmatively proved.

Wheeler v. Nesbitt, 65 U. S. 24 How. 550, 16 L. ed. 769.

It is wholly immaterial whether the party was guilty or not, if the facts known to the defendant were such as would warrant a cautious man in believing him guilty. It is a question of bona fides, and reasonableness of suspicion or belief and not one of guilt or innocence.

Thelin v. Dorsey, *supra*.

Before putting the criminal law in motion a party has a right to judge for himself from appearances, whether there is probable cause.

Newell, Malicious Prosecution, p. 268.

NOTE.—In connection with the above case as to false imprisonment by act of a servant or agent, see *note* to *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791, also *Gillingham v. Ohio River R. Co.* (W. Va.) 14 L. R. A. 798, and *Palmer v. Manhattan R. Co.* (N. Y.) 16 L. R. A. 126, 27 L. R. A.

It is the duty of the court where the facts are disputed to submit the evidence to the jury with instructions to determine its credibility and that the facts amount to probable cause or that they do not.

Atchison, T. & S. F. R. Co. v. Watson, 87 Kan. 773; *Bell v. Matthews*, Id. 686.

It is error to leave to the jury to determine whether the facts do or do not establish want of probable cause.

Emerson v. Skaggs, 53 Cal. 246.

If there be not affirmative proof of both malice and want of probable cause, it is the duty of the court to take the case away from the jury.

Wheeler v. Nesbitt, *supra*; *Hooper v. Vernon*, 74 Md. 188; *Thelin v. Dorsey*, *supra*; *Johns v. Marsh*, 52 Md. 825.

Even, although Hopps acted without probable cause, still the corporation is not liable, because there is no evidence in the record that the company ever ratified or adopted his acts in reference to the arrest.

Vanderbilt v. Richmond Turnp. Co. 2 N. Y. 480, 51 Am. Dec. 815; *Boyd v. Cross*, 85 Md. 196; *Carter v. Howe Mach. Co.* 51 Md. 297, 84 Am. Rep. 811; *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65.

Messrs. Alfred S. Niles and Oscar Wolff, for appellee:

A corporation may be liable for malicious prosecution.

Carter v. Howe Mach. Co. 51 Md. 290, 84 Am. Rep. 811; *Newell, Malicious Prosecution*, p. 881.

Nor is it necessary, in order to make a corporation liable in an action of this kind, to prove that the act was strictly within its corporate powers.

2 *Morawetz, Priv. Corp.* 2d ed. § 726.

To hold that a corporation cannot be held liable for a wrongful act, unless it be authorized or ratified by the stockholders or directors in meeting assembled, would be practically absolving a corporation from all liability, and thus nullifying the law, which says that such liability may exist.

Missouri Pac. R. Co. v. Richmond, 4 L. R. A. 280, 78 Tex. 568; *Fogg v. Boston & L. R. Corp.* 148 Mass. 518.

The officers were acting in the line of their duties, as officers of the company, with sole regard for the interests of the company and without any private end of their own. This is the test which fixes upon a corporation liability for acts done even by its meanest and most subordinate employé.

Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141; 2 *Spelling, Priv. Corp.* § 941, *note*; *Newell, Malicious Prosecution*, p. 888, § 20; *Ricord v. Central Pac. R. Co.* 15 Nev. 167; *Gulf, C. & S. F. R. Co. v. James*, 78 Tex. 12, 28; *Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179; *Potulni v. Saunders*, 87 Minn. 517; *Garretsen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

A ratification need not be in words, but may be implied from conduct or acquiescence. *Lawson, Rights, Rem. & Pr.* § 481.

Probable cause is defined as "circumstances

connected with the transaction out of which the prosecution arose, known to the defendant, which would induce a reasonable, dispassionate man to believe the plaintiff guilty of the crime with which he was charged, and to induce such a man to have undertaken such a prosecution from public motives."

Cooper v. Uitterbach, 87 Md. 285; *McWilliams v. Hoban*, 42 Md. 60; *Thelin v. Dorsey*, 59 Md. 540.

The man must be a cautious one; and the conclusion such as "a discreet, careful man would readily adopt."

Johns v. Marsh, 52 Md. 336.

Mere belief is not sufficient.

Ibid.

When the prosecution is for a crime there must be probable cause for belief in the felonious intent.

McWilliams v. Hoban, 42 Md. 64; *Flickinger v. Wagner*, 46 Md. 601.

Malice may be inferred from a want of probable cause.

Johns v. Marsh, *supra*; *Straus v. Young*, 86 Md. 255.

Malice can be inferred by the conduct, zeal, and activity of a party.

Straus v. Young, *supra*; *Turner v. Walker*, 3 Gill & J. 387, 22 Am. Dec. 329.

Roberts, J., delivered the opinion of the court:

This is an action for malicious prosecution and for false arrest, whereby the plaintiff seeks the recovery of damages of the defendant company, a body corporate of the state of Maryland.

The declaration alleges that the defendant falsely, maliciously, and without probable cause whatsoever caused the plaintiff to be arrested upon a writ issued by a commissioner of the circuit court of the United States for the district of Maryland, upon the charge of passing counterfeit money, knowing the same to be false and counterfeit, and with intent to defraud, whereupon the commissioner required the plaintiff to give bail for his appearance before him the day following for a hearing, when said charge was dismissed and the appellee discharged. In the second count it is alleged that the defendant assaulted the plaintiff and gave him into custody of a police officer upon a false charge, and required him to go before the said commissioner and give bail for his appearance, etc.

To this declaration the defendant pleaded that it did not commit the wrongs alleged.

The facts are, that the defendant was engaged in running cars upon certain streets of the city of Baltimore for the conveyance of passengers.

The plaintiff boarded one of the cars of the defendant at the corner of Druid Hill avenue and Biddle street, and before taking his seat dropped into the fare box, which was of the Slawson patent, a coin resembling a five cent piece or nickel. When the car had proceeded nearly the distance of a short block the driver of the car called the plaintiff to him and told him that he dropped a lead nickel in the box, and requested him to redeem it. The driver pointed out to the

plaintiff the particular coin, which was lying on the glass shelf of the box, which is an inclined glass plate held in such position that the coins which are dropped into the box fall upon the upper surface of the inclined plane of the glass shelf. This glass shelf is intended to give to the driver a careful scrutiny of the coins deposited for fares before the same are dropped into the lower part of the box. The testimony conclusively shows that the nickel in question was deposited in the box by the plaintiff. It is equally clear that the coin so deposited was a leaden nickel or counterfeit coin of the United States. And notwithstanding the driver told the plaintiff that he must redeem the counterfeit coin, and that he could not deliver the same to him, as a driver had no right to open the box, but that he could obtain the same at any time by calling at the office of the company, the plaintiff continued in the car and passed the office of the company without paying further attention to the matter.

Immediately thereafter three of the employees of the defendant, the driver of the car in question, the treasurer, and also the superintendent, followed the car in which the plaintiff was a short distance and after the plaintiff had left it, the superintendent approached him and said, "You put a piece of counterfeit money in the box, and I would like you to make it good," but the plaintiff declined doing so, and said there was nothing the matter with the nickel, only a piece out of the corner of it. The plaintiff was then taken before the United States commissioner, where the charge of passing a counterfeit coin was made, the superintendent making the affidavit. The commissioner held the plaintiff under bail for his appearance on the day following, and detained him for about two hours, until bail was furnished. On the day following the making of the charge, the case was heard by the commissioner, and the plaintiff discharged.

At the trial below there were two exceptions taken. One, relating to the court's action on the prayers, and the other to the admissibility of certain testimony. The liability of corporations aggregate for torts committed by them, through their agents, has, in recent years, received a good deal of attention from the courts. It may indeed be said that the question of corporate liability for torts has been in a progressive stage but, step by step, have the limits of such liability been enlarged and extended, until now there is but little difference between corporate liability and individual liability with respect to torts.

In consequence, however, of the fact that a corporation must of necessity act through its agents, courts have almost invariably held that to hold a corporation liable for a tortious act committed by its agents the act must be done by its express precedent authority, or ratified and adopted by the corporation. Nor is a corporation responsible for unauthorized and unlawful acts, even of its officers, though done *colore officii*. To fix the liability it must either appear that the officers were expressly authorized to do the

act or that it was done bona fide, in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. *Ang. & A. Priv. Corp.* 10th. ed. 311; *Carter v. House Mach. Co.* 51 Md. 296, 34 Am. Rep. 311.

When the plaintiff was arrested and held to bail in the manner already stated, the affidavit was made by the superintendent of the defendant. It is asserted in the brief of the appellee that the president of the defendant was also present at that time; we fail, however, to discover the fact in the record. But in our view of the case it is immaterial whether he was or was not. The president was but the agent of the defendant, as were the other officers and employes. There is nothing in the record which directly or indirectly tends to show that the superintendent was acting in pursuance of express authority from the defendant (51 Md. 298) in causing the arrest of the plaintiff, nor had he any implied authority for so doing, arising out of the scope of his employment, so far at least as the testimony in the record discloses. The fact that he had general authority to look after and manage the affairs of the defendant in running its cars on the streets of Baltimore city for the carriage of passengers in no manner suggests that he had, unless expressly authorized so to do by his principal, any authority to arrest a passenger for placing in the fare box a leaden nickel in payment of his fare. He may have a general authority to look after and protect the property of the defendant, and he may possess all the powers properly pertaining to such employment, and yet he would not be empowered to invoke the aid of the criminal law on behalf of his company, unless he had express precedent authority. And if this be true of the superintendent, it is equally true of the other agents and employes of the defendant. As to the subsequent ratification or adoption by the defendant, the testimony is very meagre and inconclusive. At the hearing of the charge the president, the superintendent, and the driver testified, and the impression made upon the mind of the commissioner is described by him in his testimony, when he says, "there was nothing in the conduct or manner of the officers or employes of the railway company before him to indicate that they wanted to do anything more than tell the facts which were within their knowledge, and which appertained to their examination."

The fact that the president, superintendent, and driver testified before the commissioner afford no legally sufficient evidence of ratification or adoption, for if they were without authority in causing the arrest, the subsequent testimony given for the government by them, or the manner in which they demeaned themselves in delivering their testimony in no way supports the theory of adoption or ratification. *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 520, 8 L. R. A. 846. There was not within any legally sufficient evidence given at the trial below from which the jury could have properly inferred either express precedent authority to justify the agents of the defendant in caus-

ing the arrest of the plaintiff, nor was there any legal evidence which establishes the adoption or ratification by the defendant of the acts of its agents.

It was certainly not within any of the usual objects or powers of the defendant company to prosecute offenders against the criminal laws of the United States, and it has not been contended that any such powers ever were specially conferred on the defendant.

While courts of some of the states have held corporations to a strict liability in actions of like character with the one now under consideration, we are following the doctrine which we think this court has correctly announced in the case of *Carter v. House Mach. Co.* 51 Md. 290, 34 Am. Rep. 311.

To hold differently would, we think, be opening wide the door to a class of cases which courts do not look upon with favor. Public justice has its claims, as well as the individual citizen, and it is no part of the privilege of the latter, that he can, with impunity, ignore the reasonable demands of the former.

We do not, however, sanction the idea that the rights and liberties of the citizen can be trifled with, and unfounded charges preferred, without holding the accuser to a just responsibility. And when corporations authorize their agents to maliciously commit wrongs against the citizen, or ratify or adopt such acts when done, they should be held responsible therefor. The right and the duty of the citizen are reciprocal. He should conduct himself in such manner as not to excite a well-founded suspicion that he is a wrong-doer; if he does not, he has no just cause to complain of the consequences. *Carl v. Ayers*, 53 N. Y. 14. This case now under consideration illustrates our meaning. If the plaintiff, when charged with passing a counterfeit coin with intent to defraud, had exercised a reasonable degree of prudence, which he could have done by dropping a good coin into the box for the bad one, or by going a few steps to the office of defendant, which he was then nearing, and about to pass, and redeemed the bad coin, there could have been no possible cause for trouble, but he declined to do either. Having paid no fare for the ride which he took, he quietly walks off, ignoring the obligation he was under to the defendant to pay his fare, and paying no attention to the complaint of the driver, that he had dropped a leaden nickel in the fare box. We take it to be very clear from the testimony as already stated in this opinion, that the plaintiff did deposit the leaden nickel in the box, and that it was a counterfeit coin. The plaintiff himself has not sought to disprove either fact. Under these circumstances he should have pursued a different course, if he desired to relieve himself from the consequences which reasonably followed. He had ample time to consider and determine upon the course which he thought proper to pursue, and we think he acted in such a manner to, at least, justify the agents of the defendant in believing that, even though he may have unintentionally deposited a bad coin in the box, he was afterwards willing to avail himself of

his position, and apply the counterfeit nickel to the payment of his fare. He failed to better his position when he subsequently, at the instance of the commissioner, gave a good nickel to the president of the defendant. The agents of the defendant were unskilled in the refinements of the law, and we think in what they did they acted bona fide, and with reasonable and probable cause for their conduct. The plaintiff by his course excited suspicion, and invited the charge, and thus brought upon himself the unpleasant consequences that followed, which, we think, could have been averted, by a reasonable regard for the duty incumbent upon him, under the circumstances. *Wilmarth v. Mountford*, 4 Wash. C. C. 79.

In this case we have failed to discover by implication or otherwise the slightest degree of malice. None could be inferred from the want of probable cause, because its absence has not been shown. The plaintiff in his testimony, speaking of the agents of the defendant, said, "that he knew of no reason why they should have had any feeling against him and he really had no right to think that they had." The question of the presence or absence of probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused, or upon the fact whether or not a crime has been committed. *Baldwin v. Weed*, 17 Wend. 224; *Bacon v. Towne*, 4 Cush. 218. And if a person act upon appearances in making a criminal charge, and the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was deceived, and the party accused was innocent, yet he will be justified. *Carl v. Ayers*, *supra*.

The well-settled doctrine is, that an agent has implied authority to do only such acts as relate to his own particular duties. This theoretical principle is easily enough expressed and comprehended, but it is just here that the greatest difficulties arise in defining the extent of the principal's liability. The decided cases which illustrate this view are numerous and we will refer to some of them as explanatory of the doctrines maintained in this opinion, and which we think correctly state the law. In the case of *Roe v. Birkenhead, L. & C. Junction R. Co.*, 7 Exch. 86, it appears, "that a passenger being desirous of going by an excursion train from Monks Ferry (the defendant's station) to Bangor and back, inquired of the clerk at the former station by what train he could return. The clerk informed him that his ticket would be available by evening train from Bangor; the plaintiff accordingly obtained an excursion ticket and returned by the train mentioned by the clerk. On arriving at the platform near to the Chester Station, a railway servant, who had charge of the train, upon receiving the plaintiff's ticket, told him that he had come by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was therefore taken into custody by a railway servant, under the direction of a superintendent, but,

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after having been a short time in custody, he paid the money under protest and was released. It appeared that the Chester Station was occupied by the defendant company and by several other railway companies; but one of the witnesses stated that he believed the person who took the plaintiff into custody to be one of the servants of the defendant's company. The plaintiff's attorney having written to the secretary of the defendant's company for compensation received a written answer from him requesting that he might be furnished with the date of the transaction and promising to make the necessary inquiries. The secretary also stated that it was an awkward business, and that the blame would fall upon the clerk at the station who had given the false information, and he also offered to repay to the plaintiff the sum of 2s. 6d. he had been compelled to pay. Held in an action against the defendants for the arrest, that the circumstances of the case did not afford any evidence that the arrest had been made by the authority, either express or implied, given by the company, or that they had ratified the act." In the case of *Eastern Counties R. Co. v. Broom*, 6 Exch. 814, it appeared that the plaintiff, a passenger on the cars of the company, when demanded to deliver up his ticket to the collector refused so to do; he was requested to quit the carriage which he also refused to do, whereupon he was, with necessary force only, removed. A servant of the company then took the plaintiff before a magistrate for an alleged breach of one of the company's by-laws. The attorney for the company attended before the magistrate to conduct the charge, which the court held was no evidence that the company ratified the act of their servant. In the case of *Mait v. Lord*, 39 N. Y. 881, 100 Am. Dec. 448, the question was, whether a merchant, by employing a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen and secreted about his person any of the goods kept in such store? The court says: "In examining this question, it must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it from thieves and marauders; and that the servant owes the duty so to protect it, to his employer. But this does not include the power in question. It cannot be presumed that a master, by entrusting his servant with his property and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection, that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was

not done in the business of the defendants, and they were not, as masters, responsible therefor."

We do not think it necessary to pursue the inquiry further. There are many other cases closely analogous to those quoted, among which are *Pressley v. Mobile & G. R. Co.* 15 Fed. Rep. 199; *Bank of New South Wales v. Ouston*, 48 L. J. P. C. 25; *Danby v. Beardsley*, 48 L. T. N. S. 603; *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 445; *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65; *Brokaw v. New Jersey R. & Transp. Co.* 82 N. J. L. 328, 90 Am. Dec. 659; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 815.

It follows from the views expressed that we are of opinion that there was no legally sufficient evidence in this cause to justify submitting the same to the jury. When all the facts, which the plaintiff's evidence conduces to prove do not show a want of prob-

able cause, it becomes a mere question of law, which the court must decide, and it will be useless and improper to take the opinion of the jury upon it.

The defendant's first and second prayers announced the law of the case, and should have been granted. The plaintiff's first, second and third prayers ought to have been rejected.

There is no objection to the law of the fourth prayer in a proper case. We think the court below was in error in allowing the question to be asked which is contained in the first exception, for the reason that if the agents of the defendant had no authority to make the arrest, they could not by their demurrer at the hearing make the company liable when there had been no precedent authority or subsequent ratification.

The judgment below must be reversed without a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Robert B. DASHIELL, *Appt.*,

v.

James B. M. GROSVENOR *et al.*

(.....U. S. App.....)

1. An injunction will not be granted against the manufacture of cannon in a navy yard of the United States for use on war vessels, on the ground of infringement of a patent, even if the United States is not made a party to the action.
2. A bill in equity charging actual fraud as the ground of relief will not justify a decree on another ground if the fraud is not proven.

(February 5, 1895.)

A PPEAL by defendant from a decree of the Circuit Court of the United States for the District of Maryland, in favor of complainants in a suit brought to enjoin the infringement of a patent and for an account of profits. *Reversed.*

Statement by Goff, Circuit Judge:

This is an appeal from a decree rendered in the circuit court of the United States for the district of Maryland, in the chancery cause of James B. M. Grosvenor and others against Robert B. Dashiell, by which it was adjudged that letters-patent No. 425,584, granted to Samuel Seabury, dated April 15, 1890, for improvement in breech-loading cannon, are valid, and that the same have been infringed by Robert B. Dashiell; also that said Seabury and his assigns recover from said defendant certain profits and damages, and that a perpetual injunction be issued.

NOTE.—The above case is an illustration of the rule to deny an injunction on grounds of public policy where it would interfere with public interests. See note to *Williams v. Citizens R. Co.* (Ind.) 5 L. R. A. 64.

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It is claimed in the bill, which was filed on the 25th of July, 1892, that Seabury was the inventor and patentee, and that he assigned certain interests in the letters-patent to his co complainants who with him then owned the entire right and title to the invention; that the defendant, well knowing the premises, has wrongfully, unlawfully, and injuriously, with intent to derive profits therefrom and to deprive complainants of the royalties to which they were entitled, conspired, combined, and confederated with William M. Folger and other persons, and infringed upon the rights of the owners of said patent, by making and using and causing and authorizing others to make and use a large number of breech-loading cannon, embodying the inventions described and claimed in and secured by said letters-patent, without any authority from said owners so to do, whereby defendant has realized large profits to the loss and injury of the patentee and his assignees; that at the time of the infringement charged the defendant was an officer of the United States navy holding the rank of ensign and was connected with the bureau of ordnance of the navy department, of which Commodore William M. Folger was then and still is in charge, having control and supervision of the manufacture thereat—under the direction of said bureau—of cannon for the use of the navy of the United States, particularly at the United States navy yard, at Washington, in the District of Columbia; that shortly after said letters-patent were issued to Seabury, he exhibited a model of the invention together with drawings relating to the same, to said Commodore Folger, at his office in the navy department at Washington, his purpose being to procure a trial of the device mentioned, and in case it proved successful, its adoption by the navy department, and that the said Folger requested him to furnish his said bureau with working drawings by which

the department would be able to construct a breech-loading cannon, embodying such invention, which Seabury proceeded to do, and delivered the same to Folger; that afterwards the defendant, making use of the information and drawings so provided, which it is charged were given him by Folger for that express purpose, undertook to construct and devise a design substantially the same as that so invented by Seabury, changing the form of certain parts so as to evade the charge of infringement; that defendant, in pursuance of this purpose, did contrive a design and make drawings of the same, which he furnished to Folger, who thereupon, with the consent, co-operation and aid of defendant, proceeded to construct and make trial of a breech-loading cannon in conformity with the design of the defendant, embodying substantially the Seabury invention with immaterial changes in the detail thereof, purposely designed to evade the charge of infringement, and intended to defraud Seabury and his assigns of their rights under the said letters-patent; that a test of the same proving successful by reason of the great merit of the Seabury invention embodied therein, a large number of breech-loading cannon were constructed at said Washington navy yard, according to such design, under the procurement of defendant, and with his consent as the pretended inventor of the design as well as in pursuance of the conspiracy, combination and confederacy of said Folger, with the defendant; that a large number of such cannon are now in process of construction at said navy yard under such consent and authority and in pursuance of such conspiracy and confederacy; that such infringement was conducted by defendant and Folger in a secret manner, and was intentionally kept from the knowledge of complainants until it reached such dimensions that concealment was no longer possible; that such acts worked a great fraud on Seabury and his assigns, as they were intended to do; and that defendant will continue to make and use, and cause others to make and use breech-loading cannon under the invention secured by said letters-patent, and thereby cause irreparable injury to plaintiffs unless restrained by writ of injunction.

The prayer of the bill is that defendant may be compelled to account for and pay to plaintiffs the income and profits so unlawfully obtained, together with damages and costs, and that he be perpetually enjoined and restrained, as also his clerks, servants, employes, agents, attorneys, and all persons acting under his authority, from making and using, or causing to be made and used, breech-loading cannon embodying the Seabury invention, and for such further relief as may in the premises be just and proper.

The defendant answered denying all the charges of fraud, and particularly the allegations to the conspiracy and confederation with the chief of the bureau of ordinance of the navy department. He also denied that Seabury was the true, original and first inventor of the improvement set forth in his letters-patent. The answer admits that the

defendant is a naval officer, connected with the bureau of ordnance, and that Commodore Folger is the chief of said bureau; that the defendant has been under the orders of such chief while he was engaged in the manufacture of the cannon alluded to in the bill; that in December, 1889, the defendant told Folger that he was designing a rapid-fire gun, and that he completed his plans and drawings for a model of the same in April, 1890; that in September, 1890, he was placed in charge of the "Proving Grounds," at Indian Head, in Maryland, where he has since been, but that he has had nothing to do with the manufacture or sale of the cannon alluded to, except to test them as to structural weakness, facility of operation, rapidity and precision of fire, and their efficiency and safety; that in August, 1890, he exhibited a model of his invention to Commodore Folger, who asked him to prepare working drawings for a four-inch rapid fire gun, which he did, sending them to the bureau in September, 1890; that breech loading cannon have been constructed at the navy yard at Washington, embodying an invention patented to him on the 9th day of February, 1892, but that they were manufactured under the orders, supervision and authority of Commodore Folger and the officers of said navy yard.

Other matters are set forth in the answer, but will not be referred to, as from our view of the case they are immaterial.

A great number of witnesses were examined, relative to the patents in controversy, to the state of the art to which they belong, and to the manufacturing of breech-loading cannon at the Washington navy yard, the contract relating to the use of defendant's invention, and the royalty to be paid him by the navy department for the right to use the same.

The case came on to be heard, and on the 19th day of July, 1894, a decree was entered in the court below, adjudging the Seabury patent to be valid in law; that the defendant had infringed upon the same; that complainants recover of him the profits made by him on account of such infringement; that an account be stated showing the number of breech-loading cannon made and caused by defendant to be made, embodying the invention described in the Seabury patent, and the gains and profits defendant had received from his infringement of the same, together with the damages complainants have sustained thereby; and that a perpetual injunction be issued against the defendant restraining him, his agents, clerks, servants and all persons claiming or holding under him, from making, using or selling, or in any manner disposing of, or authorizing others to make, use and sell breech-loading cannon embracing the invention or improvements described in the Seabury patent. From this decree an appeal was prayed for and allowed, the petition for the appeal and the assignments of error being filed and prosecuted by counsel acting under an order of appointment and instructions from the attorney-general of the United States, as well as by counsel for defendant below.

Mr. W. H. Stayton, with Messrs. S. F. Phillips and F. D. McKenney, for appellant:

If one inventor precede all the rest and strike out something which includes and underlies all that they produce he acquires a monopoly and subjects them to tribute; but if the advance toward the thing desired be gradual, and proceeds step by step, each is entitled to the specific form which he produces, and every other inventor is entitled to his own, so long as it differs from those of the others, and does not include theirs.

Chicago & N. W. R. Co. v. Bayles, 97 U. S. 554, 24 L. ed. 1053; *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 478, 32 L. ed. 174.

The government can no more be prevented from appropriating the qualities of such inventions in order to serve its necessities than the owners can be prevented from obtaining their money value as estimated upon a fair *quantum valebat*. Appropriation of such things by the government implies a willingness upon its part to compensate. And the court of claims is open to an ascertainment of the value and a judgment accordingly.

See *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846.

The question is, Can the government be practically enjoined from making and using a patented weapon of war useful within the sphere of the operation of such patent only to themselves, and valuable to the patentee only so far as he may be compensated for such use?

If Dashiell had been guilty of the fraud charged in the bill he might have been liable in equity. And whether guilty of fraud or not, the facts there charged might have been justified against him at law. But, inasmuch as fraud is out of the way, and the "making" or "use" complained of, is by the government alone, this court is without jurisdiction.

James v. Campbell, 104 U. S. 356, 26 L. ed. 786; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 443; *Berdan Fire-Arms Mfg. Co. v. United States*, 26 Ct. Cl. 48; *Gill v. United States*, 25 Ct. Cl. 415; *United States v. Great Falls Mfg. Co. supra*; *Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 55 Fed. Rep. 487; *Schillinger v. United States*, 24 Ct. Cl. 278.

Inasmuch as no case is stated in the bill except that to which the charge of fraud relates, and inasmuch further as the latter charge has failed, the bill must be dismissed.

Tillinghast v. Champion, 4 R. I. 178, 87 Am. Dec. 510; *Eyre v. Potter*, 56 U. S. 15 How. 42, 14 L. ed. 592; *French v. Shoemaker*, 81 U. S. 14 Wall. 314, 20 L. ed. 852; *Ferraby v. Hobson*, 2 Phill. Ch. 255; *Hilliard v. Eiffe*, L. R. 7 H. L. 39; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318.

Messrs. William A. Jenner and William G. Wilson, for appellees:

There would be no bar, but for the injunction in this suit, to prevent the defendant from manufacturing guns containing the invention or licensing others to manufacture for state militia or private parties for use, either in this

country or abroad. The defendant stands on a claim of right. He asserts property in the invention, and has exercised ownership over it, in respect of selling the invention, by licensing others and causing others to make and use it, and this he claims the right to do, not merely by virtue of his own grant, but because of the alleged weakness of our own title.

The acts shown make out a clear case of infringement.

8 Robinson, Patents, § 897; *Vaughn v. East Tennessee, V. & G. R. Co.* 2 Bann. & Ard. 537, 11 Pat. Off. Gaz. 789; *Wells v. Jacobs*, 1 Bann. & Ard. 60; *Jennings v. Dolan*, 29 Fed. Rep. 861; *Nichols v. Pearce*, 7 Blatchf. 5; *American Cotton Tie Supply Co. v. McCready*, 17 Pat. Off. Gaz. 565, 4 Bann. & Ard. 588.

That a defendant who contrives an infringement device, secures a patent for any improvement that there may be in it, and makes use of his improvement with the infringement in it by licensing others to make it and use it, and derives a profit therefrom by way of royalty on each infringing device made, is not liable to the patentee, would seem absurd.

8 Robinson, Patents, §§ 897, 910; *James v. Campbell*, 104 U. S. 357, 26 L. ed. 787.

The right of a patentee to sue an infringer, though the infringer may be in the service of the government, and the infringement used in such service, has never been denied.

Campbell v. James, 104 U. S. 356, 26 L. ed. 786; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901; *Forehand v. Porter*, 15 Fed. Rep. 256; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442; *Solomons v. United States*, 187 U. S. 342, 34 L. ed. 667; *Head v. Porter*, 48 Fed. Rep. 481.

Goff, Circuit Judge, delivered the opinion of the court:

We think that the pleadings and proofs of this cause clearly demonstrate that this is, in substance, if not in form, a proceeding the object of which is to prevent the making of breech-loading cannon of a certain character, and by a particular device, at the navy yard of the United States, in the city of Washington, District of Columbia, by those officially in charge thereof, representing the government of the United States; and also, it is clearly shown that the injunction granted by the court below will in effect prohibit the officers so in charge of said navy yard from manufacturing such cannon for use on the vessels of war of the United States, as provided for under the provisions of existing legislation, the reason for such prohibition being that, in so making breech-loading cannon, said officers are infringing on the rights granted to Samuel Seabury by letters-patent No. 435,584, dated April 15, 1890.

Should a suit instituted under such circumstances and with such intention be sustained? Do not public policy and the rights of the government in its sovereign capacity require that parties feeling themselves aggrieved on account of matters relating to such transactions as we have alluded to—to such circumstances as are set forth by the evidence taken and filed in this case should be compelled to seek relief and compensation, if so entitled, by proceeding in another

manner and before another tribunal, and that the courts should not use their writs of injunction so as to retard and embarrass the government in the prosecution of work, the product of which is absolutely essential to the public welfare and the national defense? We think that the consent of the owner of a patented device, while it is desirable and should be obtained, if it conveniently and reasonably can, is not positively necessary, in order to enable the United States to use the invention described in the letters-patent, particularly in cases where it relates to the mode of construction of implements of warfare required by the government and indispensable to the armament of its vessels of war. Such right to take and use the property of the citizen for government purposes is indisputable, an inborn element of sovereign power essential to the independence and perpetuity of the nation.

The Constitution of the United States provides that congress shall have the power to raise and support armies, and to provide and maintain a navy. By virtue thereof congress has appropriated and caused to be expended large sums of money for such purposes, and for the manufacture of arms, the construction of ships of war, and the establishment of navy yards, including the one at Washington, where the breech-loading cannon mentioned in complainant's bill have been and are now being manufactured. Under recent acts of congress, millions of dollars have been expended through the navy department, in the purchase and manufacture of the armor plate and armament required for the ships of war lately constructed and now in process of building, and in the procurement and installation of the improved machinery for use in the breech-mechanism shop at said Washington navy yard, for the purpose of constructing cannon of the character referred to in the bill. It is evident from the legislation by congress on this subject, and the action of the officials of the government thereunder, that it was and is the intention of the United States to cause to be manufactured for national purposes, breech-loading cannon of the most approved and scientific design, utilizing such plans and inventions as would best secure the result desired, and making in those cases where the right to use a patented device had not been secured, just compensation to the owner thereof, in the manner usual under such circumstances. After careful investigation, involving the examination of many designs, drawings and innovations, with the aid of models and experiments, the chief of the bureau of ordnance formulated his plans, selected and adopted the devices and inventions he deemed best, and commenced the making of the breech-loading cannon, as he was authorized and directed by the congress to do, employing in connection with such work the defendant in this case. If the invention claimed by complainants is being used and infringed by those so representing the United States, then the owners of the same can recover just compensation for such use and infringement, from the government, by suit in the court of claims, or by means of

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an appropriation for that purpose made by congress, on application made to that body.

The fifth amendment to the Constitution of the United States contains the provision that private property shall not be taken for public use without just compensation, and this we must consider as an implied assertion that on making such compensation it may be so taken. It will be noted that this is not a restriction of the power to take private property for public use, but that it is a requirement that when such property is so taken just compensation shall be made therefor to the owner. That incident of sovereignty—the right to take—belonging to every independent government, is not disturbed, nor is the manner in which such right is to be exercised, or the mode by which the proper compensation is to be ascertained and paid set forth. And because congress has provided by statutes a procedure for the condemnation of private property required for public purposes in certain instances and not in others, we are not therefore to infer that the power to take does not exist as to the other matters, nor should we construe such legislation as a limitation of that power relative to other cases of like character not embraced in such enactments. In other words the non-user of a power is not to be used to disprove its existence.

The title the individual citizen has to his property is good as against all other citizens, but it must yield to the necessity of the government, and submit to the social requirements and rights of the general public—and this right of the government to protect itself and defend its own, is not to be controlled by any other power, nor is it to depend on the consent of any person, company, or corporation. The only restriction, as we have already remarked, is the constitutional requirement that just compensation shall be made to the owner for property so taken. The proper mode of proceeding in order to secure compensation for private property taken for public use without the consent of the owner, and in the absence of legal action for condemnation, has received judicial consideration, the Supreme Court of the United States having at different times plainly indicated the same, particularly in cases where the government has used an invention without the permission of the owners of the letters-patent protecting the same. *Kohl v. United States*, 91 U. S. 367, 374, 23 L. ed. 449, 452; *James v. Campbell*, 104 U. S. 365, 26 L. ed. 786; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 28 L. ed. 846, 850; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442. Also the following cases in the court of claims: *Schilling's Case*, 24 Ct. Cl. 278, 298; *Gill's Case*, 25 Ct. Cl. 415; *Bordan Fire-Arms Mfg. Co's Case*, 26 Ct. Cl. 48.

We do not think that contending patentees, striving between themselves and those interested with them, as to the validity of their respective letters-patent, should be permitted to close the arsenals, ordnance shops and navy yards of the United States, by injunctions issuing out of their litigation, thereby

frustrating the designs of the government, rendering inoperative the legislation of congress germane thereto and causing great loss of the public funds appropriated by congress in execution of the same. It is true that the United States is not made a party to this action, but it is also true that it is disclosed by the pleadings and evidence that the cannon, the further making of which it is the object of this suit to enjoin, are now being manufactured at the navy yard of the United States, at Washington, by the employes of that establishment, under the direction of the chief of ordnance of the navy department; and it is apparent that such an observance of the injunction granted by the court below, as should be shown by those to whom it is directed, and as must necessarily be required by the courts while it is of force and effect, will close said navy yard so far at least as the manufacture of breech-loading cannon is concerned and thereby prevent the enforcement of certain laws of the United States, the consummation of which is of national importance.

Independent of the questions we have been considering, there is another reason why, on the case as made in the record before us, the plaintiffs below are not entitled to a decree in their favor. Their bill of complaint as drawn, rests upon the allegations of fraud contained therein, and it must stand or fall, as the testimony establishes or fails to sustain such charges. The positive assertion of fraud permeates the entire bill—it is the warp and woof of its structure—depending on the combination, conspiracy and confederation of the defendant and William M. Folger, as chief of the bureau of ordnance, to use the invention of Seabury and deprive the patentee and his assignees of the benefits and royalties claimed to be secured to them by the letters-patent referred to. A court of equity will not grant a decree on another ground where the bill charges actual fraud as the ground of relief, and the fraud is not proven. We find that there is an utter failure to sustain the allegations of fraudulent conspiracy and confederation charged in the bill. It is shown that Commodore Folger, in his endeavor to secure the most useful and scientific plans and devices by which to construct breech-loading cannon directed by the congress to be made, the manufacture of which was committed to him—did advise with the plaintiff Seabury and did request of him his plans and drawings, and also that he did the same with the defendant, as well as with others; and also it is shown that Folger believed that the plans of the defendant were best adapted to the object desired to be secured by the government, and that he agreed to pay a certain sum for the use of the same, under the impression that the defendant was the inventor and patentee of the design so selected. But there was no

intention to deprive the true owner of his right to demand and recover just compensation for the said taking and using, and it would not have availed had such intent existed, for the legal owner could have recovered even though another had by mistake or fraud been paid.

The charges of fraud have been made either under an entire misconception of the facts, or with a recklessness that at least is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby, by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged. We do not deem it essential to discuss this matter, elementary as it is in character, but we refer to the following cases, in which the subject is fully considered: *Montesquieu v. Sandys*, 18 Ves. Jr. 302; *Price v. Berrington*, 7 Eng. L. & Eq. 260, in which case Lord Truro says: "When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity, from that which would be applicable to the case of fraud originally stated." *Wilde v. Gibson*, 1 Clark & F. N. S. 620; *Glascott v. Lang*, 2 Phill. Ch. 810; *Curson v. Belworthy*, 22 Eng. L. & Eq. 1; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510, in which case the court uses the following language: "In almost all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground or not at all." *Fisher v. Boddy*, 1 Curt. C. C. 206 Fed. Cas. 4814; *Eyre v. Potter*, 56 U. S. 15 How. 43, 14 L. ed. 543, in which the Supreme Court of the United States cites with approval the case of *Price v. Berrington*, *supra*.

The decree complained of will be reversed and the case will be remanded with instructions to dismiss the bill.

Affirmed in 162 U. S. 425, 40 L. ed. 1025.

MARYLAND COURT OF APPEALS.

BALTIMORE & EASTERN SHORE R.
CO., Appt.,
e.

Preston B. SPRING.

(.....Md.)

An unconstitutional attempt to tax the citizens of a county for the benefit of certain residents thereof is made by a statute authorizing the issue of county bonds for the benefit of an insolvent railroad company in the hands of a receiver with a provision that from the proceeds thereof proper and legal claims held by bona fide residents of the county should be first paid.

(February 23, 1886.)

APPEAL by defendant from an order of the Circuit Court for Talbot County, overruling a motion to dissolve an injunction which had been granted to restrain the issuance of certain county bonds. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. John Prentiss Poe and Joseph B. Seth*, for appellant:

The subscription and the mode of paying for it are valid.

1 Dill. Mun. Corp. §§ 12, 154, 164, 507 A. 786; *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86.

Messrs. Thomas B. Mackall and William H. Adkins, for appellee:

The Act of 1892, chapter 295, approved by the Act of 1894, chapter 152, is unconstitutional and void.

It is an attempt to authorize the county commissioners of Talbot county to issue bonds involving the taxation of all the taxable property of the county, in order to raise money to pay certain favored creditors of the Baltimore & Eastern Shore Railroad Company—in other words to authorize taxation for private purposes.

Courts in construing a statute look to all the terms to find the true meaning and intent of the legislature, and if the real and controlling purpose of an act is found in a proviso, and that purpose is illegal, the whole act will be declared void.

Brooks v. Hydorn, 76 Mich. 273; *Baltimore v. Gill*, 81 Md. 387.

The right to tax depends on the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it.

Coates v. Campbell, 87 Minn. 498.

The constitution of Maryland provides for two classes of taxation: (1) for the support of the government; (2) with a political view for the good government and benefit of the community.

Declaration of Rights, art. 15. See *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276;

NOTE.—The above decision strikingly illustrates the doctrine that taxation must be for public purposes only. On this subject, see *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.

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Gould v. Baltimore, 59 Md. 378; *O'Neal v. Virginia & M. Bridge Co.* 18 Md. 1, 79 Am. Dec. 669; *Baltimore v. Green Mount Cemetery Proprs.* 7 Md. 517.

To tax a citizen for private purposes is to take his property without due process of law and is, therefore, a violation of the Federal as well as of the state Constitution.

Declaration of Rights, art. 23; U. S. Const. 14th Amend.

In *Van Witsen v. Gutman* (Md.) 24 L. R. A. 408, the court says it is believed that no one will contend that private property can be taken for private use on any terms whatever.

Wilkinson v. Leland, 27 U. S. 2 Pet. 657, 7 L. ed. 553; *New Central Coal Co. v. George's Creek Coal & Iron Co.* 87 Md. 560; *Cole v. La-Grange*, 118 U. S. 1, 28 L. ed. 896; *Citizens Sav. & Loan Assn. of Cleveland, Ohio, v. Topaka*, 87 U. S. 20 Wall. 655, 23 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 489, 27 L. ed. 240; *Talbot County Comrs. v. Queen Anne's County Comrs.* 50 Md. 258; *Lovell v. Boston*, 111 Mass. 454, 15 Am. Rep. 45; *Mead v. Aton*, 189 Mass. 341; *Clee v. Sanders*, 74 Mich. 692; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *State v. Osawakee Twp.* 14 Kan. 419, 19 Am. Rep. 99; *Thorndike v. Camden*, 7 L. R. A. 463, 82 Me. 39; *Dill. Mun. Corp.* §§ 159, 508, 736; *Kingman v. Brockton*, 11 L. R. A. 128, 153 Mass. 255.

The power conferred upon a municipal corporation to impose a burden upon taxpayers in aid of a railroad company is in derogation of the common law, and when granted must be clearly conferred, and strictly pursued. No presumptions are made in favor of such legislation.

Baltimore v. Gill, 81 Md. 395; *St. Mary's Industrial School v. Brown*, 45 Md. 332; *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 93.

Page, J., delivered the opinion of the court:

This is an appeal from an order of the circuit court for Talbot county, directing a writ of injunction to be issued restraining the county commissioners of that county from issuing the bonds, mentioned in chapter 295 of the Acts of the General Assembly of 1892, and in chapter 153 of the Acts of 1894.

The bill was filed by a tax-payer and citizen of Talbot county, on behalf of himself and other citizens and tax-payers of that county. It is alleged that these "acts are unconstitutional and for other reasons invalid, null and void."

Such of the facts appearing by the record, as are requisite to be stated for the purposes of this opinion, may be thus briefly set forth.

The Baltimore & Eastern Shore Railroad Company was incorporated by the general assembly in the year 1886, for the purpose of constructing and operating a railroad through Talbot and other counties of the state of Maryland. At the same session by chapter 509, the commissioners of Talbot county were authorized to indorse the bonds

of the railroad company to an amount not exceeding \$50,000, after it had been sanctioned by the voters of Talbot county. Such bonds were to be secured by a mortgage which should be second to a mortgage to the city of Baltimore. This act, which authorized only an indorsement of the bonds, and not a subscription to the stock of the railroad, though voted upon favorably by the voters of Talbot county at the general election of 1887, it is conceded, became inoperative, for the purpose of authorizing the proposed indorsement, for reasons not necessary to be now stated. By the Act of 1890, chapter 158, the county commissioners of Talbot county were authorized to subscribe to the capital stock of the company to the amount of \$25,000. This act, however, was not published as required by article 3, section 4, of the Constitution, and for that reason became invalid.

Soon after its incorporation in 1886, the railroad company proceeded to construct its road, and having fully completed it, operated it until the 21st of April, 1891, when having become totally insolvent, its property rights and franchises passed into the hands of a receiver, appointed by the circuit court of the United States for the district of Maryland; and since that date, under the decree of that court, all of its property and franchises have been sold to other parties. So that in 1892, when the Act of 1892, chapter 295, which will be the subject of our examination, was passed, the road was entirely constructed, and after having been operated for a short time, had experienced all the results of insolvency, up to the point of having its affairs administered by a receiver for the benefit of its creditors. From this recital it is clear that prior to 1892 there had never been any valid power conferred upon the county commissioners either to indorse the bonds of the company or subscribe to its stock; nor is it pretended that they ever undertook to exercise such power. In the agreement of parties, found in the record, it is stated that the commissioners "never passed any resolution to indorse the bonds . . . or to subscribe to the stock." The statement, therefore, contained in the preamble of the Act of 1892, chapter 295, also in the body of the act and also in the Act of 1894, chapter 152, to the effect that the authority to issue bonds was conferred for the purpose of raising money to "pay the county's subscription" to the capital stock of the railroad company, was wholly unfounded in fact. The county commissioners never did and never had the power to make such subscription. There is no question in this case, therefore, of good faith on the part of the county; no contractual element to embarrass the court in determining the strictly legal effect of the Act of 1892, chapter 295, and the confirmatory Act of 1894, chapter 152.

What, then, are the provisions of these acts? By the first section of the Act of 1892 the commissioners are authorized to issue the bonds of the county to the amount of \$25,000; by the second, it is provided that they "shall sell said bonds," and, with the proceeds

thereof, pay said subscription of said county to said railroad company, provided, however, that before any bonds shall be issued under this act the said railroad company . . . shall file, in the office of the county commissioners of Talbot county, an agreement in writing, authorizing the said county commissioners of Talbot county to first pay and satisfy all proper and legal claims and demands held by bona fide residents of Talbot county on the 20th day of April, in the year 1891, against said railroad company, out of the proceeds arising from the sale of said bonds, and the balance, if any, to apply under the order and direction of Joseph B. Seth, the president of said railroad company." If the claims thus provided for should prove to be in excess of \$25,000 it is enacted by the third section that they shall be paid *pro rata*; and the receipt of persons holding such claims and of the president of the company, in the event of any balance remaining after the payment of the claims, shall be good against the railroad and all others claiming under it, and by the fourth section a "committee" of three are appointed with "full power and authority" to determine the amount of each claim and who are entitled to be paid, and their decision is to be final and without appeal.

To comprehend these provisions thoroughly it must be borne in mind that the railroad company at the date of the passage of the act had fully constructed its road. It had also become insolvent, and on the day after the date mentioned in the act, that is on the 21st of April, 1891, it had passed into the hands of a receiver. No doubt it had many creditors. In Talbot county there were claims exceeding in the aggregate the entire amount of the proposed subscription, and the record shows, there was a bonded debt of \$1,600,000, secured by a mortgage upon all the property of the company. Subsequent events have shown that its insolvency was hopeless; such as could only terminate as it did, in a sale for the benefit of its mortgage creditors. Under these circumstances, it was plain, there was little probability that these creditors in Talbot county, unsecured as they were, could ever hope to have their claims paid in the ordinary way. Now, as was said by this court in *Baltimore v. Gill*, 81 Md. 387: "We must not forget that we are dealing with the substance, not with form. It is the thing done or sought to be accomplished which must determine the question of the power."

The purpose of this act was not to aid in the construction of the road, because the road was then completed; nor even to pay debts incurred in the construction, for the beneficiaries of the act were all those who being residents of Talbot county held "proper and legal claims" against the company, and this included all claims whether incurred by the company in constructing the road or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith, was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and scope of the act is simply to

levy a tax upon the property of the citizens of Talbot county, to pay to certain residents of that county the claims due to them by an insolvent railway company. This is a private purpose, and not one of the objects of taxation. By the Declaration of Rights, article 15, as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley, Const. Lim. § 479. If it be necessary to cite authorities to maintain this thoroughly established principle, the following may be mentioned: *Citizens Sav. & Loan Assn. of Cleveland, Ohio v. Topeka*, 87 U. S. 20 Wall. 655, 23 L. ed. 455; *Cole v. LaGrange*, 118 U. S. 1, 28 L. ed. 896; Cooley, Const. Lim. § 488, and authorities there cited; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Sharpless v. Philadelphia*, 21 Pa. 168, 59 Am. Dec. 759; *Brodhead v. Milwaukee*, 19 Wis. 652, 88 Am. Dec. 711; *St. Mary's Industrial School v. Brown*, 45 Md. 385.

Nor can this Act be supported under the 54th section of article 8. The object of this section was not to extend the power of taxation. It is in fact, "a limitation of power,

not only of the local authority, but of legislative power itself." *Pumphrey's Case*, 74 Md. 111. Counties have "no inherent power of taxation." What power of taxation they exercise must be delegated to them by the legislature. The legislature, however, cannot delegate a power prohibited by the constitution. Therefore the taxing power, when exercised by the county authorities, as was said by this court in the case of *Daly v. Morgan*, 69 Md. 468, 1 L. R. A. 757, "is but the exercising of the taxing power of the legislature delegated to them and is subject to every constitutional limitation to which the taxing power of the legislature is subject."

St. Mary's Industrial School v. Brown, *supra*. Being of the opinion that the object and effect of this act, are not to subserve a public purpose but to pay certain individuals by taxing the property of the people of Talbot county for their benefit, we must pronounce the act itself unconstitutional and void.

Inasmuch as what we have said disposes of the case, we deem it unnecessary to consider the other questions raised at the argument.

Order affirmed.

MINNESOTA SUPREME COURT.

STATE of Minnesota

Marion F. HIGGINS.

(.....Minn.....)

- *1. The rule that the middle name or initial is not a material part of a person's name does not apply when the first name is not given, but only its initial.
2. The second initial, "F." in the name "M. F. Higgins," is a material part of the name.
3. Where a contract is made and signed by "M. F. Higgins,"—Held, forgery may be committed by changing, with intent to defraud, the second initial, "F.," to the letter "J." in the name in the contract and in the signature to the contract, so that it reads "M. J. Higgins."

(Buck, J., dissents.)

(January 8, 1895.)

CERTIFICATION by the District Court for Faribault County for the opinion of the Supreme Court of the question as to how far altering the middle letter of a name signed to a contract would constitute forgery, after an order overruling a demurrer to the indictment. *Order affirmed.*

The facts are stated in the opinions.

* Headnotes by CANTY, J.

NOTE.—The above case makes a modification of the ordinary rule relating to the use of a middle initial in a name. See note to *Laffin & R. Powder Co. v. Steytler* (Pa.) 14 L. R. A. 690.

For the effect or necessity of a middle initial in 27 L. R. A.

Messrs. H. W. Childs, Atty-Gen., George B. Edgerton, Asst. Atty-Gen., J. H. Quinn, and F. E. Putnam, for the State:

This court says "that the law does not except in special circumstances recognize a middle initial as a necessary part of a person's legal name," thereby recognizing that each case must be considered by itself.

Stewart v. Colter, 31 Minn. 345.

In questions involving title to land this court has held squarely that the middle initial is a material part of a person's name.

Ambs v. Chicago, St. P. M. & O. R. Co. 44 Minn. 260. See also *Crouse v. Murphy*, 12 L. R. A. 58, 140 Pa. 835.

A great many persons transact all their business by the use of the initials of their Christian or middle name, and by such usage adopt those initials as part of their business name.

Oakley v. Pegler, 30 Neb. 628.

There are sufficient circumstances appearing on the face of this indictment to show this change to be material.

Stewart v. Colter and *Ambs v. Chicago, St. P. M. & O. R. Co. supra*.

Any change in an instrument that alters its legal effect or makes it speak in a substantial matter a different legal language, and wherein any obligation is increased, diminished, or discharged, is a forgery.

Penal Code, § 398; *State v. Riobe*, 27 Minn. 815.

Mr. John A. Lovely for defendant.

a docket entry or index of a judgment, see note to *Dewey v. Sugg* (N. C.) 14 L. R. A. 593, also *Davis v. Steeps* (Wis.) 23 L. R. A. 818.

As to name in records generally, see note to *Fincher v. Hanegan* (Ark.) 24 L. R. A. 542.

Canty, J., delivered the opinion of the court:

The indictment charges Marion F. Higgins with the crime of forgery. It states that on September 1, 1892, he entered into, and by the name of M. F. Higgins executed, with a certain church corporation, a contract, and sets out the contract in full, by the terms of which he agreed to build a church for a certain price, which the corporation agreed to pay him. It is further stated that on December 3, 1894, with intent to defraud, he did alter, forge, and change the contract, by removing therefrom the second initial letter, "F.," where it appears in his name in the body of the contract, and also where it appears in his signature to the contract, and substituting therefor in each place the letter "J.," "with the intent then and there to change and alter the identity of the said Marion F. Higgins, the person who signed said contract, and make the same the contract and obligation of another person, to wit, Martha Jane Higgins, who was then and there the wife of him, the said Marion F. Higgins, and whose name was intended by the said Marion F. Higgins to be indicated and made to appear upon said contract, at the time of said change and alteration, in the place and instead of that of said Marion F. Higgins." The defendant demurred to the indictment on the ground that the facts stated therein do not constitute a public offense. The demurrer was overruled, and the court below certifies to this court the question or proposition, which he states was the only one raised and argued, viz., "that to change the middle letter of the name in question did not constitute any crime, as the same was not a material part of the name, and hence could not defraud any one."

The middle name or initial is material where it appears to be material. Thus, it is material when it appears, that with the exception of the middle name or initial, two persons have each the same name, and can only be distinguished by the middle name or initial of each. It seems to us that it appears on its face that the middle letter or initial is material when only the initial of the first name is given. In the present case the first name is not given; only its initial. The name was written "M. F. Higgins" in the body of the contract and in the signature. No one would understand "M. J. Higgins" to mean the same person. In speaking of a man it is often customary, among his friends and acquaintances, to call him by his first and last name, omitting his middle name or initial. Thus "Marion F. Higgins" might well be known as "Marion Higgins." But there is no such well-understood custom when the first name is not given, but merely its initial. Thus "M. F. Higgins" would not be known as "M. Higgins." When the initials alone are given, it is not customary to drop the second initial, but it is almost invariably the custom to give both initials.

This disposes of the question certified to this court. Counsel for defendant raises other questions not thus certified, but we cannot pass upon any question not certified to us by the court below. The sufficiency of this in-

dictment is not before us, except so far as it is affected by the question thus certified and answered.

The order overruling the demurrer is affirmed.

Buck, J., dissenting:

The defendant was indicted for forgery in the second degree. On the 1st day of December, 1892, the defendant entered into a written contract with the Salem Congregation of the Evangelic Association, a church corporation of the village of Wells, in the county of Faribault and state of Minnesota, and by the terms of the contract the defendant was to construct a church house, and complete the same for said church association, on or before the 1st day of November, 1892, time being the essence of the contract, and for which the defendant was to be paid the sum of \$1,790. The contract was signed on behalf of the church corporation by the president and secretary of its building committee and by the defendant as "M. F. Higgins." The forgery charged in the indictment is that the defendant did "fraudulently and feloniously alter, forge, and change the said contract, by then and there removing the letter 'F.' where it first appears in said contract, immediately before the word 'Higgins,' and substituting therefor the letter 'J.,' with the intent then and there to change and alter the identity of the said Marion F. Higgins, the person who signed said contract, and make the same the contract and obligation of another person, to wit, Martha Jane Higgins, who was then and there the wife of him, the said Marion F. Higgins, and whose name was intended by the said Marion F. Higgins to be indicated and made to appear upon said contract at the time of said change and alteration in the place and instead of that of Marion F. Higgins." In the indictment preceding the foregoing quotation the defendant is referred to as Marion F. Higgins, although there is no allegation that Marion F. Higgins is his true name. Upon being arraigned in open court at a general term thereof held in and for the county of Faribault, in the month of January, 1894, the defendant interposed a demurrer to the indictment, upon the ground that it did not state facts sufficient to constitute a public offense. The court overruled the demurrer, and, deeming the question raised by the demurrer to be so important and doubtful as to require the decision of the supreme court upon it, did, at the request of the defendant, certify and make report to the supreme court of the question raised by the demurrer, for the purpose of obtaining such decision of this court upon the question raised by the demurrer. In the certificate of the court below it is stated that the principal and only objection made to the indictment on the hearing of the demurrer was "that to change the middle letter of the name in question did not constitute any crime, as the same was not a material part of the name, and hence could not defraud any one." It is claimed on the part of the state that the alteration and substitution of the initials set forth in the indictment materially altered the legal effect of the contract, and made the contract the obligation of another and different person from the one

who originally signed it. Whether this is true or not depends upon the sufficiency of the allegations as to whose name was intended to be substituted in the place of "M. F. Higgins." If the initial letter "M.," preceding the name "F. Higgins," signed to the contract, represented and stood for "Marion F. Higgins," or, rather if the letter "M." stood for "Marion," it stood for the same after the change of the middle letter, "F.," to "J.," for there was no change of the meaning of the letter "M.," because no other letters were added to it. Substituting "J." in place of "F." could not possibly have changed "M." to "Marion," and it would still be a greater feat of substitution to make "M." stand for "Martha Jane," whether it was intended for "Marion" or not. It is claimed that it stood for "Marion" as originally written, and then, by changing "F." to "J." it stood for "Martha Jane." But it is not anywhere alleged that the letter "M.," standing alone, was an abbreviation of the name "Martha Jane;" nor is it anywhere alleged that the wife of M. F. Higgins was ever known by the name of "M. J. Higgins," or that she went by that name, or that she ever signed or used the name of "M. J. Higgins" as her signature. Such was not her name in fact, and it so appears from the indictment itself. This allegation in the indictment negatives the allegation that the defendant, by changing "F." to "J.," intended to substitute "J." in the place of "F." so as to represent his wife's name, "Martha Jane Higgins," because it did not represent her name even after the change. If "M. F. Higgins" represented "Marion F. Higgins" before the change, it represented "Marion J. Higgins" after the change, and it seems to me illogical to hold otherwise, and especially to hold that it meant "Martha Jane Higgins." Under the allegations in the indictment, it cannot possibly mean or represent anybody but the wife, "Martha J. Higgins," and, as I contend, it did not ever represent her by any well-known rules of interpretation. It is a weakness in the indictment which is fatal to its validity. No one could be deceived or misled or defrauded into believing that it was the wife's signature, because it was not her true name, nor any name by which she was known or went or signed her name, and it is not claimed that such was the fact. The vice in the indictment is that it states too much in some matters, and not enough in other respects. When a person is indicted for having committed a public offense, there should be a reasonable certainty as to the offense charged, and the material allegations in the indictment should not be contradictory or uncertain. Referring again to the letter "M.," I am unable to find, either in the dictionaries or law books, where the letter "M." is designated as an abbreviation of the name "Marion" or "Martha Jane." There are names for which I can find that the letter "M." stands as an abbreviation, but neither of the above. The grand jury, by its accusations, imports into the act of the defendant the charge of changing the letter "M." to the name "Martha Jane," and I think such accusation an unwarranted and unreasonable construction. I concur in the opinion 27 L. R. A.

See also 33 L. R. A. 114.

of the court that forgery may be committed in some instances by changing the initial letter of the middle name of a person, but the indictment should show upon its face by proper averment how such alteration becomes material. I think that the demurrer to the indictment should have been sustained.

STATE of Minnesota

v.

Joseph MROZINSKI *et al.*

(.....Minn.....)

***Section 15, chapter 124, Laws 1893, prohibiting the taking of fish (with certain specified exceptions) in any other manner than by angling for them with hook and line, is valid.**

(December 21, 1894.)

QUESTIONS certified by the District Court for Dakota County, for the opinion of the Supreme Court, after an order overruling a demurrer to an indictment charging defendant with catching fish with a net, contrary to the provisions of the statute. *Order affirmed.*

The case sufficiently appears in the opinion.

Messrs. McDonald & Barnard, with *Mr. M. F. Propping*, for appellant:

To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations; in other words its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 885; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 265; *State v. Lewis*, 20 L. R. A. 52, 184 Ind. 250.

Mr. H. W. Childs, *Atty-Gen.*, with *Mr. William Ely Bramhall*, for respondent:

The ownership of all animals *fero natura*, found within the limits of this state, is in the state.

State v. Rodman (Minn.) July 25, 1894; *Gentile v. State*, 20 Ind. 415; *Organ v. State*, 56 Ark. 267; *Magner v. People*, 97 Ill. 820; *American Exp. Co. v. People*, 9 L. R. A. 138, 133 Ill. 649; *State v. Geer*, 18 L. R. A. 804, 8 Inters. Com. Rep. 782, 61 Conn. 144.

*Headnote by MITCHELL, J.

NOTE.—The above decision holding it to be within the province of the legislature to regulate modes of fishing is in harmony with the prior authorities. See, *Lawton v. Steele* (N. Y.) 7 L. R. A. 134, and note; also *State v. Lewis* (Ind.) 20 L. R. A. 52.

That this extends even to private premises, see *People v. Bridges* (Ill.) 16 L. R. A. 684.

The people in their sovereign capacity therefore, being the owners of the fish, have a right to say whether they will use them or not, and if so when, where, and how and by what means they shall be caught.

The right of the state to prohibit the netting of fish has been sustained.

Lawton v. Steele, 7 L. R. A. 134, 119 N. Y. 235; Gould, *Waters*, 2d ed. § 189, p. 363; *Drew v. Hilliker*, 56 Vt. 641; *State v. Snover*, 42 N. J. L. 841; *Lawton v. Steele*, 152 U. S. 183, 38 L. ed. 385; *State v. Lewis*, 20 L. R. A. 52, 134 Ind. 250.

As the people in passing laws of this character are dealing with property which belongs to them in their sovereign capacity and not with the private property of the individual, it is held that the reasonableness of these statutes is a question for the legislature to pass upon and not the courts.

Lawton v. Steele, 7 L. R. A. 134, 119 N. Y. 235; *Phelps v. Racey*, 60 N. Y. 14, 19 Am. Rep. 140; *Magner v. People*, 97 Ill. 820; *American Exp. Co. v. People*, 9 L. R. A. 138, 133 Ill. 649; *State v. Norton*, 45 Vt. 258; *Drew v. Hilliker*, *supra*.

Mitchell, J., delivered the opinion of the court:

The trial court certified several questions for the opinion of this court; but as counsel have argued only one viz., the constitutionality of section 15, chapter 124, Laws 1893, we will not consider the others. The section reads as follows: "No person at any time shall catch, take, or kill any fish in any other manner than by angling for them with a hook and line held in the hand or attached to a rod or pole (except that suckers and buffalo fish may be taken with a spear during the months of April and May) or have in possession or under control any fish caught, taken, or killed by any other manner except that a net may be used for catching white fish, lake trout, and sturgeon in international waters and minnows for bait in ponds, lakes, and rivers not inhabited by trout, provided that the meshes in the net used for catching such white fish and lake trout, sturgeon, pike and pickerel shall not be less than three and one half inches in size of mesh when the same is extended, provided that lake herring may be taken with a net the meshes of which

are at least two and one half inches when extended." The only objection urged to the provisions of this section is that they are unreasonably restrictive. The line of argument is substantially as follows: First. The limit of the police power of the state in the premises is the adoption of such measures as are reasonably necessary to prevent the extermination or undue depletion of food fishes. Second. That it is wholly unnecessary for any such purpose to prohibit the catching of fish, at least of certain kinds not named in the act, except by hook and line; that there are other ways of catching fish that are no more calculated to exterminate fish than by hook and line; that there are some kinds that cannot be taken at all by hook and line; and that an adequate supply of fish for food cannot be caught in that way. Assuming, without deciding, that the police power of the state over the taking or killing of wild animals (which belongs to the state itself, in its sovereign capacity) is subject to the limitation contended for, still we could not hold the provisions of this law invalid. In enacting any police regulation, even one regulating the use of private property or the conduct of a lawful private business, a very large discretion is reposed in the legislature. The courts will never set up their judgment against that of the legislature, and hold a police law invalid, unless it is clearly so, as having no reasonable tendency to accomplish the desired end. The legislature had to deal with the time and manner of taking fish as a practical question. It is a matter of common knowledge that different species of fish, good and bad, those that take the hook readily, and those that do not, inhabit the same waters; that the two usual methods of taking fish are by hook and line, and by nets and seines; and that the latter method usually results in the rapid and undue depletion of most kinds of valuable food fishes. Hence, if the legislature, in its discretion, deems it expedient to prohibit the latter method, no court can say that they had not the power to do so. Such laws are very common, and, so far as we know, their validity has never been successfully assailed. If experience proves that this act is unnecessarily restrictive, the remedy is with the legislature.

Order affirmed.

OHIO SUPREME COURT.

BOARD OF EDUCATION OF NEW CONCORD VILLAGE SCHOOL DISTRICT,
Pff. in Err.,

Jennie BEST.

(61 Ohio St. —.)

*1. The clause in section 3982 of the Revised Statutes, to wit: "Upon a motion

*Headnotes by the COURT.

... to employ a ... teacher ... the clerk of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept, the names of those voting aye, and the names of those voting no," — is a mandatory provision and must be strictly pursued.

2. Where the minute book containing a record of the proceedings of a board of education shows that all the members of the board were present; that a motion to pro-

NOTE.—The mandatory character of a provision for recording the yeas and nays, as a requisite of a valid vote is a question of much interest and comparatively few precedents. As to majority and quorum, see *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 306, and note; *Magenau v. Fremont* (Neb.) 9 L.

ceed to the election of teachers was carried by a unanimous vote; and that an applicant for the position of teacher was declared elected by a unanimous vote, but that the clerk did not call the roll of the members, and the names of those voting aye were not entered upon the record, — the requirement of the statute was not sufficiently complied with, and the election was invalid.

(December 11, 1894.)

ERROR to the Circuit Court for Muskingum County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for alleged breach of contract to employ plaintiff as teacher in defendant's school. *Reversed.*

Statement by Dickman, Ch. J.:

The defendant in error, Jennie Best, filed her amended petition in the court of common pleas of said county, against the board of education of New Concord village school district, the plaintiff in error alleging as follows:

"Plaintiff says that some time prior to May 17, 1887, she made a proposal by written application to the said board of education to teach the intermediate or primary department of the school of said district, for the customary time of nine months and at the customary salary of thirty dollars a month, said term to begin on or about the 5th day of September, 1887; that said board of education of the said 17th day of May, 1887, accepted plaintiff's proposal and entered into a contract with her by electing her as teacher of said intermediate department of said school, and giving her a written notice of said election; that plaintiff, relying on said contract, held herself in readiness from the receipt of said notice until the school opened September 5, 1887, to perform her part of said contract, and on said last-named date presented herself at the school-house of said district, having a teachers' certificate duly issued to her by the board of school examiners of said county, as provided and required by law, ready and willing to take charge of said department according to said contract; and that the said board of education then and there broke said contract by utterly refusing to allow plaintiff further to perform her part of said contract, and without cause dismissed her to her damage in the sum of three hundred dollars (\$300). Wherefore plaintiff prays judgment against the defendant for said sum of three hundred dollars, with interest from said 5th day of September, 1887."

To this petition there was filed an answer in which five defenses were set up. In the first defense, as amended, the defendant said:

"That it denies each and every allegation in plaintiff's amended petition." The second and third defenses were struck out on motion of the plaintiff. To the fourth defense a general demurrer was sustained.

The fifth defense reads as follows:

"Fifth Defense:

"That, in pursuance of the provisions of section 3985, Revised Statutes of Ohio, this defendant, the board of education of the New Concord village school district, adopted for its government and the government of its employes, a set of rules and regulations, which said rules and regulations were known to the plaintiff. Section 1 of article 3 of said rules and regulations reads as follows:

"The teachers shall be elected by the board of education annually, and shall hold their position for one year unless sooner removed by the board. The nominations for teachers shall be made at the June regular meeting and not be acted on for two weeks."

"Said rules and regulations including said section, were in full force at the time named in the plaintiff's amended petition, May 17, 1887. At the meeting of the board May 17, 1887, no action was taken suspending any of the rules governing the board.

On the 27th of May, at a legal meeting of the board, action was taken declaring the proceedings of May 17 illegal; said action on the 27th was taken before the adoption of the minutes of the meeting of May 17; said plaintiff was duly notified of the action of the board at the meeting of May 27.

At the regular June meeting of the board, nominations for teachers were made and the plaintiff's application, at her request, was considered among others, as teacher for the intermediate department of the schools. Two weeks later at the July meeting the plaintiff's application was rejected."

To this fifth defense there was a general demurrer, which was overruled, upon the overruling of which the plaintiff for a first reply thereto alleged:

"That it is not true and she denies that she had any knowledge whatever of any 'rules and regulations' that defendant had 'adopted for its government and the government of its employes,' or of any other rules whatever which said defendant had at the time she made her contract with it. Denies that said defendant ever had any such rules and regulations as those stated in defendant's answer, or were in force at the time named in her amended petition, May 17, 1887. Denies that no action was taken by said defendant at its meeting May 17, 1887, by which any of its rules were suspended if it ever had any rules."

The defendant moved the court to strike from the plaintiff's said first reply the following words, to wit:

"That it is not true and she denies that she had any knowledge whatever of any rules and regulations, that defendant had adopted for its government and the government of its employes, or of any other rules whatever which said defendant had at the time she made her contract with it.

This motion was sustained, and the plaintiff excepted.

At the trial the minute book of the board identified by plaintiff's witness as the record of the proceedings of the board, showed that, on May 10, 1887, the board met, and without

R. A. 786; *Atkins v. Phillips* (Fla.) 10 L. R. A. 158; *State v. Vanoedal* (Ind.) 15 L. R. A. 832.

As to casting vote, see note to *Lawrence v. Phillips*, 27 L. R. A.

lips, supra; also *State v. Pinkerman* (Conn.) 23 L. R. A. 653; *Wooster v. Mullins* (Conn.) 25 L. R. A. 604.

any suspension of the rules, balloted five times for an intermediate teacher without result. Then, without any suspension of rules, it adopted a motion that: "We adjourn to meet Tuesday, May 17, for the purpose of electing teachers for intermediate and primary departments."

Said record of proceedings also showed that, on May 17, 1887, the board, without any suspension of the rules, adopted a motion to proceed to elect teachers for the intermediate and primary departments; that said motion was carried by unanimous vote and that Miss Jennie Best was declared elected by unanimous vote, for the intermediate department.

On May 18, 1887, the clerk sent to her a notice of her election, which she received. She made no reply to the notice, and sent no acceptance to any member of the board.

On May 27, 1887, at a legal meeting of the board, before approving the minutes of May 17, action was duly taken declaring the election proceedings of that day illegal. The clerk was ordered to mail to Miss Best a notice that her election had been declared illegal, and on May 28, he duly mailed to her said notice.

At the regular June meeting nominations for teachers were made, and Miss Best's application, at her request was considered among others as teachers for the intermediate department. Two weeks later, at the July meeting, her application was rejected and another teacher duly elected.

None of the evidence introduced at the trial discloses that at the meeting of May 17, 1887, the clerk of the board called publicly the roll of all the members comprising the board, and entered on the record required to be kept the names of those voting "aye," and the names of those voting "no," on the question of the election of the defendant in error.

The evidence for the plaintiff having been heard, the defendant moved the court to arrest the testimony from the jury, and for judgment, which motion was sustained, and the jury was discharged from the further consideration of the case.

The circuit court reversed the judgment of the court of common pleas for error:

In overruling the demurrer to the fifth defense; in striking out the plaintiff's denial that she had any knowledge of the rules and regulations of the board of education; and in taking the case from the jury.

To reverse the judgment of the circuit court, this proceeding in error is instituted.

Messrs. M. M. Granger and W. J. Massey, for plaintiff in error:

The proceedings of May 17 were illegal.

(1) For disregard of the rules of the board. *Bloom v. Xenia*, 32 Ohio St. 463; *Sutherland*, Stat. Constr. 455, and cases cited.

(2) For disregard of the statutory mode of election.

Glaucque's, Rev. Stat. § 3982.

This section is mandatory.

Campbell v. Cincinnati, 49 Ohio St. 468; *Clark v. Crane*, 6 Mich. 151, 71 Am. Dec. 776; *Steckert v. East Saginaw*, 22 Mich. 104; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; 27 L. R. A.

Schuyler County Supra. v. People, 25 Ill. 181. See also *McCormick v. Bay City*, 23 Mich. 457; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Cutler v. Russellville*, 40 Ark. 105; *Olin v. Meyers*, 55 Iowa, 209; *Tracey v. People*, 6 Colo. 151; *Rich v. Chicago*, 59 Ill. 286; *Indianola v. Jones*, 29 Iowa, 282.

The mode of election prescribed by section 3982 was exclusive.

Dill. Mun. Corp. 465; *State v. Treasurer of Liberty Twp., Delaware County*, 22 Ohio St. 144.

Messrs. J. A. Troette and S. A. Dickson, for defendant in error:

Plaintiff below was elected unanimously by a *visa voce* vote, taken in the usual way, which is by a call for all those who are in favor to say "aye," those opposed to say "no." This is certainly a substantial compliance with the statute.

Section 3982, Rev. Stat., is directory only, and a substantial compliance is all that is necessary:

(a) If no legal sanction is provided by which a compliance can be enforced, they (provisions of statutes) are plainly directory.

Sedgw. Stat. Constr. p. 817.

(b) An affirmative command, unless accompanied by negative words, is directory.

Sedgw. Stat. Constr. pp. 319-324; *Upington v. Oviatt*, 24 Ohio St. 341.

(c) When the provision of a statute is the essence of the thing to be done, it is mandatory; otherwise when it relates to form and manner.

Davis v. Smith, 58 N. H. 17; *Endlich, Interpretation of Statutes*, § 436, and cases cited.

(d) When nullification of proceedings had in disregard of certain forms prescribed by statute would work injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, the statute will be held directory.

Endlich, Interpretation of Statutes, § 433.

(e) Statutory requirements intended for the guide of officers in the conduct of business devolved upon them and designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory unless accompanied by negative words.

French v. Edwards, 80 U. S. 13 Wall. 506, 20 L. ed. 702.

Where a statute is directory, a departure from the strict observance of it does not invalidate a contract, where it appears that no fraud has been practiced and no substantial right violated.

Athens County Comrs. v. Baltimore Short Line R. Co. 37 Ohio St. 205; *School Dist. No. 2, Oxford Twp., Butler County v. Dilman*, 23 Ohio St. 194; *Duke v. State*, 20 Ohio St. 225; *Fry v. Booth*, 19 Ohio St. 25; *Lehman v. McBride*, 15 Ohio St. 578; *Blanchard v. Bassell*, 11 Ohio St. 96; *Pim v. Nicholson*, 6 Ohio St. 176; *Miller v. State*, 3 Ohio St. 475; *Hubble v. Renick*, 1 Ohio St. 175.

The general principle of estoppel applies to this case.

See 2 *Parsons*, Cont. 7th ed. p. 935, and cases cited; *Reardonley v. Foot*, 14 Ohio St. 414, 84 Am. Dec. 405; *Dixon v. Sub-Dist. No. 6*,

Liberty Twp., Ross County, Ohio, 8 Ohio C. C. Rep. 517.

Dickman, Ch. J., delivered the opinion of the court:

As shown by the record, the defendant in error, Miss Jennie Best, some time prior to May 17, 1887, made a proposal by written application to the plaintiff in error, the board of education of New Concord village school district, to teach the intermediate or primary department of the school of that district. At the regular June meeting of the board she was nominated for teacher, and her application, at her request, was considered among others, for appointment as a teacher in the intermediate department. At the meeting of the board, two weeks later, in July, 1887, her application was rejected, and another teacher duly elected. Notwithstanding the rejection of her application, she presented herself at the school-house on the 5th day of September, 1887, when the scholastic year began, prepared to take charge of the school and teach it, but was not permitted to do so.

It is contended in behalf of the defendant in error, that though not elected a teacher at the regular June meeting, she was duly and legally elected at the meeting of May 17, 1887, whereby a right of action accrued to her against the board when she was refused charge of the school.

Among the provisions applying to boards of education, it is provided by section 3985 of the Revised Statutes: "The board of each district shall make such rules and regulations as it may deem expedient and necessary for its government, and the government of its appointees and pupils." In pursuance of this section of the statutes, the board adopted a set of rules and regulations, among which, section 1 of article 3 reads as follows: "The teachers shall be elected by the board of education annually, and shall hold their position for one year, unless sooner removed by the board. The nominations for teachers shall be made at the June regular meeting, and not be acted on for two weeks." The wisdom of such a rule is obvious, designed and effective as it is to give an opportunity to become acquainted with the qualifications and fitness of the applicant. The board met on May 10, 1887, and without any suspension of rules, balloted without result for an intermediate teacher, and adjourned to May 17, for the purpose of electing teachers for the intermediate and primary departments. On May 17, 1887, without any suspension of rules, a motion to proceed to an election was carried by unanimous vote, and the board then proceeding to an election, Miss Best was declared elected by unanimous vote for the intermediate department. On May 27, 1887, at a legal meeting of the board, this election was declared illegal.

It is contended in behalf of the plaintiff in error, that the election was illegal for non-compliance with the rules of the board and for disregard of the statutory mode of election as prescribed by section 3983 of the Revised Statutes.

It is urged, however, on the part of the defendant in error, that the power of the

board to make rules and regulations carries with it the power to suspend a rule; and that when, on May 17, the motion to then proceed to elect teachers was carried by unanimous vote, it worked a suspension of the rule that nominations for teachers should not be acted on for two weeks.

We deem it unnecessary to consider whether the election of the defendant in error was void by reason of a failure to comply with the rule requiring such nominations to be made at the regular June meeting, and not to be acted on for two weeks. In our judgment, the election was without the sanction of law, because in disregard of the above-mentioned section 3983. That section contains the following provision: "Upon a motion to adopt a resolution authorizing the purchase or sale of property, either real or personal, or to employ a superintendent, teacher, janitor, or other employé, or to elect or appoint an officer, or to pay any debt or claim, or to adopt any text-book, the clerk of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept the names of those voting 'aye,' and the names of those voting 'no.'"

The clerk is made the recording officer of the board, and it is incumbent upon him to call the roll on taking a vote. The statutory provision that he shall publicly call the roll, and enter on the record the names of those voting aye and the names of those voting no, is tantamount to a provision, that the vote shall be taken by yeas and nays and entered on the journal. It is not claimed, nor is it a fact, that at the election of the defendant in error as teacher, the clerk of the board called the roll and entered the ayes and noes as required by the statute.

But, it is urged that such requirement is not mandatory but directory merely. Mandatory statutes are imperative, and must be strictly pursued, otherwise the proceeding which is taken ostensibly by virtue thereof will be void. *Sutherland, Stat. Constr. § 454.* It will be observed that a motion to employ a teacher is placed on the same footing with a motion to adopt a resolution for the purchase or sale of real or personal property, or to pay any debt or claim—matters of such interest and importance as involving the expenditure of the school fund, that the statute should be strictly followed when a vote is to be taken on the adoption of such a motion.

By section 1694 of the Revised Statutes, "ordinances of a general and permanent nature, shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule; and the vote on such suspension shall be taken by yeas and nays and entered on the journal." In *Bloom v. Xenia*, 32 Ohio St. 461, it was held that the section is imperative in its injunction that ordinances shall be read on three different days, unless the rule is dispensed with by a three-fourths vote; and the remaining language of the clause is, we conceive, no less imperative or mandatory, that the vote of such suspension shall be taken by yeas and nays, and entered on the journal.

The principles announced in the last cited case were approved in *Campbell v. Cincinnati*, 49 Ohio St. 463, and we see no good reason why the most important duties enjoined upon boards of education should be held less imperative than those of no greater importance that are made mandatory upon municipal council. The authority of boards of education, like that of municipal councils, is strictly limited. They both have only such power as is expressly granted or clearly implied, and doubtful claims as to the mode of exercising the powers vested in them are resolved against them. Clearly, these organizations that derive their existence as bodies politic and corporate from the legislature, cannot be allowed the same latitude in the observance of their statutory duties as is permitted to the general assembly. Such subordinate bodies corporate are not privileged to treat express and explicit provisions of the statute as only directory, discretionary, because there are provisions in the constitution that are held directory in their character for the reason that their observance by the general assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts.

It is said, however, that the primary object of the law in providing that the roll of members of the board shall be called publicly, and the names of those voting aye or no recorded, is to determine whether a teacher has been elected by the requisite majority; and that such object is fully sustained when such is evidence produced, as appears in the minute book of the plaintiff in error, which contains the record: "Board met; members all present. Miss Jennie Best was declared elected by unanimous vote for intermediate department." Where there is a *visa voce* vote, taken in the usual way, which is by a call for all those who are in favor to say aye, and those opposed to say no, without entering at large on the minutes the names of those voting, the presiding officer judges by his ear which side has the more voices. But, if the vote of a quorum is in favor of a motion or resolution and no vote is cast against it, the record may still be, that it was acted unanimously, though some of the members present in fact abstained from voting. *Steckert v. East Saginaw*, 22 Mich. 104. To avoid uncertainty, therefore, in determining the conduct of boards of education in transacting such important official business as concerns the purchase or sale of property, the payment of debts or claims, and the selection of teachers who are to stand somewhat *in loco parentis* in training the minds, and shaping the moral character of their pupils, the general assembly has carefully guarded against ambiguity by prescribing a method of voting which should not be departed from, and in that regard, the rule *expressio unius*, should, we think, be strictly applied.

Steckert v. East Saginaw, *supra*, was a bill to restrain the collection of an assessment for paving a street. The first ground of alleged invalidity in the proceedings was, that the several votes in the common council ordering the improvement made, were not taken by ayes and noes as required by the city charter.

The provision of the charter was: "Whenever required by two members, the votes of all the members of the common council, in relation to any act, proceeding, or proposition had at any meeting, shall be entered at large on the minutes." The record of the meeting of the council gives the names of all the aldermen present. After stating the resolutions ordering the improvement, there was this minute, "adopted unanimously on call." The argument was that the record shows, *first*, the names of the several aldermen who were present when the action was had; *second*, that the roll was called on the vote; and *third*, that each of them, when the roll was called, voted for the adoption of the resolutions. This being so, the vote, it was contended, was in effect entered at large on the minutes, and that the repetition of the names of the aldermen in the minutes would have been only an idle ceremony, accomplishing no useful purpose.

It was said by Cooley, J., in pronouncing the opinion of the court: "We have found ourselves unable to take the same view of this record that is taken by the counsel for defendants. There can be no doubt that the provision of the statute which requires these votes to be entered at large on the minutes, was designed to accomplish an important public purpose, and that it cannot be regarded as immaterial, nor its observance be dispensed with. The purpose, among other things, is to make the members of the common council feel the responsibility of their action when these important measures are upon their passage, and to compel each member to bear his share in the responsibility, by a record of his action which should not afterwards be open to dispute." See also *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571. The same views are similarly expressed in *Judge Cooley's* treatise on Constitutional Limitations, as follows: "It is provided in the constitutions of some of the states that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation; and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not." 6th ed. 168.

The same doctrine is unqualifiedly approved by *Judge Dillon* in his work on Municipal Corporations, after an examination of the authorities supporting the opposite view. Sec. 291 (229).

In *Rich v. Chicago*, 59 Ill. 286, the street improvement was not asked for by the petition of the owners of a majority of the property to be assessed; and, in such case, the city charter declares that the improvement "shall be ordered only by the votes of at least three fourths of all the aldermen present, such vote to be entered by ayes and noes on the record of the common council." It was objected that there was no valid ordinance commanding the improvement, or the assessment to be made. The court says: "It does not appear, from the record introduced, or otherwise, that this improvement was ordered

by the votes of three fourths of all the aldermen present, and it appears, affirmatively, that the vote was not entered by ayes and noes on the record. We must, therefore, regard the objection as well taken."

In *Cuttler v. Russellville*, 40 Ark. 105, it was held that the weight of authority and the better opinion seems to be, that a requirement that the yeas and nays shall be called and recorded on the passage by a municipal council of an order or resolution to enter into a contract, is designed to accomplish an important public purpose; and hence cannot be regarded as immaterial, nor its observance dispensed with. To the same effect are the

decisions in *Olin v. Meyers*, 55 Iowa, 289; *Morrison v. Lawrence*, 98 Mass. 219, and in numerous other cases involving the same question.

For the foregoing reasons, the election of the defendant in error by the board of education of the New Concord Village school district was, in our opinion, illegal and void. And being so, the court of common pleas did not err in taking the case from the jury, and rendering judgment for the defendant below—the board of education.

The judgment of the circuit court should therefore be reversed, and that of the court of common pleas affirmed.

RHODE ISLAND SUPREME COURT.

Re William H. CASWELL.

(.....R. L.....)

The clerk of a court may refuse to furnish to a newspaper a copy of the proceedings in a divorce case for publication, in

NORM. Right to inspect public records.

I. Abstracters.

II. Suits.

III. Record making or copying.

IV. Account books of public officers.

a. In general.

b. Toll books.

c. As to boundaries and titles.

V. As to title to office.

VI. Liquor records.

VII. Patent records.

I. Abstracters.

In regard to the privileges of abstracters to the use of records for speculative purposes in matters not relating to a personal interest in the special record, the tendency of the decisions was that such abstracters were not entitled to the general use of the office, desks, and books for the purpose of making abstracts to be used in the future in their business, but of late years there has been legislation strongly in their favor, which has been more or less strictly or liberally construed.

So under statutory or charter provisions authorizing any person or abstractor to have inspection of the records they are entitled to a reasonable use of the same, and under such provisions it is also held that other persons though not abstracters are entitled to the same privileges. *Stockman v. Brooks*, 17 Colo. 248; *State v. Raebao*, 37 Minn. 372; *People v. Bellis*, 38 Hun, 429; *Hanson v. Eichstaedt*, 60 Wis. 538; *Johnson v. Wakulla County*, 23 Fla. 720; *State v. Long*, 37 W. Va. 206; *Re Chambers*, 44 Fed. Rep. 783.

And the same was held in *Burton v. Tufts*, 7 L. R. A. 73, 78 Mich. 363; *Burton v. Tufts*, 7 L. R. A. 324, 80 Mich. 218; *Day v. Button*, 96 Mich. 600; *Aitchison v. Wayne County Treasurer*, 90 Mich. 643.

These Michigan cases in effect overrule *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213, which required the abstractor to have a special interest in the records to be searched, before he was entitled to the privilege of inspection, but these cases were under a statute which was particular in granting the right to abstracters.

And the same was held in *West Jersey Title & Guaranty Co. v. Barber*, 49 N. J. Eq. 474.

This case and *Lum v. McCarty*, *infra*, in effect overruled *Flemming v. Clerk of Hudson County*, 30

the absence of any statutory provision on the subject.

(December 20, 1896.)

APPLICATION by the Clerk of the Court in Washington County for advice as to his

N. J. L. 280, which held that every person had access to the records only on payment of a fee for the privilege of search.

And a note or fee given for inspection of records to which the public were entitled is without consideration and against public policy. *Parsons v. Bandalph*, 21 Mo. App. 363; *Lum v. McCarty*, 39 N. J. L. 287.

While under the foregoing statutory provisions and decisions a reasonable use of the records is allowed, six hours a day when not used by the commissioners and two hours on such days is a reasonable regulation. *Upton v. Catlin*, 17 L. R. A. 232, 17 Colo. 546.

So a restriction in the use of the office to three employees of an abstract company was held to be a reasonable regulation. *People v. Richards*, 39 N. Y. 620.

So a surveyor has no right to desk room in the recorder's office to copy all the field notes of all the surveys in the county. *Phelan v. State*, 76 Ala. 49.

And in *Burton v. Reynolds* (Mich.) Sept. 25, 1894, it was held that while a general use is a matter of public privilege, the claimant must take his turn with the public, and it was said that if he refused to pay for special privileges for which others pay, he will not be entitled to such special privileges by mandamus.

On the other hand, where statutes have not been particular for the benefit of abstracters, they have been refused the privilege of the use of the office, when they had no special interest in the record at that time. *Bean v. People*, 7 Colo. 200; *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 233; *Randolph v. State*, 52 Ala. 527, 60 Am. Rep. 731; *Cormack v. Wolcott*, 37 Kan. 331.

But they are entitled to use the same if they have a present interest. *Boylan v. Warren*, 39 Kan. 301.

Under Md. Code, art. 17, § 1, providing that every clerk shall have the custody and carefully keep the books and papers of his office and give copies on payment of fee,—an abstract company cannot compel the clerks of courts to furnish copies or abstracts, and to make searches without payment of fees, or search the records of the office through its own employees, although the charter of the com-

duty to comply with the request of a newspaper reporter to furnish copies of proceedings in a divorce case for publication. *Refusal to furnish copy advised.*

The case sufficiently appears in the opinion. No counsel appeared in the case.

Tillinghast, J., delivered the opinion of the court:

At the November session of this court in Washington county the petition for divorce of *Eva M. Lee v. Thomas Z. Lee* was heard and granted. Shortly thereafter, as repre-

pany provides for examination of title. *Belt v. Prince George's County Abstract Co.* 10 L. R. A. 218, 73 Md. 289.

And the same was held to be the rule in regard to abstracters generally in Illinois prior to the Illinois Acts May 31 and June 18, 1897. *Scribner v. Chase*, 27 Ill. App. 38.

And in *Laughlin v. Hawley*, 9 Colo. 174, it was said that the refusal by the county clerk of the opportunity to examine the files sought by a land purchaser, who was affected by a judgment lien, was a personal matter between him and the clerk.

A foreign corporation owning land was refused the privilege of making abstracts of the whole county where the charter of the company was not shown. *Diamond Match Co. v. Powers*, 51 Mich. 148.

And in *Newton v. Fisher*, 98 N. C. 20, an examination was refused an attorney to inspect all chattel mortgages of a certain year to ascertain the financial condition of all the debtors of his clients. There appears to have been no statute involved in this case.

II. Suits.

In regard to the right of a party to an inspection of the documents, records, or proceedings in which he is interested, in an action pending, the general rule is that he has such a right and will be allowed the privilege of inspecting such records. *Wilson v. Rogers*, 2 Strange, 1242; *Welch v. Richards*, Barnes Notes, 468; *Daly v. Dimocks*, 55 Conn. 579.

But he will not be entitled to the inspection of records where no satisfactory reason is given. *Rex v. Maidstone*, 6 Dowl. & R. 384.

And inspection has been refused of documents in possession of the adverse party, which would compel such party to criminate himself. *Rex v. Sheriff of Chester*, 1 Chitty, 479; *Fox v. Jones*, 7 Barn. & C. 782, 1 Mann. & R. 570. See also *King v. Buckingham*, *Rex v. Cornelius*, *Rex v. Cadogan*, and *May v. Gwynne*, *infra*.

Persons who were not parties in interest have been refused an inspection of records where pleadings have not been filed by the defendant, and are still *ex parte* records. *Schmedding v. May*, 85 Mich. 1; *Cowley v. Pulaifer*, 137 Mass. 303, 50 Am. Rep. 318.

An inspection of the justice's files and memoranda was refused before he had made up his record although Vermont Rev. Laws, 828, provided that the justice shall keep a record, and his "books" of records shall be at all times subject to inspection of persons interested. *Perkins v. Cummings*, 66 Vt. 436.

And where objection was sustained to the use and copy of a stenographic report of evidence in another trial, because the party using the same had refused to allow inspection, it was error, under Neb. Comp. Stat., chap. 19, §§ 47-49, and Neb. Code, § 403, which provided for stenographic reports, and copies and evidence, and the party could have obtained a copy of the same. *Spielman v. Flynn*, 19 Neb. 242.

In *Nash v. Lathrop*, 142 Mass. 29, it was held that any person, though not a citizen, had a right to access to the opinions of the supreme court of Massachusetts.

And in *Re McLean*, 18 Rep. 318, while the right of the public to inspect the records of a federal court made on an application of a newspaper was denied, yet the same was granted "*ex gratia*."

37 L. R. A.

These cases fully sustain **Re CASWELL**, which holds that the common-law rule to the effect that a person must have some interest therein to maintain or defend an action in order to have an inspection of documents of records to be used as evidence, in so far as it is applicable, is in force in Rhode Island and justifies refusing access by a newspaper reporter to the records in divorce proceedings, to be used by him for sensational purposes.

III. Record making or copying.

It is generally held that superior officers may have access to records by their employés for the purpose of transcribing the same or indexing them. *Silver v. People*, 45 Ill. 223; *State v. Meadows*, 1 Kan. 90; *Hawes v. White*, 66 Me. 305.

But 1 N. Y. Rev. Stat., 360, providing that the board of supervisors may make such orders concerning the property of the county as they deem expedient, and the Act of 1869 giving the board, subject to the legal rights of the officers using the same, the general charge of the books and records of the county with a provision for having copies made by the officer having custody and control of the records when a judge certifies that it is necessary, do not authorize them to have new volumes of indices made, by some persons independent of the county clerk and not authorized by law to make them, and in a manner not provided for by law. *People v. Nash*, 3 Hun, 535.

IV. Account books of public officers.

a. In general.

Where the claimant has a personal interest in the matter of the officer's accounts or there is a controversy in dealings between the officer and the applicant, an inspection of the books in the custody of the officer is generally allowed. *Moody v. Thurston*, 1 Strange, 304; *Brewer v. Watson*, 65 Ala. 38; *Brewer v. Watson*, 61 Ala. 310; *Keokuk v. Merriam*, 44 Iowa, 422; *Brewer v. Watson*, 71 Ala. 200, 46 Am. Rep. 318.

Generally a tax-payer is entitled to access to the public books as far as concerns himself. *London v. Swinland*, 1 Barnard. K. B. 455; *Newell v. Stimpkin*, 6 Bing. 565, 4 Moore & P. 395; *Anonymous*, 3 Chitty, 206.

Tax-payers have been accorded the privilege of inspecting records of public officers relating to the street department and books of health department, and books of overseers of the poor. *People v. Cornell*, 47 Barb. 329; *Neville v. New York Board of Health*, 20 Abb. N. C. 59; *Rex v. Clapham*, 1 Wils. 305.

But where no beneficial interest is shown by the applicant an inspection of the account books of public officers has been refused. *Colnon v. Orr*, 71 Cal. 43; *Ex parte Briggs*, 1 EL. & EL. 651, 28 L. J. Q. B. 272; *Rex v. Clear*, 7 Dowl. & R. 303, 4 Barn. & C. 590.

In *Rex v. Great Faringdon*, 9 Barn. & C. 541, an inspection of the accounts of the parish money kept by the guardian of the poor under 22 George III., chap. 63, was allowed to a rated parishioner.

And in *King v. Leicester*, 4 Barn. & C. 891, a county rate-payer was allowed inspection of the rates made by justice and expenditure and order of sessions required to be kept by 55 George III., chap. 51.

But these latter cases may be considered as overruled in *King v. Staffordshire Justices*, 6 Ad. & EL. 84, 1 Nev. & P. 200, which held that where the

sented by William H. Caswell, clerk of the court in that county, a reporter for a Woonsocket newspaper requested him to furnish a copy of all the proceedings in said case, "for publication or otherwise;" and he now asks the advice of the court as to his duty in the premises. At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive and judicial records, etc.), provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. It is not essential, however, "that the interest be pri-

vate, capable of sustaining a suit or defense on his own personal behalf, but it will be sufficient that he act in such suit as the representative of the common or public right." 20 Am. & Eng. Encyclop. Law, pp. 522, 523, and cases cited. By statutes of the United States (see Act of August 12, 1848, —9 U. S. Stat. at L. chap. 166, p. 292), and also of several of the states, the necessity of interest has been done away with, and any person may examine public records, and take memoranda therefrom. *Re Chambers*, 44 Fed. Rep. 786; *State v. Rachac*, 87 Minn. 372; *Hanson v. Eichstaedt*, 69 Wis. 538; *Lum v. McCarty*, 89 N. J. L. 287; *Newton v. Fisher*, 98 N. C. 20. As there is no statute in this

publication had been made under 12 Geo. II., chap. 51, of the accounts of treasurer and constable a rate-payer had no right of inspection, and this was on the ground that the action in the court in regard to the transaction was open to the public and the accounts publicly considered and the applicant had no interest in past accounts.

And in 35 Geo. III., chap. 73, providing for entry of poor rates in vestry books, and 1 & 2 Wm. IV., chap. 60, requiring account books for parochial purposes to be open for inspection, the books under the first act were not included in the second act and an inspection of the former was refused to the tax-payer. *King v. St. Mary-Le-Bone*, 5 Ad. & El. 268.

In *Browne v. Cumming*, 10 Barn. & C. 70, 5 Mann. & R. 118, it was said, quoting from the preface of Coke: "The records of the king's court, they contain secret and hidden treasures and are faithfully and well kept, as they well deserve, in the king's treasury, and yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England by Act of Parliament, 46 E. III. A. etc."

In *O'Hara v. King*, 52 Ill. 303, it was held that a person conducting himself properly entering a public office from motives of curiosity during business hours who is forcibly ejected may recover damages. In this case, he said he was there to while away his time.

b. Toll books.

Every person has not the privilege of inspecting the toll books under 24 Geo. II., chap. 23, providing that all persons shall be at liberty to inspect books as 1 Geo. IV., chap. 100, providing that inspection shall be "to trustees" or any "creditor in tolls" limits the first act. *Rex v. Northleach & Witney Roads Trustees*, 5 Barn. & Ad. 978.

And a stranger is not entitled to inspection although he is a defendant in an action by the corporation for tolls. *Southampton v. Graves*, 8 T. R. 560.

And inspection was refused where issue had not been joined in a suit for trespass in distress for toll; in this case no previous demand was shown. *Hodges v. Atkins*, 8 Wils. 398, 3 W. Bl. 877.

And where the county had been indicted for not repairing a bridge, inspection of the parish books was refused on the ground that it would compel the parish to furnish evidence that would criminate itself. *King v. Buckingham*, 8 Barn. & C. 375, 3 Mann. & R. 412. See *Rex v. Sheriff of Chester*, 1 Chitty, 470; *Rex v. Cadogan*, *May v. Gwynne*, and *Rex v. Cornelius*, *infra*.

c. As to boundaries and titles.

A rate-payer was refused inspection of the parish books in order to prove that his premises were not in the parish, as he was not entitled to an inspec-

tion if he was not in the parish. *Burrell v. Nicholson*, 8 Barn. & Ad. 649.

And a parishoner could not have inspection of the parish books touching the ratability of certain property in order to use the information to support his claim to an estate. *Rex v. Smallpiece*, 3 Chitty, 238.

An inspection of the parish book was denied in an action of ejectment by the proprietor against the church wardens as the parish will not be compelled to discover their titles by showing a book kept only for their own use. *Cox v. Copping*, 1 Ld. Raym. 387.

But where the question was whether park lands were within a corporation, and inspection of the books of the session of the corporation was claimed, it was said that every person has a right to see public books. *Herbert v. Ashburner*, 1 Wils. 297. See also *Warriner v. Giles*, *infra*.

It is generally held that in order to establish a right a freeholder is entitled to inspection of court rolls of the manor. *Addington v. Clode*, 2 W. Bl. 1030; *Hobson v. Parker*, *Barnes Notes*, 247; *Rogers v. Jones*, 5 Dowl. & R. 484.

The same was held in regard to a copy-holder. *Folkard v. Hemet*, 2 W. Bl. 1061; *Rex v. Lucas*, 10 East, 236; *Rex v. Tower*, 4 Maule & S. 162; *Slade v. Walter*, Pasch. 6 Ann. B. R., 10 Vin. Abr. title, *Evidence*, F. b. p. 148.

And in *Atty-Gen. v. Coventry*, Bunn. 230; *Ex parte Briggs*, 1 El. & El. 881, 28 L. J. Q. R. 272; *Greenvelt v. Burrell*, 1 Ld. Raym. 253, 1 Salik. 200,—the same was said to be the rule, but was not necessarily passed on in these cases.

An inspection of the court rolls by a tenant of the manor was granted. *Rex v. Shelley*, 8 T. R. 141.

Where in an action of ejectment by a lessee of the public market where the boundary was in question an inspection of the public market books was allowed. *Warriner v. Giles*, 3 Strange, 954. See also subhead "*Boundary*."

In *Rex v. Merchant Tailors' Co.*, 2 Barn. & Ad. 115, it was held that the tenant had no right to inspect all the rolls.

And it was held that a freehold tenant of a manor has no right to inspect the court rolls unless there is a cause involving his case pending. *Rex v. Allgood*, 7 T. R. 746.

Where the claimant failed to show that he was a tenant and had made a prior demand, an inspection of the court rolls was refused. *Roe v. Aylmaer*, *Barnes Notes*, 236.

In an action by a bishop against the Duke of Bridgewater and several tenants for tithes, the plaintiff was denied an inspection of the court rolls of the manor to see what proportion they paid of the modus insisted upon. *Bishop of Hereford v. Bridgewater*, Bunn. 269.

And in *Smith v. Davies*, 1 Wils. 104, in an ejectment where the defendant claimed a freehold, he was refused an inspection of the court rolls in the pos-

state, however, regulating this matter, the common-law rule above stated, in so far as it is applicable here, is doubtless in force. Whether or not we should be willing to go to the full extent thereof, we are not now called upon to decide. But it is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for

that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records.

We advise the clerk that he should not furnish a copy of the case referred to for the purpose named.

All the Judges concur in this opinion.

session of the plaintiff on the ground that the plaintiff was not required to assist the defendant to make out his title.

An inspection of the court rolls in possession of the lord of the manor will not be granted where he was indicted for not repairing the highway as a party is not bound to criminate himself. *Rex v. Cadogan*, 1 Dowl. & R. 550, 5 Barn. & Ald. 902. See also *King v. Buckingham*, 8 Barn. & C. 375, 2 Mann. & R. 412; *Rex v. Sheriff of Chester*, 1 Chitty, 479; *May v. Gwynne*, and *Rex v. Cornelius*, *infra*, as to criminating evidence.

V. As to title to office.

Generally an inspection of election books or public records will be granted, where the purpose is to vindicate some public or private right and is to be made under reasonable regulations. *State v. Hoblitzelle*, 35 Mo. 620; *State v. Williams*, 36 Mo. 3; *Richards v. Pattinson*, Barnes Notes, 225; *King v. Babb*, 8 T. R. 579.

But will not be made if the demand is premature as where the return has not yet been made in a mandamus to fill up the corporation. *King v. Nottingham*, 1 W. Bl. 60; *Rex v. Justice of Surry*, Sayer, 145.

Or where the evidence has not all been taken in an election contest, an inspection of the ballot box was refused. *Re McCullough*, 12 Phila. 370.

Or where an inspection of vestry books controlled by defendant would require the defendant to furnish evidence against himself, it was refused in an action for libel for publishing a report to the vestry. *May v. Gwynne*, 4 Barn. & Ald. 301. See also *Rex v. Sheriff of Chester*, 1 Chitty, 479; *Rex v. Cadogan*, and *Rex v. Cornelius*, *infra*; *King v. Buckingham*, 8 Barn. & C. 375, 2 Mann. & R. 412.

So an inspection of the appointment of the overseers of the poor in order to see if they were fit persons, was refused. *Reg. v. Harrison*, 9 Q. B. 794, 3 New. Sea. Cas. 490, 16 L. J. M. C. 83, 10 Jur. 381.

In an action against a postmaster for intermeddling in an election, an inspection of the postoffice book to prove his deputation was denied. *Crew v. Saunders*, 2 Strange, 1005.

Where a motion was made to inspect rejected ballots of the election in proceedings of attachment against the publisher of a newspaper for contempt in deterring witnesses, it was held that the judges at chambers could not commit for contempt and no rule was granted. *MacCartney v. Oorry*, 7 Ir. C. L. Reg. 242.

But a bishop's books of registry of presentations
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were allowed to be inspected where both the plaintiff and the defendant claimed a living within the diocese. *Finch v. Bishop of Ely*, 2 Mann. & R. 127; *Rex v. Ely*, 3 Barn. & C. 112.

VI. Liquor records.

Some cases hold that a mandamus will be granted to compel an inspection of liquor records as bonds filed in the office of the county treasury. *Brown v. Knapp*, 54 Mich. 123, 53 Am. Rep. 300.

Or letters filed with an application for the issuing of the saloon license. *State v. Williams*, 41 N. J. L. 322.

But under Michigan Laws 1887, chap. 313, requiring that druggists' books recording the sales of liquor shall be open to the inspection of the public, a private person is not entitled to a mandamus for such inspection where he does not show any peculiar interest in such inspection. *Thomas v. Hamilton* (Mich.) July 5, 1894.

An inspection of the books of the corporation in a prosecution for granting a license to alehouse keepers was refused as a defendant could not be compelled to criminate himself. *Rex v. Cornelius*, 2 Strange, 1210. See also *May v. Gwynne*, 4 Barn. & Ald. 301; *Rex v. Cadogan*, 1 Dowl. & R. 550, 5 Barn. & Ald. 902; *King v. Buckingham*, 8 Barn. & C. 375, 2 Mann. & R. 412; *Rex v. Sheriff of Chester*, 1 Chitty, 479.

VII. Patent records.

A commissioner of patents will not be required by mandamus to furnish copies of pending application for patents or papers connected therewith. *United States v. Commissioner of Patents*, 8 Mackey, 223.

And search through the files of the secret archives of the patent office for abandoned cases was refused. *United States v. Commissioners of Patents*, 62 Pat. Off. Gaz. 1968.

But in *United States v. Hall*, 1 L. R. A. 738, 7 Mackey, 14, it was held that the commissioner was required to furnish certified copies of rejected applications after patents had been abandoned.

In *Boyden v. Burke*, 55 U. S. 14 How. 375, 14 L. ed. 543, it was held that every person who makes a demand of the commissioner in a respectful manner is entitled to copies of patents.

Cases in regard to the right to obtain copies by paying for the same have not been included, except in the case of patents, neither have cases as to the right to copy records to be used in an action for malicious prosecution.

I. T.

WASHINGTON SUPREME COURT.

George E. HART, *Respt.*,

v.

NIAGARA FIRE INSURANCE COMPANY *et al.*, *Appls.*

(.....Wash.....)

1. An insurance company cannot deny that one sent out by it to solicit business for it is its agent, although the policy subsequently issued provides that no person "unless authorized in writing" shall be deemed its agent.
2. A provision on a slip of paper pasted on the face of an insurance policy and having no connection with the warranties expressed therein, that a watchman shall be employed by the insured to be constantly on the premises while the mill is not in operation, does not release the company from liability for a loss which is not due to a failure to keep the watchman.
3. An instruction in an action on an insurance policy that the jury should be satisfied by a "clear" preponderance of proof that plaintiff burned the buildings before finding the fact is not misleading in connection with an instruction that the action is a civil one and it is not required to establish the facts beyond a reasonable doubt, but only by a fair preponderance of proof.

(October 23, 1894.)

APPEAL by defendant Niagara Fire Insurance Company from a judgment of the Superior Court for Pierce County, in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Crowley, Sullivan & Grosscup, for appellants:

Even in cases where the party procuring the insurance was the local agent of the company issuing the policy, the courts have, under the provisions of a policy like the one in question, considerably limited the general rule as laid down in the case of *Meisterman v. Home Mut. Ins. Co.* 5 Wash. 524.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 528, 29 L. ed. 984, 987; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; *Richardson v. Maine Ins. Co.* 46 Me. 894, 74 Am. Dec. 459; *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 168, 19 Am. Rep. 490; *Cox v. Aetna Ins. Co.* 29 Ind. 586; *Atlantic Ins. Co. v. Carlin*, 58 Md. 886; *Wood v. Firemen's Ins. Co.* 126 Mass. 816; *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 47, 23 L. ed. 833; *Abbott v. Shawmut Mut. F. Ins. Co.* 8 Allen, 215.

The policy is a unilateral contract and its acceptance by plaintiff operates as an assent to the conditions intended to bind him.

McWilliams v. Cascade Fire & Marine Ins. Co. 7 Wash. 48; *Moore v. State Ins. Co.* 72 Iowa,

NOTE.—On the question when an insurance agent is the agent of the insured, see note to *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.* (Mich.) 20 L. R. A. 277.
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414; *Reeve v. Phœnix Ins. Co.* 28 La. Ann. 219; *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla. 399; *Swann v. Watertown F. Ins. Co.* 96 Pa. 37; *McFetridge v. Phœnix Ins. Co. of Brooklyn*, 84 Wis 200; *Richardson v. Maine Ins. Co. supra*; *American Ins. Co. v. Neiberger*, 74 Mo. 163; *Beck v. Hibernia Ins. Co. of Ohio*, 44 Md. 95; *Baltimore F. Ins. Co. v. Loney*, 20 Md. 37; *American Ins. Co. v. Barnett*, 73 Mo. 864; *Catron v. Tennessee Ins. Co.* 6 Humph. 176; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Bonneville v. Western Assur. Co.* 68 Wis. 298; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 856; *Wineland v. New Haven Security Ins. Co.* 53 Md. 277; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; 2 Wood, Fire Ins. § 532.

The language of the policy, that the assured should keep a watchman constantly, night and day, when the mill was idle and not in operation, is plain and unambiguous. The insured, at the time he takes the risk, has a right to fix the conditions upon which he assumes the risk, and when the insured accepts his policy he is bound by all the conditions which are required to be performed by him during the continuance of the risk.

Blumer v. Phœnix Ins. Co. 45 Wis. 622, 43 Wis. 535, 33 Am. Rep. 880; *Rankin v. Amazon Ins. Co.* 89 Cal. 203; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 54 Am. Dec. 309; *Sheldon v. Hartford F. Ins. Co.* 23 Conn. 235, 58 Am. Dec. 420; *Wilson v. Hampden F. Ins. Co.* 4 R. I. 159; *Ripley v. Aetna Ins. Co.* 80 N. Y. 138, 86 Am. Dec. 862; *First Nat. Bank of Ballston Spa v. Insurance Co. of North America*, 50 N. Y. 45.

The rule is applied not only to provisions relating to watchmen, but to every sort of promissory conditions.

Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 Am. Dec. 543; *Security Ins. Co. v. Fay*, 23 Mich. 467, 7 Am. Rep. 670; *Dewees v. Manhattan Ins. Co.* 84 N. J. L. 247; *Lamburg v. German F. Ins. Co. of Peoria* (Iowa) 23 L. R. A. 99; *Galveston Ins. Co. v. Long*, 51 Tex. 89; *Wustum v. City F. Ins. Co.* 15 Wis. 138; *Cerf v. Home Ins. Co.* 44 Cal. 820, 18 Am. Rep. 165; *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539; *Virginia Fire & Marine Ins. Co. v. Morgan* (Va.) Nov. 9, 1898; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 686; *Poor v. Humboldt Ins. Co.* 125 Mass. 274, 28 Am. Rep. 228; *Western Assur. Co. v. McPike*, 62 Miss. 740; *Cook v. Continental Ins. Co.* 70 Mo. 610, 35 Am. Rep. 438; *Bennett v. Agricultural Ins. Co.* 50 Conn. 420, 51 Conn. 504; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 866; *Cedar Rapids Ins. Co. v. Shump*, 16 Ill. App. 248; *Thomas v. Fame Ins. Co.* 108 Ill. 91; *Mead v. Northwestern Ins. Co.* 7 N. Y. 530; *Westfall v. Hudson River F. Ins. Co.* 12 N. Y. 290; *Ferree v. Oxford Fire & Life Ins., Annuity & Trust Co.* 67 Pa. 373, 5 Am. Rep. 496; *Frost's Detroit Lumber & Wooden Ware Works v. Millers & Mfrs. Mut. Ins. Co.* 37 Minn. 800; *Mack v. Rochester German Ins. Co. of Rochester*, N. Y. 106 N. Y. 560; *Kyte v. Commercial Union Assur. Co.* 3 L. R. A. 503, 149 Mass. 116; *Thomson v. Weems*, 9 App. Cas. 671; *Imperial F. Ins. Co. of London*,

Eng. v. Coos County, 151 U. S. 452, 38 L. ed. 231; May, *Ins.* § 156; *Fabyan v. Union Mut. Ins. Co.* 38 N. H. 203; *Moore v. Phoenix Ins. Co.* 43 N. H. 240.

A similar rule is applied in life insurance cases.

Müller v. Mutual Ben. L. Ins. Co. 81 Iowa, 316, 7 Am. Rep. 123; *Mutual Ben. L. Ins. Co. v. Müller*, 39 Ind. 475; *Co-Operative L. Assn. v. Leflore*, 53 Miss. 1; *Baumgart v. Modern Woodmen of America*, 85 Wis. 546.

The same rule applies in marine insurance. *Goicochea v. Louisiana State Ins. Co.* 6 Mart. (N. S.) 51, 17 Am. Dec. 175; *McLoon v. Commercial Mut. Ins. Co.* 100 Mass. 472, 1 Am. Rep. 129; *Imperial F. Ins. Co. of London, Eng. v. Coos County*, *supra*.

The courts do not hold that where the language is plain and unambiguous and the condition is violated that the insured can recover notwithstanding the breach.

1 Wood, *Fire Ins.* § 179.

Messrs. Snell & Johnson for respondent.

Messrs. Parsons, Correll & Parsons for Pacific National Bank.

Dunbar, Ch. J., delivered the opinion of the court:

This action was brought in the superior court of Pierce county by the plaintiffs to recover from the defendant the Niagara Fire Insurance Company the sum of \$940, plaintiffs claiming that amount due them upon a policy of insurance issued by the defendant company to George E. Hart, and assigned by him to the copartnership of Hart & Jewell, the property covered by the insurance being certain mill property situated near the city of Tacoma. The interest of the Pacific National Bank as plaintiff in the suit arises by virtue of the chattel mortgage made by the copartnership firm of Hart & Jewell to secure the payment of \$4,000 to the bank, the policy of insurance providing that the loss should be paid to the plaintiff bank. There was also other insurance upon the property, placed in other companies, making the total insurance of the company \$10,000. The policy of insurance was issued on the 17th day of October, 1892. On the 18th day of October, the interest of Hart was transferred to the copartnership firm of Hart & Jewell. The mill was burned on the 30th day of November, 1892, while the policy of insurance was in full force, if it had not been forfeited. Plaintiffs alleged their loss, \$10,500; alleged due notice of the fire, and loss thereby, to the defendant company, in conformity with all the terms and conditions of the policy; alleged that they performed and carried out all the terms and conditions required of them in said policy of insurance; that proof of loss was furnished and received by the corporation and that sixty days had elapsed since said proof was furnished, etc. Subsequent to the commencement of the action, Hiram Jewell, whose name appeared in the original action, upon motion, was dismissed as one of the plaintiffs; whereupon plaintiff Hart and the plaintiff Pacific National Bank filed a supplemental complaint, making said Jewell a defendant. As this action of the court does not seem to affect

the questions in controversy, we will not further notice it.

The policy was an ordinary insurance policy, and contained the usual terms and conditions of such policies. The particular provisions of the policy which the defendant claimed in its answer and on the trial of the cause to have been violated are as follows: "(1) This entire policy, unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the knowledge of the insured . . . or if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple. (2) It is understood and agreed that, during such time said mill is idle or not in operation, a watchman shall be employed by the insured to be in and upon the premises constantly, day and night." It eventuated that the mill insured was built on leased land, the same being school land, which was not subject to sale, but which had been leased by the respondents from the county commissioners of Pierce county. It is denied that the policy was issued by the company with knowledge of the location and situation of the property, except as the same was shown in the description in the policy itself; denied that they had any knowledge or information as to whether the plaintiffs, at the time of the fire, had an interest in the property described in the policy to an amount exceeding the aggregate of the amount of all sums mentioned in the complaint, or any other amount; denied that they had ever made a contract of insurance with the plaintiffs, or either of them, except upon the conditions and rules of the policy annexed to the complaint; denied that the mill was burned without any fault of the plaintiffs; that any sum whatever was due from them to the plaintiffs; and denied that the plaintiffs had performed all the conditions and requirements of the policy; affirmatively averred the conditions of the policy mentioned above; and further averred that the fire by which the property mentioned in the complaint was destroyed was kindled, or caused to be kindled, by the plaintiff Hart, intentionally, for the unlawful purpose of thereby procuring from the defendant and his other insurers the indemnity by them stipulated to be paid under the terms and conditions of the several policies; alleged that one Joseph F. Smith was, at the time the policy was issued, the owner of an undivided one half of the property insured, and continued to be such owner until November, 1892. The reply averred that the person who received the application for the policy was, before said policy was issued, specifically and fully told, informed, and apprised of the fact, and fully knew that the property stood on ground owned and held by the state of Washington as school land, etc., and that the policy was issued with the knowledge of such facts; and alleged that it was the fault, neglect, and wrongdoing of said defendant in drawing the said policy of insurance that he did not state that the interest of said Hart was a leasehold interest. The other affirma-

tive matters in the answer were denied by the reply. Upon this state of pleadings the case went to trial. Judgment was rendered in favor of the plaintiffs for the sum of \$940.79, with interest and costs.

There are three main propositions of law discussed in this case:

First. Did the court err in instructing the jury that the defendant company was estopped from denying the ownership of Hart in the ground on which the mill property insured was located, if, prior to the issuance of the policy, no questions were asked of Hart relating to the title of the ground, and no references were made by him as to the title? It is conceded by the appellant that, under the undisputed testimony in this case, this instruction would be sustained by the rule announced by this court, in *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, and that Hansen would be considered the agent of the defendant company were it not for the fact that the policy contained a provision that, "in any matter relating to this insurance, no person, unless authorized in writing, shall be deemed the agent of this company;" but that, by reason of the incorporation of this provision in the policy, Hansen became the agent of the insured, instead of the insurer. If, as was said by the court in *Mesterman v. Home Mut. Ins. Co.*, *supra*, the better reason is in favor of the rule that an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of said policy, or the application therefor, if, at the time it was so insured, the fact of such violation was known to the company or its duly authorized agent, the respective rights of the parties ought not to be changed by any mere form of words which is placed in the policy, when the facts and the relations of the parties remain exactly the same. If, under the legal, well-established, and universally understood definition of "agency," the solicitor is in law and in fact the agent of the company, it should not be allowed to escape its responsibilities by a simple device of words which flatly contradict the true meaning of the contract. It is true enough that it is in no sense the duty of the courts to make contracts for parties, but it is equally true that it is their duty to prevent the evasion of honest responsibilities by the interjection into one-sided contracts of statements which, in a hidden manner, when technically construed, serve only to destroy the honestly intended and mutually understood conditions of the contract. If, in other words, the solicitor is actually the agent of the company, sent out by it to solicit business for it, receiving his instructions from the company, receiving his pay from the company, using blank forms prescribed by the company, and liable to discharge by the company, it would be a travesty on the administration of justice, which would shock the sense of every right-thinking person, to allow a company to escape a just responsibility by interjecting a provision in a policy denying this patent fact; especially in a case of this kind, where there was no written application,

which is the document to which the attention of the assured is especially called, the one which he signs, and the one for which he ought to be held most strictly accountable. Even when a written application is made, the courts have almost universally held that where the assured gave proper answers to the questions, and the agent who acted as the scrivener wrote them down falsely, the company could not on that account escape its liability in case of damage. See 3 Wood, Fire Ins. p. 837, and cases cited. What difference would it make in principle, in a case of that kind, to state in the policy that the agent should be considered the agent of the insured instead of the insurer,—a technical statement, of which only a lawyer knows the meaning, and which is incorporated after all the negotiations are completed? This position is not only sound in reason and in morals, but is also well sustained by authority, although it must be regretfully admitted that there is some conflict of authority on this question. In discussing the question, the court, in *Kausal v. Minnesota Farmers Mut. F. Ins. Assn.*, 81 Minn. 17, 47 Am. Rep. 776, after stating the rule that the agents of insurance companies authorized to procure applications for insurance, and to forward them to the companies, must be deemed the agents of the companies, among other things, says: "After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured, and not of the insurer. But, as has been well remarked by another court, 'there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.' If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that, if the agent was the agent of the company in the matter by making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently

issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle, and in accordance with public policy,"—citing *Wood, Fire Ins.* § 139; *May, Ins.* § 140; *Commercial Ins. Co. v. Ives*, 56 Ill. 403; *Gans v. St. Paul Fire & Marine Ins. Co.* 43 Wis. 108, 28 Am. Rep. 535; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331. This case is cited by Wood on Insurance (vol. 2, p. 838), and the same principle is announced in many other cases.

Appellant's second objection is, we think, also untenable. The instruction of the court on that head was as follows: "And if you further find from the evidence that, at the time of the loss, the interest of the plaintiff Hart and Hiram Jewell in the property insured was sole and unconditional ownership, excepting as to the interest of the Pacific National Bank, then the defendant company is estopped from urging that defense, and the conditions of the policy with reference thereto would be immaterial." It will be seen that, under the instruction of the court, the company could only be estopped in case the jury found that Hart and Jewell were the sole and unconditional owners of the property insured, excepting the interest of the Pacific National Bank. If that were true, of course the company would be estopped from urging the defense of nonownership; and the jury, under this instruction, could, and doubtless did, determine the controversy between Hart and Smith in relation to the ownership of the property insured, and evidently found on that proposition in favor of Hart.

The third contention is that the court erred in modifying the request of the defendant to charge the jury that if they believed from the evidence that if, at any time during the existence of the policy, the insured failed to keep a watchman when the mill was not in operation, plaintiffs could not recover, by adding, "unless you further find from the evidence that said fire was not due to or the result of their failure to keep such watchman," the provision in the policy being: "It is understood and agreed that, during such time as said mill is idle or not in operation, a watchman shall be employed by the insured to be in and upon the premises constantly, day and night." The contention of the appellant is that the terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the insured must show himself within these terms; in other words, that compliance of the insured with the terms of the contract is a condition precedent to the right to recover. The respondents seek to draw a distinction between a contract with an accompanying provision that, if a certain agreement is broken, it shall work a forfeiture of the contract, and an agreement without such provision, urging that in this instance, if it had been the

intention of the parties to the contract that a breach of the agreement should work a forfeiture, they would have expressly said so in the contract. The investigation of this question has been somewhat perplexing, owing to the fact that the authorities cited are not exactly in point; and the adjudicated cases which we have been able to investigate on our own motion in but very few instances decide this identical point. Most of the cases cited by appellant are cases where representations have been made in the surveys or applications, and the question is discussed whether such representations are continuing representations or promissory representations or warranties; but in most of them it appears that there was an express stipulation, either in the application or the policy, that the violation of the agreement should work a forfeiture. Thus, in *Blumer v. Phoenix Ins. Co.*, 45 Wis. 623, in the written application for insurance of the mill against fire, the applicant, in answering the question whether the mill was ever left alone, and whether there was a watchman in it during the night, said: "Not a regular watchman, but one or two hands sleep in the mill." By a stipulation in the same instrument, it was held that the statements were a full, true, and just exposition of all the facts and circumstances, and were offered as a basis of the insurance requested, and were made a special warranty; and the court held that, "in view of these stipulations, the answer above recited was an express warranty by the assured that one or two of his employes lodged in the mill each night, and was also a promissory and continuing undertaking which bound him to a substantial compliance with its terms during the life of the policy." The case of *Blumer v. Phoenix Ins. Co.*, 48 Wis. 535, 38 Am. Rep. 830, was on the same state of facts. The question does not seem to be discussed at all in appellant's third citation,—*Ranck v. Amazon Ins. Co.* 89 Cal. 208. In that case the court simply held that, under the undisputed testimony concerning the breach, it was error for the court to submit the question to the jury. In *Glendale Woolen Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 809, one of the conditions of the policy was that the survey and description of the property should be deemed a part of the policy and a warranty, thus stipulating the existence of the fact under discussion in this case. In *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 285, 58 Am. Dec. 420, the main point decided was that the reference to the survey in the policy conceded it to be an entire contract; but the court decided in that case that where one of the interrogatories was, "Is there a watchman in the mill during the night?" to which the answer was, "There is a watchman nights," the answer was not a warranty, but a representation material to the risk, to be substantially kept and performed. In *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159, the court was only construing what the parties themselves had stipulated to be a warranty. This plainly appears from the language of the opinion, on page 170, where the court says: "Considering every answer in this applica-

tion, as the parties have expressly made it, a warranty, we have not asked ourselves how material the answers in question may be to the risk, since that has been already determined by the parties for themselves. They have made the truth of each and all of the answers in this application a condition precedent to the right of the assured to recover on this policy; and we have therefore confined ourselves to the humbler office of construing their language, instead of rising to the consideration of the materiality of the facts about which they have chosen to employ it." Thus, it will be seen that the question at issue here was there confessed, and the argument of the court was based on that confession. And so with most of the cases cited by appellant. While it does not always directly appear, in most of the cases it can be plainly inferred, that, either in the application or policy, there has been a positive assertion of a warranty. The citations made by appellant, in its reply brief, from *Wood on Insurance*, seem to be in point so far as many of the statements made by the author are concerned; but, when the cases upon which the author bases the statement made in the text are traced out, they are nearly all found to contain a stipulation that the policy should be void if the conditions stipulated are not true, or are not maintained, as the case may be. It must be admitted, however, that some few of the cases seem to maintain appellant's position, notably *Ripley v. Aetna Ins. Co.* 80 N. Y. 186, 86 Am. Dec. 362, and *First Nat. Bank of Ballston Spa v. Insurance Co. of North America*, 50 N. Y. 45. It does not appear from an investigation of those cases that any substantial warranties were made, and the definition by Wood of a "promissory warranty," cited in appellant's reply brief, is based upon these two cases, which are cited by that authority. There are also some cases which sustain respondents' contention, although, as we have said before, this identical question has been seldom adjudicated.

It will be observed that in the main body of the policy in the case at bar there is no agreement concerning a watchman. That provision appears on a small slip of paper pasted on the face of the policy. It does not appear with, and has no logical connection with, or relation to, the warranties expressed in the policy. It is especially stipulated that, if any of the conditions provided for between lines 7 and 30 are violated, the policy shall be deemed void. With line 81 the policy begins to recite regulations and conditions innumerable, closing with line 112; but in none of the conditions mentioned after line 80 is there a provision for a forfeiture, although some of them are probably as important as the condition concerning the watchman. Where, then, in the body of the policy, does this detached condition regarding the watchman logically belong? What more ground have we to conclude that it was the intention that it should be located above line 80 than that it should be located after line 80, or than after line 112, which is the last line of the policy? If it had been regularly incorporated in the policy anywhere

after line 80, it could not possibly be construed that it was intended to be one of the things warranted, for the things warranted have been classified and specially mentioned; and, under the rule of "*expressio unius est exclusio alterius*," it could not be construed to be a warranty. It is a stronger case than if it stood alone for construction, for the presumption is in harmony with the maxim above expressed. If it had been the intention to make it a warranty, it would have been mentioned with the other warranties.

Again, the rule is universal that statements contained in the application will not be construed to be warranties if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties. Forfeitures are not favored by the law, and constructive warranties which warrant a forfeiture are most strongly construed against the party for whose interest they are inserted in a contract. This rule is laid down by May on Insurance, and in fact by all other authorities. The court will hold a stipulation, whether contained in the policy or the application, to be a representation, rather than a warranty, when there is room for doubt or ambiguity of language or otherwise. It is true there is no ambiguity of language here, so far as the condition to be performed is concerned; but there is ambiguity of arrangement, which leads to grave doubts whether it was the intention to make the performance of the condition a condition precedent to the right of recovery; and, whenever such a doubt is raised, it must, according to all authority, be resolved in favor of the assured, and the existence of a provision for a forfeiture cannot be established by inference or conjecture. And this is right, and in perfect consonance with the construction of the contract generally. In an ordinary contract no damages can be recovered by reason of a breach if the breach does not result in damage. In this case, if the rule contended for by appellant should prevail, if the respondents had failed or neglected to keep a watchman for one day, and the mill had not burned for a month afterwards, and it positively appeared that the fire was in no way attributable to such neglect or breach, the company could escape its liability by reason of a breach which was entirely immaterial, and which in no way contributed to the damage. This would be a hard and unjust condition; and while it may be true that the insurance company would have a right to make a contract to this effect, and, if such contract were made, that it would be the duty of the court to enforce it, regardless of its hard conditions, yet, as we have before said, it is the duty of the court to see that such contract has actually been made, and it must be established by clear and convincing testimony. In other words, it must appear from the whole contract, considering both the language and its arrangement, that such was the intention. As is said by May on Insurance (vol. 1, § 164): "They are not necessarily warranties because they appear on the face of the policy. In order to have the force of a warranty, the statement must, indeed,

constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty. Whether they are so or not will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument." In *Goddard v. East Texas F. Ins. Co.*, 67 Tex. 69, 60 Am. Rep. 1, the following clause appeared on a piece of paper different from that on which the policy of insurance to which it was attached was printed, and was attached by mucilage to a blank space on the face of the policy: "It is understood and agreed that the assured shall keep a set of books, showing a record of his or their business, including all purchases and sales, both for cash and on credit, as well as a copy of his or their last inventory, warranted to be kept in an iron safe at night." The court in that case said that "the place on the policy where the clause was thus pasted was in the midst of a sentence on the face of the policy, with which it had no proper connection, and which purported to contain the promises entered into by the insurance company, and not those made by the insured. The existence of the clause was not known to the insured. In a suit upon the policy, in which it appeared that the stipulations regarding the iron safe were not observed, there being no evidence of fraud committed by the insured, or of resulting injury to the insurer from a failure to keep the safe, it was held: (1) That the clause could, at most, be regarded as a representation, and not as a clause of warranty. (2) The method of attaching the clause to the policy precluded it from being invested with any higher dignity than a mere representation. (3) Words purporting to be a condition on which a policy is issued must be set forth in such a place and in such a manner in the policy as to leave no doubt that they were so intended, and words inserted promiscuously therein, having no connection with the other conditions of the policy, although the word 'condition' is used, will not be treated as a condition of the policy,—citing *Kingsley v. New England Mut. F. Ins. Co.* 8 Cush. 393." It will thus be seen that the case above cited was identical with the case at bar. The case of *Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co.*, 89 Mich. 407, also sustains the contention of respondents.

The appellant insists that the argument that a party who makes a contract containing a continuing promise to do a particular thing can with impunity violate the promise because the contract does not contain a clause expressly stating that a failure to keep the promise shall render the contract void is too absurd to merit discussion. This would be true if any such an argument were made, but the criticism made by appellant would apply to the breach of any contract. Of course, if a party violates his contract, he does it at his peril, and is liable for any damages which may flow from it; but the contention of the respondents simply is that he should not be liable for damages which did not flow from it. As this is a new ques-

tion in this state, we feel justified, under the authorities, in deciding it in consonance with our views of right, and therefore hold that no error was committed by the court in the instruction complained of, as the instruction placed the burden upon the plaintiff to show that the breach did not contribute to the loss.

Appellant also urges that the court erred in instructing the jury as asked by plaintiffs' request No. 1, the error of the court consisting in the use of the word "clear." The court instructed the jury as follows: "The burden of proof is on the defendant, but before you can so find, you should be satisfied by a clear preponderance of proof that he did so burn said buildings." Had this instruction been all the instruction given to the jury on this subject, there might be some ground for the apprehension of the appellant that the jury would conclude that the court was invoking the rule in a criminal case that this fact would have to be established beyond a reasonable doubt. Even if we consider that the court had erred in this instruction, the instructions asked for by the defendants which were given by the court, it seems to us, place the question of the sufficiency of the proof in as strong a light before the jury as the instruction given by the court which is complained of by the defendants. The seventh instruction asked by the defendants was as follows: "In order to show fraud, or show a fraudulent act by proof, the proof of the facts and circumstances must be such as will convince the mind of an ordinarily prudent person that the party charged is guilty of such charge; and the facts and circumstances must be such as not to be susceptible of any natural or reasonable explanation consistently with the honesty and integrity of the person charged therewith in respect to the matters in issue." Instruction No. 8, asked by the defendants, was as follows: "This is a civil action, and it is not required in a civil action to establish the facts beyond a reasonable doubt, as in a criminal case, but a fair preponderance of proof is all that is required on the part of the one who attempts to establish any given condition of affairs." Thus, as we have said above, putting the construction on instruction No. 8 as qualified by No. 7 asked by the defendants, there is certainly no room for them to raise objections to the instruction actually given by the court. But without considering the action of the defendants and the instructions asked by them, when we take into consideration the whole of the instruction on this point, which was as follows: "This is a civil action, and it is not required in a civil action to establish the facts beyond a reasonable doubt, as in a criminal case, but a fair preponderance of proof is all that is required on the part of one who attempts to establish any given condition of affairs,"—and the further charge that, "as to the defense that George E. Hart burned, or caused to be burned, the buildings in question, that the burden of proof is upon the defendant, and that, before you can so find, you should be satisfied by a clear preponderance of the evidence that he burned his buildings, or

caused them to be burned," we think the idea is removed that the jury in any way got the impression that any greater amount of proof should be required than that required in a civil action. The court had already told them that it was not required in a civil action that the facts should be established beyond a reasonable doubt, as in a criminal case, and had also informed them that the burden of proof was upon the defendant. It seems to us that, in connection with the instruction given above, the phrase "clear preponderance of the evidence" amounts to nothing more than a preponderance of evidence, or a distinct preponderance of evidence, which would, of course, be necessary to a verdict, as it must be a distinct pre-

ponderance before the preponderance can be ascertained. Construing the instructions together, we think the jury was not misled by the instruction.

The claims that errors were committed on the part of the court in the admission of certain testimony we do not think are substantiated by the record. So far as the further contention is concerned,—that the verdict of the jury was contrary to the evidence,—we think there was sufficient testimony on all the points controverted, including the question of the watchman, to sustain the verdict.

The judgment will therefore be affirmed.

Anders and Stiles, JJ., concur.

IOWA SUPREME COURT.

E. B. THOMPSON

v.

T. H. JACKSON *et al.*, Appts.

(.....Iowa.....)

1. **The jurisdictional amount for an appeal exists where a judgment for the necessary amount can be rendered consistently with the pleadings, although it includes exemplary damages.**
2. **Jurisdiction can be collaterally attacked in an action for wrongful acts in executing a judgment.**
3. **Jurisdiction of a justice of the peace in Iowa over a nonresident is not obtained with-**

out any service in the township where the suit was brought.

4. **A justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing he had jurisdiction.**
5. **A constable is not liable for executing a justice's judgment merely because it was in excess of jurisdiction, if the justice was not liable.**

(January 22, 1896.)

A PPEAL by defendants from a judgment of the District Court for Palo Alto County, in favor of plaintiff in an action brought to re-

NOTE.—The above case is in line with the trend of judicial thought in its disposition to break down the distinction as to the liability of superior and inferior judges for acts done in excess of jurisdiction (see *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and *note*). But there is grave doubt as to the correctness of the decision. Judges whether of superior or inferior jurisdiction are not exempt from liability for their acts if they act entirely without jurisdiction.

In *Bradley v. Fisher*, 80 U. S. 13 Wall. 335, 20 L. ed. 644, the court says: "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority when the want of jurisdiction is known to the judge no excuse is permissible."

In *Calder v. Halket*, 3 Moore, P. C. C. 75, Parke, B., says, in effect English judges when they act wholly without jurisdiction have no privilege.

In *Houlden v. Smith*, 14 Q. B. 841, 19 L. J. Q. B. 170, it is decided that a judge of a court of record is answerable for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends; thus where a person living out of the territorial jurisdiction of a county court was committed for contempt in not obeying a summons from such court, the judge was held liable.

In *Lange v. Benedict*, 73 N. Y. 37, 29 Am. Rep. 80, one of the grounds of deciding in favor of the judge was that "his act was not without the inception of jurisdiction."

In *Gwynn v. Poole*, Lutw. fol. 1566, it is said: "Other inferior jurisdictions are limited in respect 27 L. R. A.

to place, as the jurisdiction of justices of peace in relation to the poor is limited to making rates for the relief of them in their several parishes, but if they tax the parish of S. to the relief of the poor of the parish of D. that is an apparent excess of their jurisdiction and the justice and the officer are liable to an action." "And of that sort also are inferior courts in corporations where the judge and officer are liable or not with this difference: where it appears or may reasonably appear to them that the cause arose out of their jurisdiction [territorially] and yet notwithstanding they proceeded they are both liable to an action; but it is otherwise where it doth not appear or cannot reasonably appear whether the cause arose out of their jurisdiction or not; for there no action will lie against them unless they proceed after they are informed or know that the cause of action arose out of their jurisdiction."

In *THOMPSON v. JACKSON* the court says that "no jurisdiction was acquired by the service." Why? Not, it would seem, because the service was defective in an action of which the subject-matter was within the jurisdiction of the justice, but because the statute gave the justice no jurisdiction of the subject-matter in this particular case unless defendant was served in the township where suit was brought. If this is true then the justice usurped jurisdiction and within the authorities above cited is not protected. It is to be regretted that the court did not discuss this phase of the question and decide whether the justice was acting without jurisdiction of the subject-matter or simply without jurisdiction of defendant.

H. P. F.

cover damages for alleged trespass in assuming jurisdiction of a cause of action, entering judgment and proceeding to levy upon and sell some of plaintiff's property, in satisfaction thereof, when there was no jurisdiction in the cause. *Reversed.*

The facts are stated in the opinion.

Messrs. C. E. Cohoon and B. E. Kelly, for appellants:

The justice had jurisdiction of the subject-matter of the action.

See *Auspach v. Ferguson*, 71 Iowa, 144.

But having judicially determined that he had jurisdiction of the person of the defendant, though such judicial determination was by him made erroneously, before he entered judgment, the question is, Can he be held to respond in damages to Thompson for such erroneous holding on a question of law while acting in his judicial capacity?

It was not a case of no service, but of insufficient service. He had jurisdiction of the subject-matter and his jurisdiction was co-extensive with his county, and he was therefore not acting without any jurisdiction whatever.

Bonsall v. Iselt, 14 Iowa, 312; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Ballingier v. Tarbell*, 16 Iowa, 492, 85 Am. Dec. 527; *Morris v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Baker v. Chapline*, 12 Iowa, 204; *Pratt v. Western Stage Co.* 27 Iowa, 364; *Rogers v. Loop*, 51 Iowa, 48.

The defendant T. H. Jackson is not liable herein, having had jurisdiction of the subject-matter, whether he had or had not jurisdiction of the person of the defendant Thompson or not.

Bradley v. Fisher, 80 U. S. 18 Wall. 835, 20 L. ed. 646; *Alles v. Reece*, 89 Fed. Rep. 341; *Cooley, Torts*, 420; *Scott v. Stansfield*, L. R. 8 Exch. 220.

No action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice.

Scott v. Stansfield, L. R. 8 Exch. 220; *Henke v. McCord*, 55 Iowa, 378.

A judicial officer acting within his jurisdiction enjoys absolute immunity from liability in a civil action for a mistake of law or error in judgment.

3 Hilliard, *Torts*, 101; *Cooley, Torts*, 408.

In note to page 409, *Cooley on Torts*, it is said: "There are dicta in some cases, that a justice is civilly responsible when he acts maliciously or corruptly, but they are not well founded, and the express decisions are against them."

Jones v. Brown, 54 Iowa, 74; *Green v. Talbot*, 36 Iowa, 499; *Howe v. Mason*, 14 Iowa, 510; *Gowling v. Gowling*, 12 Iowa, 495; *Wasson v. Mitchell*, 18 Iowa, 158; *Lancaster v. Lane*, 19 Ill. 242; *Adkins v. Brewer*, 5 Cow. 206, 15 Am. Dec. 364; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 353; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 305, 6 Am. Dec. 290.

When an officer receives from any court a warrant or execution regular upon its face commanding him to execute it by doing certain acts, no matter what any outsider or interested persons say to him as to whether the court had or had not the legal right to issue

the same, it is such ministerial officer's business to execute it.

Bishop, Non-Cont. L. 1889 ed. § 211, p. 85; *Henke v. McCord*, 55 Iowa, 386; 2 Hilliard, *Torts*, 125; *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *Cooley, Torts*, pp. 465-467.

There is no showing that either of the defendants acted maliciously or vindictively, but simply did what any man under like circumstances would do in a like case.

Throop, Pub. Off. § 759, p. 720; *Baker v. Sheehan*, 29 Minn. 235; *Chase v. Ingalls*, 97 Mass. 524.

Messrs. Soper, Allen & Morling, for appellee:

The official acts of a justice of the peace depend for their validity on their accordance with the statute from which his powers are derived.

Cook v. United States, 1 G. Greene, 42.

That the justice had no jurisdiction in the suit in question is settled by *Meunch v. Breitenbach*, 41 Iowa, 527, and *Auspach v. Ferguson*, 71 Iowa, 144.

The defect in the justice's proceedings was not in the manner of service but in the justice's jurisdiction.

The judgment having been rendered without jurisdiction was a nullity and subject to collateral attack.

Reed v. Wright, 2 G. Greene, 84; *Freem. Judgm.* 2d ed. §§ 117 et seq.; *Risley v. Phenix Bank*, 88 N.Y. 887, 38 Am. Rep. 421.

Plaintiff was not bound to appear and raise the question of jurisdiction.

Dunlap v. Cody, 31 Iowa, 266, 7 Am. Rep. 129; *Hamilton v. Millhous*, 46 Iowa, 74; *Freem. Judgm.* 2d ed. § 117.

The justice had no jurisdiction to make any determination in the case. He is therefore liable as a trespasser.

Lanpher v. Dewell, 56 Iowa, 153; *Horns v. Pudil* (Iowa) May 24, 1893; 1 *Cooley, Torts*, 416, 420; 12 Am. & Eng. Encyclop. Law, pp. 868, 400.

If a court acts without jurisdiction its judgments are nullities. They are not voidable but void. They are justification and all persons concerned in executing such judgments or sentences are trespassers.

12 Am. & Eng. Encyclop. Law, p. 400, and authorities cited; *Cooley, Torts*, 1st ed. § 469; *Freem. Judgm.* 2d ed. § 117; *Freem. Executions*, §§ 20, 102. See *Merritt v. Reed*, 5 Denio, 352; *Horns v. Pudil, supra*.

An officer making an excessive levy is a trespasser *ab initio* and liable accordingly.

Cooley, Torts, 1st ed. § 462.

Roethrock, J., delivered the opinion of the court:

1. The defendant T. H. Jackson was a justice of the peace, and C. B. Jackson was a special constable. A judgment for \$2.75 and costs was entered on the docket of said justice against E. B. Thompson, plaintiff herein, and in favor of one Nolan. Execution was issued on the judgment, and it was served by C. B. Jackson, as special constable, by levying upon and selling certain hay in stack, the property of the defendant in execution. This action was brought to recover damages

of the defendants, on the ground that the judgment was void for want of jurisdiction to render the same. It is averred in the petition that the hay levied upon was of the value of \$44, and that the "levy and sale were excessive." It is also charged in the petition "that said defendants acted in the premises in willful excess and abuse of their authority and of the process of the law, and fraudulently and maliciously and with oppression, and they conspired together in the premises to oppress this plaintiff, and defraud him, and to do damage aforesaid; that the defendants have in their possession the documents, papers, and judgment entry hereinbefore referred to, and the plaintiff is unable to set out copies thereof; wherefore the plaintiff demands judgment against the defendants for \$44, actual damages, and \$50, exemplary damages, and costs." The judgment on the verdict against T. H. Jackson was for \$46.52, and against C. B. Jackson for \$10.

The first question presented goes to the jurisdiction of this court to entertain the appeal. It is claimed by appellee that the amount in controversy, as shown by the pleadings, does not exceed \$100, and that, as the trial judge did not certify questions for the determination of this court, the appeal should be dismissed. We have set forth part of the petition to show that the plaintiff claimed exemplary damages under proper averments, and demanded \$44 actual damages, and \$50 exemplary damages. And the petition was afterwards amended by striking from the demand for judgment the sums of \$44 and \$50, and inserting in lieu thereof the sum of \$49 and \$150, respectively. So that when the case was tried the plaintiff demanded judgment for \$199. The petition was not at any time before or after verdict amended by reducing the amount claimed. The thought of counsel for appellee is that the amount in controversy did not exceed \$100 because the recovery of exemplary damages is not a matter of right, but that the amount thereof is left to the discretion of the jury. The defendants denied the averments of the petition charging them with malice and oppression, and the cause was submitted upon pleadings which authorize a judgment for plaintiff for more than \$100. It is true it is not the amount named in the prayer of a petition that determines the amount in controversy; that question is settled by the body or charging part of the pleading. *Cooper v. Dillon*, 56 Iowa, 368. If by the pleadings, and consistently therewith, a judgment might have been recovered for more than \$100, the case is appealable, with the certificate required by section 8173 of the Code. *Ormsby Bros. v. Nolan*, 69 Iowa, 180; *Madison v. Spitsnogle*, 58 Iowa, 369. There is no doubt that the defendants had the right to appeal the case.

2. It appears from the record that the defendant T. H. Jackson was a country justice of the peace in Lost Island township, Palo Alto county. S. J. Nolan formerly lived in that vicinity, and removed to the state of Montana. He left some verified accounts with said justice of the peace for collection, among which was an account against E. B. Thompson,

who resided in said township. He removed across the line of said township into Highland township, in the same county, in November, 1892. Shortly after his removal, Jackson issued an original notice on said account, and delivered it to a constable, and it was served on Thompson in Highland township. The justice made up his docket in proper form, and it shows affirmatively that the original notice was served in Highland township. Thompson made no appearance on the return day, and, as appears by the docket entry, the justice found that he was served with the notice "in the manner required by law in Highland township," and entered a judgment against him on the 10th day of December, 1892. Thompson gave no attention to the matter; and, on the 24th day of the same month, execution was issued, a levy was made, and the property was afterwards sold.

The principal question arises upon the claim that Jackson had no jurisdiction to enter the judgment, and, because of the want of jurisdiction, he and the special constable are liable in damages for executing the judgment. Counsel for appellants contend that the justice had jurisdiction, or, rather, that the question of jurisdiction cannot be raised in a collateral proceeding. We think this position is not well taken. The statute defining the territorial jurisdiction of justices of the peace is not as explicit as it might be made. Section 8507 of the Code provides, in a general way, that the jurisdiction is coextensive with the county unless specially restricted. Section 3509 is as follows: "Suits may in all cases be brought in the township where the plaintiff or defendant, or one of several defendants, resides." Section 3510 provides that suits "may also be brought in any other township of the same county if actual service on one or more of the defendants is made in such township." The plaintiff in the action was a nonresident of the county, and Thompson was not served with the original notice in the township where the suit was brought, and no jurisdiction was acquired by the service. *Auspach v. Ferguson*, 71 Iowa, 144. This question was determined by the justice, and he decided that he had jurisdiction of Thompson.

The district court instructed the jury upon this question as follows: "As to the defendant T. H. Jackson, you are told that, in the judgment of the court, it appears from the undisputed facts that the said Jackson had no jurisdiction of the person of the defendant in the action wherein P. J. Nolan was plaintiff, and the plaintiff, E. B. Thompson, was defendant; and that he had no jurisdiction to render the judgment of December 10, 1892, against the plaintiff in this case; and that in rendering the said judgment, and in issuing an execution thereon, and in delivering the same to the officer, with instruction to levy the same, the said defendant acted without warrant or authority of law, and is liable to the plaintiff herein for such damages as he has sustained. It appears from the uncontroverted testimony that, under the execution in question, a certain quantity of hay belonging to the plaintiff was levied upon and sold and

converted by the purchaser, and the measure of the plaintiff's recovery would be the fair, reasonable market value of the said hay, as it was at the time and place levied upon, with interest on such sum at six per cent per annum to date; and this will be the limit of plaintiff's recovery, unless you find that the defendant acted maliciously. As to the defendant T. H. Jackson, therefore, your verdict will be for the plaintiff, and against him, in such sum, at least, as will compensate the plaintiff for the loss of the hay levied upon under the rule hereinbefore given you; and, if you find that the defendant T. H. Jackson acted maliciously, then, in addition, you may allow the plaintiff exemplary damages in such amount as, in your best judgment, he ought to recover, not to exceed the amount claimed in the petition. As to the defendant C. B. Jackson, you are told that the execution delivered to him, and under which he made levy upon the property of the plaintiff, is regular in form, and upon its face appears to be a valid writ. The defendant C. B. Jackson was therefore justified in proceeding to execute the said writ, and in levying upon and selling the hay in controversy, unless he knew or had knowledge of such facts as would put him upon inquiry, which inquiry, if prosecuted with reasonable diligence, would have disclosed the fact that the judgment upon which the said execution was issued was void for want of jurisdiction of the justice rendering the same." Under these instructions, the jury were required to find a verdict against the defendant T. H. Jackson in some amount; and the right of recovery for actual damages is founded upon the theory that he is absolutely liable in damages even if he acted in good faith, believing that he had jurisdiction.

It is a well-established general rule that judges of superior courts and courts of general jurisdiction, when acting within the scope of their jurisdiction, are not liable, however erroneous or wrongful their acts may be. *Bradley v. Fisher*, 80 U. S. 18 Wall. 335, 20 L. ed. 646; *Cooley, Torts*, pp. 472-474; *Bishop, Non-Cont. L.* §§ 781-784. And, if a judge of such court should mistakenly decide that the service or writ by which the defendant is sought to be brought into court was such as to give jurisdiction of the defendant, there is no reason why he should not be protected from an action for damages, as well as when he decides any other question in a case erroneously. To illustrate: Suppose a judge of one of our district courts should have the question presented whether an original notice was properly served, and should decide that the service was good, and it should afterwards be adjudged that it was so defective that it was no service; under all the decisions and views of text-writers, an action for damages would not lie against him. We have probably discussed these fundamental rules sufficiently for the purpose of this case.

3. A distinction is sought to be made between the liability of a judge of a court of general jurisdiction and a justice of the peace. It is stated thus in *Cooley on Torts* (section 419): "It is universally conceded 27 L. R. A.

that, when inferior courts or judicial officers act without their jurisdiction, the law can give them no protection. The rule has been held otherwise, however, in cases of judges of superior courts where the error has consisted in exceeding their authority." In section 420 the reason of the distinction is stated thus: "Why the law should protect the one judge, and not the other, and why, if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error, are questions of which the following may be suggested as the solution: The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law which compels him to keep within his jurisdiction at his peril cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally, until an exception appears which is clearly beyond its intent. Its very nature is such as to confer upon the officer intrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority, when the fact was directly the contrary." We have set out this extended extract because it embodies all of the reasons given by the various courts which have promulgated the doctrine. It will be observed that the distinguished author, by his opening statement in the quotation, makes a most pertinent suggestion as to why the rule should have been adopted. After an exhaustive examination of the cases which make this distinction, we have to say that we do not think that they are founded upon grounds which can be sustained by any logical or reasonable argument. In the case of *Henke v. McCord*, 55 Iowa, 378, it was held that a justice of the peace who enforced an ordinance which is void for want of power in the city to enact it cannot be held liable therefor in a civil action. The general rule as stated

in *Cooley on Torts* is referred to, and the following language was used in reference thereto: "Whether a rule is just which affords immunity to the judge of a superior court, who, from his position and presumed learning, ought to be most free from error, whilst it holds an inferior judicial officer liable, we need not now determine." The case of *Brooks v. Mangan*, 86 Mich. 576, involves the same question as to the liability of a justice of the peace for enforcing a void city ordinance. The court said: "It is conceded that circuit judges cannot be held liable in a civil action for any judicial determination although such determination results in depriving the citizen temporarily of his liberty. Circuit judges are usually men of experience and education in the law, while justices of the peace seldom have any legal education or training. Upon what reason should the former be held exempt from liability for their errors, while the latter must be severely punished for honest errors of judgment? I can find no reason in such a distinction." In *Bishop, Non-Contract Law*, § 788, it is said: "Most of the cases exhibit an inclination to be specially severe on justices of the peace and other inferior magistrates, compelling them, in distinction from the rule as to the superior judges, to respond in damages whenever their judicial act was without jurisdiction. But, in reason, if judges properly expected to be the most learned can plead official exemption for their blunderings in the law, *a fortiori* those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages to their mistakes honestly made, after due carefulness." We might cite many other protests and criticisms by courts and text-writers condemning the rule, but it is not necessary to do so. The current of legal thought is that the distinction is unreasonable, unjust, illogical, and ought not to obtain.

It is to be remembered that this case is founded on the want of jurisdiction in the justice of the peace, and an excessive levy on property by the constable. There are averments in the petition in aggravation of the alleged wrong, as that the acts were malicious and without cause, and vindictive damages are claimed. The instructions we have set out above ignore all these considerations, and hold the justice of the peace liable because his judgment was void; and the jury were further instructed that the constable was liable if he knew or had knowledge of such facts as would put him on inquiry, which inquiry, if prosecuted with reasonable diligence, would have disclosed the fact that the judgment was void for want of jurisdiction, and that he was also liable if he made an excessive levy on property. It must be remembered that we are discussing the question of liability for judicial acts only. A justice of the peace is both a judicial and ministerial officer. For his wrongful ministerial acts he is liable the same as any other ministerial officer. This is the effect of the decisions in the cases of *Lanpher v. Dewell*, 56 Iowa, 153, and *Horns v. Pudil* (Iowa) 55 N. W. Rep. 485.

Some question is made as to whether any of the assignments of error apply to both of the defendants. We discover no ground for this objection. If, as we have found, the justice of the peace was not liable for rendering the judgment, the constable was also protected by the judgment for all his acts, unless for a willfully excessive levy and sale of property, with intent to oppress the defendant in execution. *Henke v. McCord* and *Brooks v. Mangan*, *supra*.

For the error in the instructions above discussed, the judgment of the District Court is reversed.

MICHIGAN SUPREME COURT.

TALBOT PAVING CO., *Piff. in Err.*,
v.

Charles A. GORMAN.

(.....Mich.....)

1. Receiving and using goods after opportunity to ascertain whether they conform to the description in the contract or not, constitutes an acceptance which cuts off all right to recover for defects in them, unless there was a warranty.
2. A contract for paving stone according to certain specifications does not imply any warranty.

(December 23, 1894.)

NOTE.—The above case is an interesting illustration of the law as to implied warranty in sales by description, as to which see *note* to *Murchie v. Cornell* (Mass.) 14 L. R. A. 492.

27 L. R. A.

ERROR to the Circuit Court for Wayne County, to review a judgment in favor of defendant in an action brought for compensation for the value of labor which plaintiff had been compelled to expend upon material furnished by defendant to plaintiff and for shortages, in which defendant set up a claim for unpaid purchase money upon which he recovered. *Affirmed*.

The facts sufficiently appear in the opinion.

Messrs. Brennan, Donnelly & Van De Mark for plaintiff in error.

Mr. Walter Barlow, for defendant in error:

Where a contract is made for an article of a particular quality, and it is sent in pursuance of such contract, where the party has an opportunity to examine the article, and where an opportunity is given, and the party takes the article that is delivered in pursu-

ance of the contract, it is accepted in fulfillment of the contract and he may not thereafter object to the fact that the article was not up to the particular quality which was contemplated.

Comstock v. Sanger, 51 Mich. 497; *Parker v. Palmer*, 4 Barn. & Ald. 887; *Chapman v. Morton*, 11 Mees. & W. 584; *Reed v. Randall*, 29 N. Y. 858, 86 Am. Dec. 805; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Barton v. Kane*, 17 Wis. 98, 84 Am. Dec. 728, 18 Wis. 262; *Watkins v. Paine*, 57 Ga. 50; *Roebbing's Sons Co. v. Winthrop Hematite Co.* 70 Mich. 846.

Where the defect in the goods is open and obvious on inspection, an acceptance of the goods is a bar to a suit for breach of the warranty.

Comstock v. Sanger, and *Gaylord Mfg. Co. v. Allen*, *supra*; *Parks v. Morris & Tool Co.* 54 N. Y. 590; *Day v. Pool*, 52 N. Y. 420, 11 Am. Rep. 719; *Gurney v. Atlantic & G. W. R. Co.* 59 N. Y. 858.

Hooker, J., delivered the opinion of the court:

The plaintiff contracted with the defendant for the delivery f. o. b., Detroit, of a quantity of Medina paving stone, the same to answer the requirements of Detroit specifications, of which defendant had a copy. The contract was made by correspondence. At request of defendant, the plaintiff advanced \$2,500 upon the contract, and afterwards made other payments, leaving a balance of \$1,838.47. The requisite amount of stone was shipped to Detroit, where it was unloaded, and used by the plaintiff upon its paving jobs, upon which it was at work. It is claimed upon its behalf that the stone did not conform to the specifications rendering it necessary to put work upon them, of which it seasonably informed the defendant, with the suggestion that he might send men to do such work if he chose, and that he did send men who did some such work. This action was brought by the purchaser, who claimed a balance his due of \$684.49 for such work done by it and for some broken stone. The defendant claimed the amount of \$1,838.47. The defendant recovered \$1,493, which probably included some interest. The court instructed the jury that: "There can be no question, with reference to this executory contract, that the acceptance by the Talbots in the first instance precluded their recouping, as we may say, for the character of the stone, because it did not come up to the Detroit specifications. In other words, they had the opportunity to examine the stone as it was delivered on the cars in this city, and, unless there was something further than that,—unless there was some other promise on the part of the defendant,—then the defendant would be entitled to a verdict for the amount claimed, viz., one thousand three hundred and thirty-eight dollars and forty-seven cents, with interest from November 5, 1892." The court instructed the jury further that if they should find that the defendant came to Detroit, and agreed with the plaintiff to pay for the work mentioned, there was a moral consideration that would

support the promise, and the amount should be allowed to the plaintiff.

The principal question in this case is whether the plaintiff, by receiving and using the stone, accepted them as a full compliance with the contract, or whether he had a right to take them, and recover his damages by way of recoupment or action growing out of their failure to equal the specifications. There are cases which hold that an acceptance of goods precludes such recovery, and there are others which hold the contrary. On principle, the distinguishing feature seems to be a warranty. If the sale is without a warranty, and affords an opportunity for ascertaining whether the goods conform to the description, the doctrine of *caveat emptor* applies, and an acceptance cuts off all rights of recovery. The vendee should decline to receive the goods, and sue for a breach of the contract. If, on the other hand, the sale is with a warranty, the vendee may lawfully receive the goods, and recover or recoup damages upon the warranty, which is held to be a collateral undertaking. It is believed that the principle is generally recognized. In addition to cases cited by counsel, see *Pierson v. Crooka*, 115 N. Y. 539. It seems to be in the present case; counsel for appellant insisting that an implied warranty exists, while, upon the other hand, it is said that the provision in relation to the specifications is a condition precedent merely. The contract was an executory contract, and may fairly be said to have contemplated the manufacture of the curbing from a specified stone, in accordance with specified dimensions and workmanship. If the agreement to furnish such stone of the specified dimensions was a warranty at all, it is difficult to understand why it was not an express warranty, and, if it was such, there can be no implied warranty that the stone should conform to the specifications. Indeed, this does not seem to be claimed. These things were a necessary part of the description of the commodity, and nothing more, unless the face of the contract justifies the conclusion that it was intended as a warranty. Neither party asserts this, and so we turn to the question of implied warranty. The exact point made by plaintiff appears to be that, inasmuch as the defendant knew what the specifications were, the law implied a warranty of fitness. A pertinent inquiry is, "A fitness for what?" Was it fitness for the paving jobs that the plaintiff had on hand? If this be claimed, it is a sufficient answer to say that the evidence fails to disclose that the defendant knew what jobs he had. Moreover, if the law is to imply that the stone was to be fit for the job, it must be, because defendant knew what the job actually required, and had undertaken to provide that, and his liability would be tested by that. But this was not so. He only knew what the specifications required. They might be right or wrong. He had no means of determining, and it was not left to defendant's judgment to make suitable stone for the jobs. He had simply undertaken to deliver certain stone of given dimensions. If he should deliver such he would be en-

titled to pay. If he did not, it could hardly be claimed that he could require acceptance on the ground that the stone was suitable, or better adapted, to the purpose of the plaintiff than as though made according to direction. Clearly, if plaintiff had furnished specifications, and had a right to insist on the stone being in conformity thereto, regardless of defendant's judgment, it could not sustain the proposition that the law should imply a warranty to make them conform to some other test; and manifestly it cannot be said that knowledge of the use intended should require defendant to vary from his contract as to dimensions. The conclusion appears to us irresistible that no such warranty as this can be implied. *Breen v. Moran*, 51 Minn. 525, is cited as a case "upon all fours" with this, but we infer from a perusal of that case that the contractor there undertook to furnish stone for a particular purpose which he understood. And in that case the court based the right to recover upon a warranty, and not the failure to perform a condition precedent; thus recognizing the rule of law stated. The distinction between conditions precedent and warranty is clearly recognized in the Minnesota cases cited in *Breen v. Moran*. See *Marwell v. Lee*, 84 Minn. 511; *Thompson v. Libby*, 85 Minn. 448.

An examination of the brief of the plaintiff's counsel will show that all of the cases cited are based on the existence of a warranty. In this respect they are in harmony with the cases cited by opposing counsel. See *Potter v. Lee*, 94 Mich. 140. We notice one or two that seem to rest upon facts lead-

ing to the inference that a warranty may have been found from a bare promise to deliver goods of a given description. Such is perhaps the rule in South Carolina, and possibly other states. But if such can be called a warranty, it is an express warranty, and in this case would be a warranty to deliver stone according to specification, and not a warranty to deliver those fit for the purpose that plaintiff had in hand, whatever that may have been. The correctness of these decisions may be questioned in view of the English and American cases in opposition to them. They seem to be based upon language of Mr. Starkie in his work on Evidence, and a discussion to be found in notes to the case of *Cuttler v. Powell* in 2 Smith, Lead. Cas. 1, substantially implying that when the vendee uses the goods to prevent loss or injury the rule should not apply. See *Cox v. Long*, 69 N. C. 7; 2 Smith, Lead. Cas. 8th Am. ed. p. 86. But as counsel has not discussed the point, or planted their case upon any such claim, we do not feel called upon or at liberty to discuss or decide the question.

It was claimed by the plaintiff that the defendant came to Detroit, and agreed to pay for the work in question. The court instructed the jury that plaintiff should recover if they found such to be the fact, which was as favorable a charge as the plaintiff was entitled to. This view of the case renders it unnecessary to discuss the question in relation to the admission of evidence of the meaning of the term "f. o. b." as the plaintiff was not injured by the evidence.

The judgment must be affirmed.

The other Justices concur.

TENNESSEE SUPREME COURT.

M. GRANT *et al.*, Appts.,
v.

LOOKOUT MOUNTAIN COMPANY *et al.*

(98 Tenn. 691.)

1. **Minority stockholders may compel the corporation to pay actual and necessary expenses**, including reasonable attorney's fees, of a successful suit by them to recover corporate property which had been wrongfully conveyed by the corporate officers according to the wishes of the majority stockholders.
2. **A lien for counsel fees attaches to the property recovered in a suit by minority stockholders to recover corporate property wrongfully conveyed by the corporate officers at the instance of the majority stockholders.**

(October 25, 1894.)

A PPEAL by complainants from a decree of the Chancery Court for Hamilton

County, denying a motion for reference by plaintiff to determine the counsel fees to be allowed in a proceeding which had been instituted by complainants to recover land which was alleged to have been wrongfully transferred by the corporation. *Reversed.*

The facts are stated in the opinion.

Messrs. Cooke, Frazier & Swaney for appellants.

Messrs. Watkins & Bogle, for appellees:

A claim for professional services, resting as it does upon contract, cannot be made a charge against persons other than the client by the simple fact that the services have inured to their benefit; and the attorneys of a minority of the stockholders of an insolvent corporation, who have filed a bill for injunction, receiver, and sale, charging fraud and confederacy on the part of the defendants, are not entitled to have their fees allowed out of the proceeds of sale made by the receiver appointed under the bill.

NOTE.—The above case touches a question of considerable importance on which there is a conflict of authority as shown by the citations in the brief and opinion. These include most if not all the cases similar to the present one in which is decided the question of allowing costs including counsel fees 27 L. R. A.

out of corporate funds to minority stockholders where they preserve property for the corporation generally and not merely their own shares therein.

For many cases on remedies of minority stockholders in general, see *Mack v. De Bardeleben Coal & Iron Co. (Ala.)* 9 L. R. A. 650, and *note*.

Hubbard v. Camperdown Mills, 25 S. C. 496; *Hand v. Savannah & C. R. Co.* 21 S. C. 162.

In partition suits the defendant may be more benefited than the complainant, yet this court has held that the defendant's property was not liable for complainant's fees.

See also *Keith v. Fitzhugh*, 15 Lea, 49.

The court cannot allow fees as a lien even against a client, for a mere preservation of an existing right.

Garner v. Garner, 1 Lea, 29.

Even though the fund preserved is a trust fund.

Stanford v. Andrews, 12 Heisk. 664; *Sharp v. Fields*, 5 Lea, 826; *Winchester v. Heiskell*, 16 Lea, 564.

Nothing whatever was brought in for administration—nothing was recovered, but the deeds and transfers were canceled, and the company placed just where it was before the suit was brought.

Cook, Stock & Stockholders, § 748. Also see *State v. Edgefield & K. R. Co.* 4 Baxt. 93.

The trend of decisions in this state is strongly against the allowance of solicitor's fees to be taxed on an adversary.

Williams v. Burg, 9 Lea, 455; *Keith v. Fitzhugh*, 15 Lea, 49.

McAlister, J., delivered the opinion of the court:

The single question presented for determination in this cause is whether complainants below are entitled to have counsel fees allowed and declared a lien on the property recovered. The proceedings in which the professional services were rendered were commenced by *M. Grant et al.*, minority stockholders in the Lookout Mountain Company, against said corporation and certain officers and directors therein, to enjoin a sale of all the real and personal property of the corporation to a Boston syndicate, to be paid for in bonds covering the property of defendant corporation, and two other corporations, known as the Lookout Mountain Hotel Company and the Chattanooga & Lookout Mountain Railroad Company. The bill charged—First, that the proposed sale of the entire property of the corporation was *ultra vires*; and, second, that the proposed transaction was fraudulent, in this: that the majority stockholders in the Lookout Mountain Land Company were also the owners of a majority of the stock in the hotel and railroad companies, that the last two corporations were insolvent, and that these majority stockholders were using their power to sacrifice the land company for the benefit of their interest in the two insolvent corporations. Answers were filed by all the defendants, and upon motion the injunction was dissolved. It appears that the original contract was not attempted to be carried out, but a second contract was made, by which a deed was executed of all the real estate to Baxter, and the personality sold him, in consideration of his promissory note for \$300,000, due in ten years. No security was given upon the note, and the bill charged that Baxter was insolvent. An amended and supplemental bill was then filed by said minority stockholders, to cancel the deed to Baxter and recover the

property, and to prevent the consolidation of said Lookout Mountain Land Company with the other two corporations. Answers were filed by the defendants, proof was taken, and a decree pronounced by Chancellor McConnell in favor of complainants, in accordance with the prayer of their bill. The deed was canceled, and the possession of all the realty and personalty described in the bills was decreed to be restored to the Lookout Mountain Company, and, if necessary, a writ of possession was ordered to issue. It should be remarked that the deed executed to Baxter conveyed real estate on Lookout Mountain valued at \$500,000, and also real-estate notes, belonging to the company, amounting to about \$50,000, and that all of this property was recovered by the principal decree, and restored to the corporation. The minority stockholders, who had thus conducted the litigation to a successful determination, thereupon moved the court for a reference to cover their necessary expenses and solicitors' fees incurred in the prosecution of the suit, and prayed that it be declared a lien upon the property recovered. The solicitors themselves also made a similar motion. The chancellor was of opinion that the litigation was a controversy between warring stockholders, and that complainants were not entitled to an allowance for counsel fees against the company, and the motions were accordingly refused. The defendants below abandoned their appeal on the main question, and there is now no controversy in respect to the correctness of the decree rendered in favor of complainants.

Complainants appealed from the decree of the chancellor, refusing a reference on the motion for an allowance of reasonable counsel fees. The first error assigned is that the chancellor erred in refusing said motion, for the reason that, no question having been made as to the necessity of the suit to recover and preserve the valuable real and personal property belonging to the Lookout Mountain Company, and the necessity for employing counsel to prosecute the cause, and the recovery having inured to the company, it was a proper case for the allowance of counsel fees. The second assignment is that the chancellor should have decreed that the counsel fees be paid out of the recovery, inasmuch as the suit was brought for the purpose of protecting the property in the first instance, and was prosecuted in good faith to a successful termination; that the recovery inured to the benefit of the corporation, the Lookout Mountain Company, and all of its property was restored to it, and no especial benefits reaped by the complainants.

The only answer to the claim of complainants for an allowance of their reasonable counsel fees, as we see it in this record, is that the judicial machinery by which these transactions were canceled, and the property restored to the corporation, was set in motion by minority stockholders. It may be conceded at the outset that if this is the case of an intestine war between discordant stockholders to promote their individual emolument, and not for the immediate benefit of the corporation, it would not be a proper case for the allowance of counsel fees. Ordinarily, the

directors and other officers of a corporation institute all suits in the name of the corporation, when it is necessary to protect its property rights, and it is only when the officers have breached their trust, and refused to take action, that suits can be instituted by minority stockholders. It is insisted that this suit was in reality the suit of the Lookout Mountain Company, and, the regular trustee having breached his official duty, that the minority stockholders had a right to put the machinery of the law in motion on behalf of the corporation, and employ counsel to represent it. The insistence is that the recovery in such a case as this belongs to the corporation, and the suit is in all respects the same as if the corporation had prosecuted it, except that the stockholders may commence such a case. 3 Pom. Eq. Jur. § 1095. The reasons adduced by Prof. Pomeroy for the rule allowing minority stockholders to institute such a suit appear to us conclusive on this question. We quote his language, as follows: "Although the corporation holds all the title, legal or equitable, to the corporate property, and is the immediate *cestui que trust* under the directors with respect to such property, and is theoretically the only proper party to sue for wrongful dealings with that property, yet courts of equity recognize the truth that the stockholders are ultimately the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation; and that the final object of suits by the corporation is to maintain the interests of the stockholders.

"While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if, in any such case, the corporation should refuse to bring suit, the courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule were admitted.

"To that end the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself: Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrongdoing directors, officers, and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party,—usually as codefendant.

"The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought. He is permitted to sue in this

manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation. It is maintained directly for the benefit of the corporation; and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff. The corporation is therefore an indispensably necessary party, not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class,—that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no direct interest. The defendant corporation alone has any direct interest. The plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice." 3 Pom. Eq. Jur. § 1095.

In the case at bar, if the corporation had instituted the suit, it would undoubtedly have been liable for the fees. We think it was such a suit as the corporation ought to have commenced; but the directors and officers having assumed an antagonistic position to the rights of the stockholders, and illegally conveyed away all the corporate property, threatening the entire destruction and dissolution of the corporation, the minority stockholders had a right to intervene, and, by bill in equity, protect the corporate interests. The company was an indispensable party to the suit, and for this reason the decree was not recovered for Grant and the other minority stockholders, but for the corporation. 2 Cook, Stock & Stockholders, 2d ed. § 748; *Hove v. Barney*, 45 Fed. Rep. 668; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 635; *Denderick v. Wilson*, 8 Baxt. 181.

In the case of *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48 *et seq.*, Baxter, Circuit Judge, allowed counsel fees and other necessary expenditures in the prosecution of a suit by minority stockholders, where they succeeded in having a lease of real estate forfeited, and recovered the property for the corporation. In that case the iron company owned an iron ore mine. In 1877 the company leased its mine to a partnership composed of four brothers known as the St. Clair Brothers. These brothers, after effecting the lease, organized the Winthrop Hematite Company to work the mine. In 1881, before the expiration of the lease, an effort was made, but without success, to renew the lease for the hematite company. Thereupon the St. Clair Brothers bought a majority of the stock of the iron company. They organized and manipulated the iron company so as to have a resolution passed by its directors, directing an 18-year lease to be made to the hematite company at lower rates and royalties than the old lease, then about to expire. This lease was accordingly executed. *Meeker and*

other stockholders in the iron company filed their bill to rescind the renewal lease to the hematite company, and for an account of rents and profits. The court rescinded the lease, and appointed a receiver to take charge of the mines for the iron company. It was held that as the suit was prosecuted for the benefit of all the parties interested, to protect and preserve a trust fund, they were entitled to be reimbursed from the fund for all proper expenditures made or liabilities incurred. A reference was ordered to ascertain what would be a proper allowance for counsel fees and other necessary expenditures. Upon the authority of this case, Spelling, in his treatise on Corporations, lays down the following rule viz.: "The owner of stock in a corporation who sues for himself and all other shareholders successfully, for a wrong done to the corporation, is entitled to be reimbursed his actual and necessary expenses, including attorney's fees, out of the corporate fund." 2 Spelling, Priv. Corp. § 643; Cook, Stock & Stockholders, 8d ed. § 748, p. 1158. An English case very much in point is that of *Kernaghan v. Williams*, L. R. 6 Eq. 228, opinion by Lord Romilly, M. R. See also *Internal Imp. Fund Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1137; *Contra R. & Bkg. Co. v. Pettus*, 118 U. S. 116, 28 L. ed. 915; *Moddaugh v. Wilson*, 181 U. S. 843, 88 L. ed. 186. We are therefore of opinion that this record shows that through the intervention of these minority stockholders the property of the corporation has been preserved,

protected, and indeed recovered, after it had been illegally conveyed away, and that, such recovery inuring to the benefit of the corporation, the suit was, to all intents and purposes, the suit of the corporation itself. The Lookout Mountain Company is therefore responsible for proper and reasonable counsel fees, incurred by complainants in the prosecution of the suit.

The remaining question is, whether these fees are liens upon the land conveyed by the deeds which complainants procured to be canceled. The record shows that this land had been conveyed away, and that by the decree it was restored to the company, and, if necessary, a writ of possession was ordered to issue. This was not the case merely of canceling a deed or removing a cloud, but of absolute recovery. The case comes within the rule laid down by this court, that counsel are entitled to a lien upon the fund recovered by their clients for reasonable fees, and this lien attaches to real estate, when the subject of litigation. *Perkins v. Perkins*, 9 Heisk. 95; *Keith v. Fitzhugh*, 15 Lea, 50; *Garner v. Garner*, 1 Lea, 29. We are therefore of opinion that these fees must be paid by the Lookout Mountain Company, and that they are liens on the land recovered.

The decree of the chancellor is reversed, and the case remanded for a reference in accordance with the motions submitted by complainants and their counsel in the court below.

MONTANA SUPREME COURT.

William BRAITHWAITE, *Appt.*,
v.

Phillip F. HARVEY, Admr., etc., of Joseph Leighton, Deceased, *Respnt.*

(.....Mont.....)

1. A judgment against an administrator in one state has no binding force or effect against another administrator of the same estate in another state.

NOTE.—*Judgments of another state or country rendered against an executor or administrator.*

I. The general rule.

II. In proceedings commenced in decedent's lifetime.

III. Reasons for the rule.

IV. The effect of the United States Constitution and act of congress.

V. How affected by state statute.

VI. As evidence of indebtedness.

VII. Exceptions to the general rule.

VIII. English decisions.

The subject of this note is confined to the questions of a judgment of another state rendered against an executor or administrator, considered purely as such, and does not include the question of the right to sue, which will form a separate note.

As to the conclusiveness of probate as *res adjudicata*, see note to *Sly v. Hunt* (Mass.) 21 L. R. A. 660.

I. The general rule.

The decisions of the courts upon the question of the right of an executor or administrator to defend an action, brought in a foreign jurisdiction, 37 L. R. A.

feet against another administrator of the same estate in another state.

2. A judgment against an administrator in one state need not be pleaded in a suit on the same account against another administrator in another state in order to show that the demand sued on had been given credit for the amount realized under the foreign judgment.

wherein letters testamentary or of administration have not been taken out, in his representative capacity, establish the doctrine that he has no power to defend, and that a judgment thus rendered against him in such capacity, being wholly unauthorized, cannot be enforced against the estate of the decedent, and that such executor or administrator must be sued in the courts of the state or country granting administration, to which alone he is accountable; his authority being limited, and when exceeded not binding upon the estate of the deceased.

This doctrine is established by the following cases: *Turner v. Blinn*, 54 Ark. 83; *Clark v. Holt*, 18 Ark. 257; *Greer v. Ferguson*, 56 Ark. 324; *Clopton v. Booker*, 27 Ark. 438; *Holcomb v. Phelps*, 16 Conn. 127; *Hobart v. Connecticut Turnp. Co.* 15 Conn. 145; *Riley v. Riley*, 8 Day, 74, 3 Am. Dec. 280; *Hedenberg v. Hedenberg*, 46 Conn. 30, 38 Am. Rep. 10; *Gordon v. Clarke*, 10 Fla. 179, decided under the Florida statutes; *Gordon v. Simonton*, 10 Fla. 193; *Sloan v. Sloan*, 21 Fla. 539; *Jackson v. Johnson*, 34 Ga. 511, 39 Am. Dec. 253; *Burt v. Duncan*, 36 Ga. 580; *Davis v. Smith*, 5 Ga. 274, 45 Am. Dec. 279, 285; *Judy v. Kelley*, 11 Ill. 213, 50 Am. Dec. 453; *McGar-*

3. An administrator will not become bound by the judgment by assisting in the defense of a suit against another administrator of the same estate in another state.
4. A statement in a letter that "whatever is due is ready whenever I can safely pay you or" a third person named is not a sufficient new promise to take the claim out of the statute of limitations.
5. Striking a paragraph from a complaint on motion is not reversible error, if it was not sufficient to authorize a recovery.

(March 19, 1894.)

A PPEAL by plaintiff from a judgment of the District Court for Custer County in an

action brought to recover the amount remaining due on a contract for the transportation of certain freight. *Affirmed.*

The facts are stated in the opinion.

Messrs. George W. Newton and Middleton & Light, for appellant:

The facts alleged in the complaint estopped the defendant from interposing the technical defense of pleading the statute of limitations. The defendant has had his day in court upon the claim in question. Neither the benefit of judgment on one side, nor the obligation on the other are limited exclusively to the parties and their privies.

Freem. Judgm. 3d ed. §§ 174, 175.

A party who actually appears and defends

vey v. Darnall, 10 L. R. A. 861, 134 Ill. 307, 32 Ill. App. 226; Slaughter v. Chenoweth, 7 Ind. 211; Naylor v. Moody, 2 Blackf. 247; Creswell v. Slack, 68 Iowa, 110; Curle v. Moor, 1 Dana, 445; Baker v. Smith, 8 Met. (Ky.) 264; Hopkins v. Towns, 4 B. Mon. 124, 39 Am. Dec. 497; Fletcher v. Sanders, 7 Dana, 345, 32 Am. Dec. 96; Burbank v. Payne, 17 La. Ann. 15, 37 Am. Dec. 513; Mason v. Nutt, 19 La. Ann. 41; Kraft v. Wickey, 4 Gill & J. 332, 23 Am. Dec. 599; Norton v. Palmer, 7 Cush. 523; Goodwin v. Jones, 3 Mass. 514, 3 Am. Dec. 173, decided under the Massachusetts Statutes of March 4, 1874, chapter 32, and denying the ability of a prospective or defend, the action being a personal one founded on a contract made by the deceased and therefore not within the terms of the statute; Ploquet v. Swan, 4 Mason, 460; Fay v. Haven, 3 Met. 109; Cutter v. Davenport, 1 Pick. 81, 11 Am. Dec. 149; Pond v. Makepeace, 2 Met. 114; Goodwin v. Jones, *supra*; Woodworth v. Spring, 4 Allen, 326; Low v. Bartlett, 8 Allen, 259; Dawes v. Boylston, 9 Mass. 337, 6 Am. Dec. 72; Stevens v. Gaylord, 11 Mass. 256; Davis v. Kestey, 8 Pick. 475; Campbell v. Sheldon, 13 Pick. 23; Selectmen of Boston v. Boylston, 2 Mass. 334; Morrill v. Morrill, 1 Allen, 123; Langdon v. Potter, 1 Mass. 313; Ela v. Edwards, 13 Allen, 43, 90 Am. Dec. 174; Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32; Dawes v. Head, 3 Pick. 123; McEwan v. Zimmer, 33 Mich. 765, 31 Am. Rep. 332; Commercial Bank of Kentucky v. Slater, 31 Minn. 173, 174; Winter v. Winter, 1 Walk. (Miss.) 311; Boyd v. Lambeth, 24 Miss. 433; Riley v. Mosely, 44 Miss. 37; Bentschler v. Jamison, 6 Mo. App. 126; Cabanne v. Skinker, 56 Mo. 337; Goodall v. Marshall, 11 N. H. 83, 35 Am. Dec. 472; Thompson v. Wilson, 2 N. H. 291; Taylor v. Barron, 35 N. H. 434, 435; Sabin v. Gilman, 1 N. H. 193; Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 106; Brownlee v. Lookwood, 20 N. J. Eq. 239; Durie v. Blauvelt, 49 N. J. L. 114; Hutton v. Hutton, 40 N. J. Eq. 461; Warren v. Eddy, 13 Abb. Pr. 23; Chapman v. Fish, 6 Hill, 555; Doolittle v. Lewis, 7 Johns. Ch. 45, 2 L. ed. 215, 11 Am. Dec. 339; Brown v. Brown, 4 Edw. Ch. 243, 6 L. ed. 309; Lyman v. Parsons, 23 Barb. 572; Field v. Gibson, 20 Hun, 274, 56 How. Pr. 223; Re Webb, 11 Hun, 123; Hopper v. Hopper, 12 L. R. A. 237, 125 N. Y. 400; Petersen v. Chemical Bank, 33 N. Y. 21, 33 Am. Dec. 238; Lyon v. Park, 111 N. Y. 350; Johnston v. Wallis, 2 L. R. A. 323, 113 N. Y. 230; Morrell v. Dickey, 1 Johns. Ch. 153, 1 L. ed. 97; Black v. Woodman, 5 Redf. 304; Williams v. Storrs, 6 Johns. Ch. 353, 2 L. ed. 143, 10 Am. Dec. 340; Brown v. Brown, 1 Barb. Ch. 139, 5 L. ed. 349; Vermilya v. Beatty, 6 Barb. 429; Metcalf v. Clark, 41 Barb. 45; Campbell v. Tousey, 7 Cow. 64; Smith v. Webb, 1 Barb. 230; Brookshire v. Dubose, 55 N. C. 276; Swearingen v. Morris, 14 Ohio St. 424; Morthland v. Wireman, 3 Penn. & W. 185, 33 Am. Dec. 71; Magraw v. Irwin, 37 Pa. 139; Bomberger v. Raymond, 2 Pa. Dist. Rep. 230; Moore v. Fields, 43 Pa. 467; Brodie v. Bickley, 2 Rawle, 431; Conover v. Chapman, 3 Bail. L. 43; Tillman v. Walkup, 7 S. C. 60; Sparks v. White, 37 L. R. A.

7 Humph. 36; White v. Archbill, 2 Sneed, 583; Patton v. Overton, 8 Humph. 123; Keaton v. Campbell, 2 Humph. 224; Lee v. George, 6 Humph. 61; George v. Lee, Id. 61; Allsup v. Allsup, 10 Yerg. 233; Beeler v. Dunn, 3 Head, 37, 75 Am. Dec. 751; Jones v. Jones, 15 Tex. 433, 65 Am. Dec. 174; Cherry v. Speight, 23 Tex. 533; Jones v. Boulware, 39 Tex. 367; Dodge v. Wetmore, Brayton (Vt.) 92; Fugate v. Moore, 36 Va. 1045; Pugh v. Jones, 6 Leigh, 239; Andrews v. Avory, 14 Gratt. 229, 73 Am. Dec. 355; Jarvis v. Barrett, 14 Wis. 591; Price v. Mace, 47 Wis. 23; Smith v. Grady, 68 Wis. 215; Warren Mfg. Co. v. Briggs & Co., 3 Pañes, C. C. 514; Caldwell v. Harding, 6 Blatchf. 503; Harvey v. Richards, 1 Massou. 331; United States v. Union Pac. R. Co., 11 Blatchf. 330; Fenwick v. Sears, 5 U. S. 1 Cranch, 259, 2 L. ed. 101; Mellus v. Thompson, 1 Cliff. 125, 131; Dixon v. Ramsay, 7 U. S. 3 Cranch, 319, 2 L. ed. 453; Newberry v. Robinson, 36 Fed. Rep. 341; Security Ins. Co. v. Taylor, 2 Biss. 443; Dent v. Ashley, Hemp. C. C. 54; Kerr v. Moon, 22 U. S. 9 Wheat. 553, 571, 6 L. ed. 162, 163; Peale v. Phipps, 55 U. S. 14 How. 393, 14 L. ed. 459; Aspen v. Nixon, 45 U. S. 4 How. 497, 11 L. ed. 1059; Stacy v. Thrasher, 47 U. S. 6 How. 44, 12 L. ed. 337; Hill v. Tucker, 54 U. S. 13 How. 453, 14 L. ed. 223; McLean v. Meek, 59 U. S. 13 How. 16, 15 L. ed. 277; Armstrong v. Lear, 25 U. S. 12 Wheat. 169, 6 L. ed. 539; Doe v. McFarland, 18 U. S. 9 Cranch, 151, 3 L. ed. 637; Vaughan v. Northup, 40 U. S. 15 Pet. 1, 10 L. ed. 639; Bischoff v. Wethered, 76 U. S. 9 Wall. 812, 19 L. ed. 329; United States v. Cox, 50 U. S. 16 How. 100, 15 L. ed. 239; Graeme v. Harris, 1 U. S. 1 Dall. 456, 1 L. ed. 221; Reynolds v. Stockton, 140 U. S. 254, 273, 35 L. ed. 464, 470.

So if a person dies intestate domiciled in a foreign country, indebted, administration being granted in such country and an ancillary grant being issued in the United States, the debt, although contracted in the states, must be enforced and referred for settlement to the jurisdiction granting the original administration. *Dawes v. Head*, 3 Pick. 123.

In the above case of *Magraw v. Irwin*, 37 Pa. 139, the court conceded that the above doctrine was in conflict with *Swearingen v. Pendleton*, 4 Serg. & R. 380, and *Evans v. Tatem*, 9 Serg. & R. 253, 11 Am. Dec. 717.

The prior case, *Swearingen v. Pendleton*, was one wherein an executor in Virginia was held liable at law for a *deceit* in Pennsylvania, and the latter, *Evans v. Tatem*, a case in which an action at law in Tennessee was held sustainable against an administrator of a decedent's estate in Pennsylvania.

Whatever orders, judgments, or decrees may be rendered by the courts of another state against an executor or administrator in respect of so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of

in the name of another is bound by the judgment.

Montgomery v. Vicery, 110 Ind. 211; *Valentine v. Mahoney*, 87 Cal. 389.

One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein.

Stoddard v. Thompson, 31 Iowa, 81; *Elliott v. Hayden*, 104 Mass. 180; *Train v. Gold*, 5 Pick. 830; *Jackson v. Griswold*, 4 Hill, 532; *Palmer v. Hayes*, 112 Ind. 289; *Burns v. Garcia*, 118 Ind. 320; *Roby v. Eggers*, 180 Ind. 415; *DeMetton v. DeMello*, 12 East, 234; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

primary administration permitted to be litigated in the courts of another state come within the rule of conclusiveness; but beyond this the proceedings of the courts of the state in which ancillary administration is held are not conclusive upon the administration in the courts of the state in which primary administration is due, and the rule is not changed even though a party whose estate is being administered by the courts of one state permits himself or itself to be made a party to the litigation in the other. *Raynolds v. Stockton*, *supra*.

Especially where the claimants are not creditors but stand in the character of legatees or distributees of the decedent. *Brown v. Brown*, 1 Barb. Ch. 189, 5 L. ed. 349.

And the fact that part of the assets have been recovered by a foreign administrator appointed in another state, upon promises made by the defendant, which judgment the defendant sought to enforce, does not vary the doctrine. *Brookshire v. Dubose*, 55 N. C. 278.

Any action which would go to subject the defendant's person or estate to just liability might be maintained, but where he is sued in his representative capacity only, no *devastavit* being charged so as to make him liable out of his own state, he cannot be made subject to such action. *Winter v. Winter*, 1 Walk. (Miss.) 211.

And if sued in his representative capacity the fact of his appearing and pleading will not alter the rule, his authority being limited, and when exceeded his actions have no binding effect. *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455.

He cannot therefore be sued elsewhere, even on a judgment rendered against him in the state where he was appointed. *Pond v. Makepeace*, 3 Met. 114; *Goodwin v. Jones*, 3 Mass. 514, 3 Am. Dec. 173; *Cutter v. Davenport*, 1 Pick. 317, 11 Am. Dec. 149.

It has been stated that even the provisions of the Florida attachment laws (section 5 of McClellan's Dig. p. 113), as to executors or administrators who have removed from or reside beyond the limits of the state, is no exception to the above rule. *Sloan v. Sloan*, 21 Fla. 589.

And the consent of an executor or administrator to be made a party to a suit in order to represent the deceased's interest, cannot, by virtue of his authority as such, give him any right to defend the suit. *Gordon v. Simonton*, 10 Fla. 195.

So he cannot be permitted to come in under a notice and defend a suit there. *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279, 285.

Neither can such administrator appear in a foreign jurisdiction in his official capacity, and consent to the issuing of execution against the decedent's estate upon a judgment obtained in the deceased's lifetime, and especially is this so when there is an administrator appointed within the jurisdiction refusing his assent and asking that the 37 L. R. A.

An administrator, wherever appointed, is in privity with the intestate, but there is ordinarily no privity in law or estate between administrators appointed in different sovereignties and a judgment against one is not a bar against the other.

Hill v. Tucker, 54 U. S. 13 How, 466, 467, 14 L. ed. 226.

That rule is wanting in comity and the courts have seemed to yield to it with reluctance. Like all general rules it admits of exceptions.

The case at bar is, clearly, not within the general rule.

The principle laid down in *Freeman on Judgments*, section 174, and the decisions cited therewith, *supra*, are controlling.

execution be set aside. *Bomberger v. Raymond*, 3 Pa. Dist. Rep. 280.

The appearance of an administrator to a suit brought against him in his representative capacity in a foreign jurisdiction, being wholly unauthorized, the judgment resulting therefrom will have no binding effect on the estate. *Judy v. Kelley*, *supra*.

The very silence of the Arkansas act as to any liability of the personal representative to be sued in the courts of the district for assets received would seem equivalent to a declaration that he was not to be subjected to any such liability. *Greer v. Ferguson*, 56 Ark. 324; *Vaughan v. Northrup*, 40 U. S. 15 Pet. 3, 10 L. ed. 641.

It not being a subject of presumption that when the statute was passed the legislature knew that a foreign executor or administrator had no power to sue or be sued in the courts, there being no reason therefor which would warrant the assumption that the legislature expressly changing the law in one particular intended thereby to change it in the other. *Greer v. Ferguson*, *supra*.

The appointment by a testatrix of different executors to manage her property in different jurisdictions is legal and such executors are only chargeable for property within their own jurisdiction. *Sherman v. Page*, 21 Hun, 66.

If a creditor wishes a suit to be brought in any foreign country in order to reach the effects of a deceased testator or intestate situated therein, letters of administration must be taken out in due form according to the local law, as the executor or administrator appointed in another country is not suable there and has no positive right to or authority over those assets, neither is he responsible therefor. *Baker v. Smith*, 3 Met. (Ky.) 284.

Until such act is done, it cannot be made the subject of a suit for a legacy in the courts of this country. *Armstrong v. Lear*, 25 U. S. 12 Wheat. 199, 6 L. ed. 589.

The fact that executors appointed in another state have the right to receive money deposited by the testator in another state and to apply it in due course of administration at the place where they were appointed, and the receipt of the money by such executors is not sufficient to authorize the filing of a bill against them in such state, on the ground that the cause or right of action arose within the jurisdiction. *Brown v. Brown*, 1 Barb. Ch. 189, 5 L. ed. 349.

The remedy in such a case, of the residuary legatee wishing to obtain the proceeds of such stocks and the accrued dividend, is to cite the executors to prove the will and to take out letters testamentary in the state, and in case of neglect to have an administrator with the will annexed appointed. *Ibid*.

He cannot therefore be liable as for a *devastavit* where he does not in pursuance of the notice of

The ancillary administration is subsidiary and supplemental to the domiciliary administration.

Schouler, Executors & Administrators, § 175.

After the payment of the home creditors, the residuum is to be transmitted to and distributed at the place of domicile, unless for some special reason, as to charge the security for faithful administration in the ancillary administration, equity would require its retention there.

Wilkins v. Ellett, 76 U. S. 9 Wall. 740, 19 L. ed. 586; *Porter v. Heydock*, 6 Vt. 374; *Jennison v. Hapgood*, 10 Pick. 77; *Parsons v. Lyman*, 20 N. Y. 103; *Stokely's Estate*, 19 Pa. 476.

suit respecting land in a foreign jurisdiction defend that suit, as he is not to be personally responsible for not doing that which the law of the land will not permit him to do. *Davis v. Smith*, 5 Ga. 226, 48 Am. Dec. 274.

The mere fact that one of several executors comes within the jurisdiction of the court upon other business does not make him amenable to the process of that court in his representative capacity. *Security Ins. Co. v. Taylor*, 2 Biss. 448.

Process by attachment will not lie against an absent executor or administrator. *Weyman v. Murdock*, Harp. L. 123; *Young v. Young*, 2 Hill. L. 425; *Regenstein v. Pearstein*, 30 S. C. 134; *Stevenson v. Dunlap*, 33 S. C. 350.

A judgment rendered in a foreign state against an administrator is not a ground of an action against the personal representatives of a decedent in Texas, in the absence of facts showing assets in the hands of the administrator and in his possession in the state. *Cherry v. Speight*, 28 Tex. 503.

The reasons assigned in the adjudged cases, to show that an executor or administrator cannot be made an original defendant in a state other than the one from which he derives his authority, apply with equal force against making him a respondent to a suit in equity, abated by the death of his testator or intestate. *Mellus v. Thompson*, 1 Cliff. 125, 131.

To a judgment rendered against an administrator appointed by a proper foreign court, sought to be enforced against a different administrator in another state, the latter may plead *res inter alios acta*, there being no privity between them as they derive their commissions from different political sovereignties. *Turley v. Dreyfus*, 33 La. Ann. 885.

And if a judgment be recovered against an administrator in a federal court, the real estate of the intestate cannot be sold contrary to the laws of the state upon that subject. *Yonley v. Lavelander*, 38 U. S. 21 Wall. 276, 22 L. ed. 536.

In *Field v. Gibson*, 20 Hun. 274, 56 How. Pr. 232, the action was denied against an executrix sued in her representative capacity to recover specific sums of money as therein due under a lease executed by the testator, founded either upon the lease itself or upon the use and occupation of the premises.

A *cestui que trust* appealing from an order decreed by the judge of probate allowing an account of the administration of the deceased's estate rendered by the surviving executor, was denied a right to charge such executor with rents and profits received by him from real estate in New Hampshire under a will which was also proved in the latter state. *Morrill v. Morrill*, 1 Allen, 132.

A foreign administrator has no right to the possession of land and is not liable in his fiduciary capacity for taking exclusive possession of and occupying the same, neither is he, individually or as administrator, liable for rents and profits which

An acknowledgment of indebtedness made by a debtor to a stranger with the intent that it shall be communicated to, and influence the creditor, is as effectual to defeat the statute of limitations as if made to the creditor or his authorized agent.

DeFreest v. Warner, 98 N. Y. 217, 50 Am. Rep. 637.

In this case the promise and acknowledgment were made in relation to the claim in question in this action. It was made to J. D. Biggert, who is alleged to have been acting on behalf of persons interested in the said claim, viz., the intervenors. Braithwaite was also interested in the claim; he could maintain the action in his own name for the benefit of himself and

accrue on account of such occupancy, and a judgment of the court against him therefor as administrator is erroneous. *Fairold v. Hagel*, 54 Ark. 61.

In *Pearson v. Darrington*, 32 Ala. 227, a decree was rendered by an orphan's court in Alabama against the domestic personal representatives of a foreign administrator in favor of the legatee of a foreign intestate; the court held it void for want of jurisdiction.

Where administration was granted and still pending in another state, it was held that, therefore, equity would not, even though it might entertain a bill *quia timeo* to prevent destruction of the assets within the jurisdiction, proceed to a final settlement, but remitted the parties to the proper tribunal. *Worthy v. Lyon*, 18 Ala. 784.

In *Turner v. Risor*, 54 Ark. 33, a creditors' judgment, recovered against the Louisiana administrator sought to be enforced against the property in the hands of the administrator in Arkansas, was barred, not being presented till two years after the time provided for the filing of claims, distribution having been made among the heirs the Louisiana judgment not binding the administrator in Arkansas.

An administrator appointed in Alabama and residing there cannot in equity be charged, at the instance of distributees in Georgia, with waste and mal-administration, the administrator being solvent with sufficient bond for the performance of the trust. *Jackson v. Johnson*, 34 Ga. 511, 39 Am. Dec. 263.

The laws of Georgia do not recognize foreign executors as such at all, or rather they did not prior to the Act of 1850. *Caruthers v. Corbin*, 39 Ga. 73.

In *Davis v. Estey*, 3 Pick. 475, original administration was granted in another state, and a commission in insolvency issued in that state, notice being given to the creditors but none to those in Massachusetts until after the claims of the commission, ancillary administration being granted in Massachusetts without such commission being issued; it was held in an action by a creditor against the latter administrator that the creditor was entitled to judgment for a *pro rata* dividend, but that execution could not issue thereon.

A foreign administrator is not accountable in the New Jersey courts for assets coming to his hands in such foreign jurisdiction, neither are his personal representatives nor his heir-at-law accountable, nor an administrator *de bonis non* of the original intestate's estate under letters granted in that jurisdiction. *Brownlee v. Lookwood*, 20 N. J. Eq. 239.

Where administration was granted at the place of the decedent's domicile subsidiary administration being granted in New York the latter relates exclusively to the assets within that jurisdiction and the jurisdiction of the New York courts is limited to such assets and does not extend to assets collected

the intervenors as the party with whom and in whose name the contract was made for the benefit of another, the trustee of an express trust.

Braithwaite v. Power, 1 N. Dak. 455; Code Civ. Proc. § 6.

Whether new promises related to the debt in question is for the jury, and no evidence is to be rejected on that issue.

Cook v. Martin, 29 Conn. 68; *Buckingham v. Smith*, 23 Conn. 453; *Shipley v. Shilling*, 66 Md. 558; *McCormick v. Brown*, 86 Cal. 180, 95 Am. Dec. 170; *Farrell v. Palmer*, 86 Cal. 187; *Schmidt v. Pfau*, 114 Ill. 494; *Porter v. Blam*, 25 Cal. 292, 85 Am. Dec. 182.

under the original letters and brought into the state of New York, and therefore the administrator appointed in Massachusetts cannot be made accountable in the New York courts for the assets collected under the Massachusetts grant and brought into the state, but he may be required to submit to an examination respecting the assets of the deceased in the state of New York, liable to be administered under the letters granted in that state. *Black v. Woodman*, 5 Redf. 364.

An administrator is not to be charged with assets of the intestate received by a co-administrator in another state of which he may have obtained possession. *Mothland v. Wireman*, 3 Penn. & W. 126, 23 Am. Dec. 71.

Where letters of administration were taken out in New York, the domicile of the deceased, the administrators subsequently removing to Pennsylvania without settling the account, and an account was afterwards stated against them in proceedings before the surrogate having jurisdiction (New York), a decree being made against them to hand over the estate in their hands to a new administrator who subsequently brought actions and recovered judgment for want of defense, it was held that the decree was conclusive against them and that the fund was not liable to administration in Pennsylvania under the Act of 1832, and therefore the act did not apply, the fund in controversy being the product of assets and the estate being administered in another jurisdiction. *Moore v. Fields*, 49 Pa. 467.

Where an administrator *cum testamento annexo* in Maryland received assets (stocks and bonds) of Pennsylvania companies, the same subsequently forming part of her share as legatee, upon her death an action against an administrator *de bonis non* appointed in the Maryland court who took no administration in Pennsylvania and was only temporarily within the state, was denied. *Magraw v. Irwin*, 87 Pa. 129.

In *Gray's App.*, 116 Pa. 366, a foreign debtor had made a voluntary payment of his debt to his foreign executor, and afterwards upon the executor's removing into the state of Pennsylvania, sought to charge him as a creditor under ancillary letters of administration. It was held that it was a good answer to such creditor's claim, that the executor had already accounted for it in the proper courts of the domicile of the deceased, and had been ordered to pay it as set forth in the decree.

And in *Smith v. Grady*, 68 Wis. 215, the question was whether the service of process in that state upon the defendant's testator gave the Ontario (Canada) court jurisdiction of his person so as to make valid its personal judgment against him based upon such service. The court held that a claim against the testator's estate being based upon a void judgment was properly disallowed, inasmuch as a personal judgment founded alone upon service of process in another state or foreign country was void. *McEwan v. Zimmer*, 38 Mich. 766, 21 Am. Rep. 37 L. R. A.

Messrs. Strevel & Porter, for respondent:

A judgment rendered in a foreign state or jurisdiction against an administrator in such foreign state or jurisdiction is utterly without validity or effect as a claim against an administrator of the estate of the same deceased person in this state. In such case there is neither privity of law nor estate.

Stacy v. Thrasher, 47 U. S. 6 How. 44, 12 L. ed. 337; *Aspden v. Nixon*, 45 U. S. 4 How. 467, 11 L. ed. 1059; *Freem. Judgm.* 3d ed. § 163; *McLean v. Meek*, 59 U. S. 18 How. 16, 15 L. ed. 277; *Brodie v. Bickley*, 2 Rawle, 431; *Story*, Conf. L. p. 739.

322; *Bischoff v. Wethered*, 76 U. S. 9 Wall. 312, 19 L. ed. 829; *Jarvis v. Barrett*, 14 Wis. 501, followed.

Where a person domiciled in England died leaving property in that country, and in the state of Pennsylvania, the executor taking out letters testamentary in both countries, in a suit in the former country against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended. *Aspden v. Nixon*, 45 U. S. 4 How. 467, 11 L. ed. 1059.

In *United States v. Cox*, 59 U. S. 18 How. 100, 15 L. ed. 290, it was held that a surety upon an administration bond could not be held liable for moneys in the hands of his principal as agent of other administrators.

II. In proceedings commenced in deceased's lifetime.

Whatever may be the rule, if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced and the estate is taken possession of by a tribunal of a state, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another state, either voluntarily or by submitting himself to the jurisdiction of the latter court. *Reynolds v. Stockton*, 140 U. S. 254, 273, 35 L. ed. 464, 470; *Jones v. Jones*, 15 Tex. 463, 65 Am. Dec. 174.

It makes no difference that service was obtained upon the intestate in his lifetime, for the reason that the suit is not prosecuted to judgment against him, but the judgment is recovered against an ancillary administrator who represents the intestate only as to the assets within the jurisdiction where the appointment is conferred; the effect of the personal service upon the intestate dying with him. *Jones v. Jones*, *supra*.

Such a judgment recovered against the administrator has no other or greater effect than if it had been recovered in a suit originally instituted against him. *Ibid*.

The fact that the executors appear and defend an action brought against the testator in his lifetime and appeal from the judgment, confers no jurisdiction as they cannot invest themselves with authority to represent the deceased's estate which is denied to them by the laws of the state, nor acquire such authority by merely assuming it. *Greer v. Ferguson*, 56 Ark. 324.

By death jurisdiction of his person ceases, and such action can only be proceeded to a judgment upon a substitution for him of some person lawfully empowered to defend. *Ibid*., following *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *McGarvey v. Darnall*, 33 Ill. App. 223; *Rentschler v. Jamison*, 6 Mo. App. 128.

The circuit court loses jurisdiction over the person of the deceased by his death, and acquires no jurisdiction over his administrator by any service had upon him while he was out of the territorial limits of the sovereignty under which the court

A judgment *in rem* binds only the property within the control of the court which rendered it; a judgment *in personam* binds only the parties to that judgment and those in privity with them.

Johnson v. Powers, 189 U. S. 156, 35 L. ed. 112; *Stacy v. Thrasher*, *supra*; *Woerner*, Administration, p. 380.

A new premise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due and show a present unqualified willingness and intention to pay it, at the time acted upon and acceded to by the creditor.

Wachter v. Albee, 80 Ill. 47.

acts, as the state of Illinois cannot by notice to a citizen of Missouri draw him to its forum *Rentschler v. Jamison*, *supra*, following *Warren Mfg. Co. v. Etna Ins. Co.* 2 Paine, C. C. 614.

Where the bank brought suit against the administrator, alleging that there were no assets in Pennsylvania where action had been commenced against deceased in his lifetime, seeking to enforce the judgment upon the Minnesota estate, the court held they could not recover, the remedy being controlled by the *lex fori*; section 50 of chapter 53 of the Minnesota General Statutes, providing that in no other cases, except such as are expressly provided for in that chapter, shall any action be commenced or prosecuted against an executor or administrator; the plaintiff not bringing himself within the cases provided. *Commercial Bank of Kentucky v. Slater*, 21 Minn. 174.

III. Reasons for the rule.

Where a receiver or administrator, or other custodian of an estate, is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state. *Reynolds v. Stockton*, 140 U. S. 254, 273, 35 L. ed. 464, 470.

The power of an executor is given by the will of the testator, but his right to appear in any court and the validity of his acts in that capacity depend wholly upon the probate of the will by the prerogative court, within the limits of that local jurisdiction in which he claims the power to act. *Riley v. Riley*, 3 Day, 74, 3 Am. Dec. 280.

The liability of an administrator to account is commensurate with the jurisdiction of him from whom they have received his authority, and that he can act officially only in things committed to him is a common principle of general jurisprudence. *Mothland v. Wireman*, 3 Penn. & W. 185, 33 Am. Dec. 71.

The right or the liability is purely representative and exists only by force of the official character, and so cannot pass beyond the jurisdiction which gave it. *Hopper v. Hopper*, 12 L. R. A. 237, 125 N. Y. 400; *Jonston v. Wallis*, 2 L. R. A. 828, 113 N. Y. 230.

His official character being derived from the letters granted to him in the court of the domicile of the testator. *Davis v. Smith*, 5 Ga. 274, 45 Am. Dec. 273.

And he has no power by his acts or omissions to affect the assets elsewhere. *Taylor v. Barron*, 35 N. H. 484.

His representation of the intestate being a qualified one, not extending beyond the assets of which the ordinary has jurisdiction. *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 12 L. ed. 337.

Inasmuch as naked admissions of a foreign administrator might, upon a foreign judgment, be competent to bind the assets, the law limits the power of an administrator to assets for the ad-

The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay.

McCormick v. Brown, 36 Cal. 185, 95 Am. Dec. 170; *Biddell v. Brizzolara*, 64 Cal. 355; *Bell v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 175.

Pemberton, Ch. J., delivered the opinion of the court:

Through this action plaintiff seeks to recover judgment against Phillip Harvey, administrator of Joseph Leighton, deceased, on demand for the payment of \$5,535.93, and interest, arising on a contract hereinafter referred to. The claim was presented to and

ministration of which he and his sureties are responsible. *Brodie v. Bickley*, 2 Rawle, 431.

He cannot invest himself with authority to represent the deceased's estate, which is denied to him by the laws of the state, nor acquire such authority by merely assuming it. *Greer v. Ferguson*, 54 Ark. 341.

He is accountable only to the authority from which he derives his power. *Low v. Bartlett*, 3 Allen, 259; *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 639; *Fay v. Haven*, 3 Met. 109; *Boyd v. Lambeth*, 24 Miss. 433; *Greer v. Ferguson*, *supra*; *Fletcher v. Sanders*, 7 Dana, 345, 33 Am. Dec. 93.

And where administration was granted. *Lyon v. Park*, 111 N. Y. 350; *Petersen v. Chemical Bank*, 32 N. Y. 21, 38 Am. Dec. 208; *Hedenberg v. Hedenberg*, 46 Conn. 30, 33 Am. Rep. 10.

So he is entitled to the benefits and protection of the laws which such local jurisdictions give. *United States v. Union Pac. R. Co.* 11 Blatchf. 390; *Kerr v. Moon*, 22 U. S. 9 Wheat. 555, 6 L. ed. 161; *Armstrong v. Lear*, 25 U. S. 12 Wheat. 169, 6 L. ed. 589; *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 639.

He has no official existence in any such other state, and possesses no power there which he can exercise in his official capacity. *Mellus v. Thompson*, 1 Cliff. 123, 131.

The letters conferring the office or trust only in the state where granted. *Riley v. Moseley*, 44 Miss. 37.

They must comply with the statutory provisions made by comity in such exterior jurisdiction. *Security Ins. Co. v. Taylor*, 2 Biss. 446.

The laws and courts of a state can only affect persons and things within their jurisdiction, and therefore both as to the administrator and the property confided to him a judgment in another state is *res inter alios acta*. *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 12 L. ed. 337; *Turley v. Dreyfus*, 53 La. Ann. 885.

And the tribunals of other states have no right to interfere with or control the application of those assets according to the *lex loci*. *Vaughan v. Northup*, *supra*; *Boyd v. Lambeth*, 24 Miss. 433; *Greer v. Ferguson*, 56 Ark. 341; *Fletcher v. Sanders*, 7 Dana, 345, 33 Am. Dec. 93.

It being an established principle of international law that assets shall be administered under the authority of the local sovereign. *Fletcher v. Sanders*, *supra*.

A judgment *in rem* binds only the property within the control of the court which renders it, and a judgment *in personam* binds only the parties to that judgment and those in privity with them. *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112.

No one can be bound by the verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possesses the power of making himself a party. *Dent v. Ashley*, Hemp. C. C. 54.

The parties against whom a judgment is sought

disallowed by the administrator of the decedent. This action was then brought in the district court thereon. The questions involved in this appeal arise on the action of the trial court in striking from the complaint portions thereof, on motion of defendant, and thereafter sustaining demurrer interposed to the complaint, on the ground that it shows no sufficient facts to constitute a cause of action, because it appears on the face thereof that the cause of action is barred by the statute of limitations. It appears that in 1880 a contract for the transportation of certain freight from Bismarck, Dak., via the Missouri river by boat to Ft. Buford, was made between plaintiff, as transporter, and

decedent and several others, as consignors. The contract was made and evidenced by the following letter: "Bismarck, D. T., Nov. 3d, 1880. Capt. Wm. Braithwaite, Steamer Eclipse—Dear Sir: On your accepting this proposition, will agree to give you one dollar and seventy-five cents (\$1.75) per one hundred pounds, from Bismarck to Ft. Buford, on freight up to the amount of one hundred tons, and on all over and above one hundred tons, one dollar and fifty cents (\$1.50) per one hundred pounds. Receipts to be equal to 100 tons to Buford. Freight to be paid on receipt of bills of lading by draft at ten days' sight on Jos. Leighton, St. Paul. Yours, etc., J. C. Barr, Agt. for

to be enforced, should be the same or be in privity with those against whom it was given. *Slauter v. Chenoweth*, 7 Ind. 211.

The assets in the hands of an administrator cannot be affected by a judgment to which he is a personal stranger. *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 13 L. ed. 337.

Foreign administrators are independent of each other, no connection exists between them, each represents the intestate by an authority coextensive only with the state in which his appointment is made. *McLean v. Meek*, 50 U. S. 18 How. 14, 15 L. ed. 277. *Stacy v. Thrasher*, *supra*, and *Hill v. Tucker*, 54 U. S. 13 How. 458, 14 L. ed. 223, followed.

An administrator appointed in one state, is as much a stranger to an administrator in another state in respect of their appointment, powers, estates, duties, and liabilities, as are strangers or administrators of the estates of different decedents. *McGarvey v. Darnall*, 10 L. R. A. 361, 134 Ill. 337, affirming 33 Ill. App. 223; *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *Rosenthal v. Benick*, 44 Ill. 202; *Ela v. Edwards*, 13 Allen, 43, 90 Am. Dec. 174; *Stacy v. Thrasher* and *McLean v. Meek*, *supra*.

They derive their authority from different sovereignties and over different property, the authority of each being paramount to the other, and each is accountable to the ordinary from whom he receives his authority. *Stacy v. Thrasher*, *supra*.

An administrator under a grant of administration in one state is not in privity with an administrator appointed in another state. *Ibid.*; *Judy v. Kelley*, *supra*; *Slauter v. Chenoweth*, 7 Ind. 211; *Turley v. Dreyfus*, 33 La. Ann. 383; *Ela v. Edwards*, *supra*; *Low v. Bartlett*, 3 Allen, 269; *Selectmen of Boston v. Boylston*, 2 Mass. 364; *Goodwin v. Jones*, 3 Mass. 514, 3 Am. Dec. 173; *Grout v. Chamberlin*, 4 Mass. 611; *Borden v. Borden*, 5 Mass. 77, 4 Am. Dec. 32; *Langdon v. Potter*, 11 Mass. 313; *Talmage v. Chapel*, 16 Mass. 71; *Fay v. Haven*, 3 Met. 108; *Wheelock v. Pierce*, 6 Cush. 238; *Norton v. Palmer*, 7 Cush. 523; *Taylor v. Barron*, 35 N. H. 484; *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Clark v. Clement*, 33 N. H. 563; *King v. Clarke*, 2 Hill, Eq. 611; *Brodie v. Bickley*, 2 Rawle, 431; *Aspden v. Nixon*, 45 U. S. 4 How. 467, 11 L. ed. 1056; *Stacy v. Thrasher* and *Hill v. Tucker*, *supra*; *Dent v. Ashley*, Hemp. C. C. 54.

They are, as to creditors, executors in privity bearing the same responsibilities as if there were only one executor. *Hill v. Tucker*, 54 U. S. 13 How. 458, 14 L. ed. 223.

The relations or privity between executors and their testators in Louisiana do not differ from those which exist at common law. *Ibid.*

If persons have claims against the decedent's estate which they wish to pursue in their own state against a foreign administrator, they must either take out letters of administration against the estate in their jurisdiction, or procure the executors to probate the will within the state before the 37 L. R. A.

courts of the state, either state or federal, can obtain jurisdiction in personam of the executors or of the property of the decedent. *Security Ins. Co. v. Taylor*, 2 Biss. 448; *Davis v. Smith*, 5 Ga. 235, 45 Am. Dec. 279; *Caldwell v. Harding*, 5 Blatchf. 501; *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 630; *Williams v. Storrs*, 6 Johns. Ch. 353, 3 L. ed. 143, 10 Am. Dec. 340; *Kerr v. Moon*, 23 U. S. 9 Wheat. 555, 6 L. ed. 161; *Peale v. Phipps*, 55 U. S. 14 How. 363, 14 L. ed. 459; *Mellus v. Thompson*, 1 Cliff. 123, 121; *Clark v. Holt*, 16 Ark. 259; *Brookshire v. Dubose*, 55 N. C. 276; *Allsup v. Allsup*, 10 Yerg. 233.

He must be clothed with authority derived from the law of such state. *Gordon v. Clarke*, 10 Fla. 179; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 2 L. ed. 215, 11 Am. Dec. 339; *Taylor v. Barron*, 35 N. H. 496; *Sabin v. Gilman*, 1 N. H. 193; *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Gordon v. Simonton*, 10 Fla. 190; *Morrell v. Dickey*, 1 Johns. Ch. 150, 1 L. ed. 97; *Smith v. Webb*, 1 Barb. 230; *Hobart v. Connecticut Turnp. Co.*, 15 Conn. 145; *Chapman v. Fish*, 6 Hill, 555; *Fenwick v. Sears*, 5 U. S. 1 Cranch, 259, 3 L. ed. 101; *Dixon v. Bameay*, 7 U. S. 3 Cranch, 312, 3 L. ed. 453; *Graeme v. Harris*, 1 U. S. 1 Dall. 453, 1 L. ed. 221; *Picquet v. Swan*, 4 Mason, 460; *Kerr v. Moon*, 23 U. S. 9 Wheat. 555, 6 L. ed. 162; *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 630; *Vermilya v. Beatty*, 6 Barb. 431; *Naylor v. Moody*, 2 Blackf. 247; *Cutter v. Davenport*, 1 Pick. 81, 11 Am. Dec. 149; *Dodge v. Wetmore*, Bray. (Vt.) 93; *Langdon v. Potter*, 11 Mass. 313.

The Mississippi courts do not recognize an administrator appointed in another state, and before the personal representative of a decedent will be considered as clothed with that character, he must be invested with it by the courts of that state according to the state law. *Elley v. Moseley*, 44 Miss. 37.

The rule is founded in the convenience and necessity of independent administrations in every state where there is property belonging to the estate and the independence of such administrations upon each other. *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Clark v. Clement*, 33 N. H. 563; *Stacy v. Thrasher*, 47 U. S. 6 How. 467, 11 L. ed. 1056.

Such administrations are by reason of such want of privity so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other or affect assets received by the latter in virtue of his own administration. *King v. Clarke*, 2 Hill, Eq. 611; *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 12 L. ed. 337; *Aspden v. Nixon*, 45 U. S. 4 How. 467, 11 L. ed. 1056; *Brodie v. Bickley*, 2 Rawle, 431.

The commission of an administrator extends only to assets of which the ordinary has jurisdiction, and it constitutes him a representative of the intestate no further than as regards the administration of those particular assets, the power being but co-extensive with that of him from whom it is de-

H. C. Akin, Jos. Leighton, & Benton Line." The freight mentioned was transported, as appears, with some delays and other incidents in relation to the fulfillment of the contract, which are not necessary to recite in this determination, and thereby the claim for the enforcement of which this suit is prosecuted accrued in said year. The complaint not only pleads this contract, but alleges that on the 12th day of November, 1887, this plaintiff instituted a suit in the district court of the then territory of Dakota, in and for the county of Burleigh, now in the state of North Dakota, against Joseph Leighton, and several other parties alleged to be interested with him, to recover the amount alleged to

be due plaintiff thereon. This suit was by attachment, and the property of Joseph Leighton in said territory at the time was seized thereunder. All the proceedings in said suit, and the history thereof, are set out in the complaint, or referred to as exhibits, and made part thereof, including the judgment of the district court, and the appeal therefrom to the supreme court of said territory, and the judgment of said supreme court. In these allegations the death of Joseph Leighton is shown to have occurred on the 2d day of September, 1888, at Custer county, in the state of Montana, where he resided. Joseph Leighton was never personally served with process in the Dakota suit.

rived, and it is consequently incompetent directly or indirectly to affect assets which belong to another jurisdiction. *Brodie v. Bickley, supra.*

He is only accountable to the legal tribunals of the state where appointed. *Fay v. Haven, 3 Met. 109; Vermilya v. Beatty, 6 Barb. 489; Sparks v. White, 7 Humph. 88; Brodie v. Bickley, supra.*

Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not *de jure* extend to other countries. *Vaughan v. Northup, 40 U. S. 15 Pet. 1, 10 L. ed. 689; Greer v. Ferguson, 56 Ark. 324; Taylor v. Barron, 35 N. H. 495; Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 108.*

Therefore his authority cannot be more extensive than that of the government from which he receives it. *Stacy v. Thrasher, supra.*

Whatever operation is allowed to it beyond the original territory of its grant, is a mere matter of comity which every nation is at liberty to yield to or withhold, according to its own policy and pleasure with reference to its institutions and the interests of its own citizens. *Greer v. Ferguson, 56 Ark. 324, following Vaughan v. Northup, 40 U. S. 15 Pet. 1, 10 L. ed. 640.*

And a judgment or order rendered against him is without force beyond its jurisdiction. *Tillman v. Walkup, 7 S. C. 60.*

The courts of the state of New York will not take notice of letters testamentary or of administration granted by a neighboring state, for the purpose of the persons appointed under them being made parties to actions in the state. *Campbell v. Touzey, 7 Cow. 64.*

If it were otherwise the assets might be drawn out of the estate to the great inconvenience of domestic creditors, and be distributed on very different terms according to the laws of another jurisdiction. *Doolittle v. Lewis, 7 Johns. Ch. 45, 3 L. ed. 215, 11 Am. Dec. 389; Morrell v. Dickey, 1 Johns. Ch. 153, 1 L. ed. 96; Riley v. Moseley, 44 Miss. 37.*

Letters of administration granted in a foreign state have no extraterritorial effect. *Barclift v. Treece, 77 Ala. 523; Naylor v. Moffatt, 29 Mo. 126; Fugate v. Moore, 86 Va. 1045.*

The court of the domicile of the testator or intestate is the forum to which the legatees under a will, or the parties entitled to the distribution of the estate of an intestate, are required to resort. *Hutton v. Hutton, 40 N. J. Eq. 461.*

The objection must be raised by way of defense and cannot be urged on motion to set aside the summons. *Metcalf v. Clark, 41 Barb. 43.*

IV. The effect of the United States Constitution and act of congress.

In *Stacy v. Thrasher, 47 U. S. 6 How. 44, 13 L. ed. 337*, it was contended that, although the general principles might apply to judgments against ad-

ministrators acting under powers received from states wholly foreign to each other, yet they could not apply to judgments against administrators in different states of the Union, by reason of the provision of the constitution ordaining that full faith and credit should be given in each state to the public acts, records, and judicial proceedings of every other state, and the court held that in order to give effect to the provision of the constitution the judgment must be against the same parties, who must be privies, and on the same subject-matter, where the proceeding is *in rem*, and that the parties to such judgments were not the same, neither were they privies and therefore not bound by the judgments.

A judgment may have the effect of a lien upon all the defendant's lands in the state where it is rendered, yet it cannot have that effect on lands in another state by virtue of the faith and credit given to it by the constitution, and by the Act of Congress of May 23, 1790, which prescribes the mode of authenticating records and defines their effect, and enacts that they shall have faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. *Stacy v. Thrasher, supra.*

The United States Constitution, in declaring that full faith and credit shall be given in each state to the judicial proceedings of the other states, means only that credit shall be given to them as against parties bound by the record or their privies, not as against strangers. *King v. Clarke, 2 Hill. Eq. 611.*

The provisions of the Constitution of the United States do not of themselves, in respect to a question of administration, give any greater force or efficacy to a judgment recovered in another state than belongs to a foreign judgment, and that for all purposes of administration such judgments are to be considered as foreign judgments. *Brown v. Public Administrator, 2 Bradf. 103.*

So the provisions of the United States Statutes at Large (1 Stat. at L. p. 79) enabling civil suits to be brought against persons in their individual capacity, either in the district whereof they are inhabitants, or in which they are found at the time of serving the writ, do not apply to executors and administrators, for the reason that their authority is limited to the territory of the state from which it is derived. *Mellus v. Thompson, 1 Cliff. 125, 131 following Fenwick v. Sears, 5 U. S. 1 Cranch, 259, 3 L. ed. 101; Dixon v. Ramsay, 7 U. S. 3 Cranch, 319, 2 L. ed. 453; Kerr v. Moon, 23 U. S. 9 Wheat. 556, 6 L. ed. 162; Aspden v. Nixon, 45 U. S. 4 How. 467, 11 L. ed. 1056; Stacy v. Thrasher, 47 U. S. 64 How. 44, 13 L. ed. 337; Hill v. Tucker, 54 U. S. 13 How. 458, 14 L. ed. 223.*

The Act of Congress of June, 1822, authorizing any person to whom letters testamentary or of administration are granted in the states of the United States to prosecute claims by suits in the courts of

After his death one Harvey Harris was appointed administrator of his estate in Dakota territory, and appeared as such, and defended such suit. It seems, too, that, pending said suit in Dakota, certain other parties were permitted to intervene therein. These matters are particularly set out in paragraphs 17, 19, 20, 21, 22, and 23 of the complaint, and are as follows:

"(17) That thereafter, on or about the 11th day of February, 1889, one Harvey Harris, of said Burleigh county, was duly appointed administrator of the estate of said Joseph Leighton, deceased, by the then probate court of said Burleigh county, territory of Dakota, the same being a court of general

jurisdiction in probate matters, and having and possessing jurisdiction for the appointment of the said Harris, as hereinbefore shown; that, after qualifying under said appointment, in accordance with the laws of the then territory of Dakota, now state of North Dakota, the said Harris entered upon the discharge of his duties as such administrator of the estate of said Joseph Leighton, deceased, in said Burleigh county and territory, and continued in the discharge of said duties as such administrator, until the said estate in said Burleigh county, then territory of Dakota, now state of North Dakota, was fully administered."

"(19) That thereafter, on or about the 15th

the District of Columbia, in the same manner as if the same had been granted to such persons by the proper authority in the District of Columbia, limits by its terms the power to institute suits and does not authorize suits against an executor or administrator. *Vaughan v. Northrup*, 40 U. S. 15 Pet. 1: 10 L. ed. 639.

The effect of the Act of Congress of June, 1822, was to make all debts due by persons in the district, not local assets for which the administrator was bound to account in the courts of the district, but general assets which he had full authority to receive and for which he was bound to account in the courts of the state from which he derived his letters of administration. *Ibid.* *Kane v. Paul*, 39 U. S. 14 Pet. 23, 10 L. ed. 341, followed.

But under the provisions of the Act of March 3, 1873, section 4 (17 U. S. Stat. at L. 509), which directs a suit in equity to be brought in the name of the United States against the Union Pacific Railroad Company and others, different rules for the conduct of the suit from those by which ordinary suits were governed, were created, the act providing that such writs might, *inter alia*, be served upon representatives of deceased parties, who were not residents of the district in which the suit was commenced, and whose testators were not such residents, the statute overruling the general principles governing such actions. *United States v. Union Pac. R. Co.* 11 Blatchf. 390.

V. How affected by state statute.

The general equity jurisdiction of the circuit court of the United States, to administer as between citizens of different states the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts. *Lawrence v. Nelson*, 142 U. S. 215, 36 L. ed. 120.

The Florida statute clothes foreign executors and administrators with authority to bring suits, but does not authorize them to defend suits, and therefore a foreign executor is not a proper party defendant. *Gordon v. Clarke*, 10 Fla. 179.

Under section 3418 of the Georgia Code a citizen of another state passing through that state might be sued in any county thereof in which he might happen to be at the time when sued, and it was held that the provisions of the law were general and included executors and administrators as well as all other persons, there being no exception in their favor and that therefore if they came within the jurisdiction of the court they were liable to be sued in any county. *Johnson v. Jackson*, 56 Ga. 336, 21 Am. Rep. 226.

Under the constitution and laws of Georgia, the superior courts of that state have jurisdiction of all civil cases, except as therein provided, and the sovereignty and jurisdiction of the state and the laws thereof, extend to all persons while within its 27 L. R. A.

limits, whether as citizens, denizens, or temporary sojourners, under section 21 of the Code. *Ibid.*

The above provisions are general and include executors and administrators as well as other persons, and there is no exception made in favor of executors and administrators or securities on their bonds, and if they come within the jurisdiction, they are suable in any county in the state in which they may happen to be at the time sued. *Ibid.*; *Mohrneyx v. Seymour*, 30 Ga. 440, 76 Am. Dec. 622.

In *Turner v. Linam*, 55 Ga. 233, the question was whether an administrator appointed in Alabama could be made a party to a suit brought in Georgia by his intestate, by filing in the office of the clerk of the superior court an exemplified copy of the order of his appointment from the probate court of Alabama. The court held that under section 2315 of the Code, a properly authenticated exemplification of the letters testamentary or of administration must be filed with the clerk of the court to become a part of the record, and that the terms of such section must be complied with before the executor or the administrator could be made a party to any action.

Section 43 of the Illinois statute in relation to the administration of estates, gives express authority to executors appointed in other states to prosecute suits in that state, to enforce claims of the estate of the deceased in the same manner as if letters testamentary had been granted them under the provisions of the laws of that state, and in *Decker v. Patton*, 20 Ill. App. 210, a mortgage redemption suit, the court stated that it saw no reason for holding that a foreign executor might not under the statute appear in court in any form in which it might become necessary for him to appear, in order to properly prosecute or enforce any of the claims of the estate of his testator, and that in such cases he might even appear as a defendant.

The Iowa Code provides, section 2368, that when administration has been granted in another state or country a foreign administrator may, upon his application and upon qualification as is required of other administrators, be appointed to administer upon the property of the deceased in that state, unless another administrator has been previously appointed in the state.

In *Creswell v. Slack*, 66 Iowa, 110, the court held that the above section simply provided for the appointment in that state of one who had been previously appointed to administer upon the property of the estate in a foreign jurisdiction, and did not apply to an administrator who was not appointed under that provision, and that his powers and relations were in no manner limited or defined by it and therefore such an action will not lie.

Under the Compiled Laws of Kansas, ed. 1879, § 2491, p. 436, an executor or administrator appointed in any other state or county may sue or be

day of March, 1889, by stipulation, a copy of which is hereto attached and referred to, and found upon page 46 of 'Exhibit one,' and by an order of said district court, in which said action was pending, a copy of which order is hereto attached and referred to, and found upon pages 47 and 48 of 'Exhibit one,' hereto attached, said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, came into said court, and entered his appearance in said action, and as a party defendant therein, and as the administrator and successor of the said Joseph Leighton, deceased, and that said action was revived and continued against said Harris, as said administrator, and thereafter

proceeded with said Harris as said administrator of said Joseph Leighton, deceased, as a party defendant.

(20) That on or about the 23d day of February, 1889, William Rea and Geo. F. Robinson, copartners as Robinson, Rea & Co., J. C. Kay and Woodruff McKnight, copartners as Kay, McKnight & Co., A. W. Cadman as A. W. Cadman & Co., and Joseph McC. Bigger, applied to said court to intervene in said action, and by said court were permitted so to do, and so did, and thereafter said action proceeded with said interveners as parties thereto; and that a copy of the order of said court permitting said intervention is hereto attached and re-

sued in any court in that state in the capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued. *Bella v. Holder*, 12 Fed. Rep. 608.

Upon the construction of the above statute, the court in *Cady v. Bard*, 21 Kan. 667, held that a nonresident might be sued in an action of contract for the recovery of money, and that service might be obtained by attachment and publication, and therefore a foreign executor or administrator could be sued in like manner.

Section 208, chapter 37, of the Kansas General Statutes, p. 472, provides that an executor or administrator duly appointed in any other state or territory may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued.

The Massachusetts Statute of March 4, 1784, chap. 32, providing that when an action is pending, the cause of which shall survive, if either party die, his executor or administrator may take upon himself the prosecution or defense of the action, does not apply to an administrator deriving his authority from the laws of another state where the action is a personal one founded on contract, and therefore a foreign executor or administrator is not entitled to prosecute or defend such an action. *Goodwin v. Jones*, 3 Mass. 514, 3 Am. Dec. 178.

In *Selectmen of Boston v. Boylston*, 2 Mass. 384, the question involved was the right to disclosure by a residuary legatee as against a foreign administrator and depended upon the construction to be placed upon the Massachusetts Act of June 20, 1785, which enacts that where a copy of any will proved and allowed in any probate court in any of the United States, or in any foreign state or kingdom, is directed to be filed and recorded in any probate court in this government pursuant to the act, the filing and recording thereof have the same force and effect as the filing and recording of any original will proved and allowed in the same probate court, and that the judge might proceed to take bonds from the executor or grant administration of the estate lying in this government with the will annexed, and settle the estate in the same way and manner as estates of testators whose wills have been duly proved before him, and the court held that the act only applied to effects received by such administrator in this country and not to effects received by him abroad, namely in England.

Under the Minnesota General Statutes of 1878, chap. 53, § 14, which enacts that all actions which are pending against a deceased person at the time of his death may, if the cause of action survive, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same, it was held that a judgment recovered against a foreign administrator was within the provisions of the act, the court stating the word "administrator" as general, and as applying to foreign as well as to

domestic administrators, and to any species of administrator expressly recognized by the Minnesota statutes as having authority to act as such in that state. *Brown v. Brown*, 35 Minn. 191.

So under such statutes a foreign administrator may be admitted to defend an action pending against his intestate. *Ibid*.

Section 1960 of the Mississippi Code declares that personal property situated in that state shall descend and be distributed according to the laws of that state, notwithstanding the foreign domicile of deceased in another state. *Carroll v. McPike*, 33 Miss. 500.

In Mississippi the administration of the effects of a deceased person, no matter where his domicile was, is independent of all other administrations and is to be conducted in all respects as if the decedent had been a citizen of the state when he died, debts being paid according to the assets, and creditors, no matter where residing nor where the debts were contracted, being entitled to prove their claims and proceed to enforce them and to share the assets. In this case deceased was a citizen of Missouri, letters of administration being granted in that state and in Mississippi, the administrator being sued by a Texas creditor. *Ibid*.

The New York statute gives the executor or the administrator with will annexed appointed in that state, alone the right to call upon a foreign executor to account for the wrong done to the estate. *Brown v. Brown*, 1 Barb. Ch. 189, 5 L. ed. 349.

Under the Tennessee Act of 1841, chapter 60, letters of administration might be granted upon a nonresident estate where the deceased had any property at the time of his death, at the time letters were applied for or where a suit was to be brought or defended relating to the estate, and it was held that under such act upon a judgment recovered in Kentucky against a defendant removing to Tennessee, the Tennessee courts had authority upon the death of the administrator to grant letters of administration on the deceased's estate which would vest the title in the judgment in the new administrator. *Swaney v. Scott*, 9 Humph. 327.

The Revised Statutes of Wisconsin, section 2387, provide in effect that a foreign executor or administrator duly appointed upon complying with the provisions of the statute as to filing his original appointment or a copy thereof duly authenticated, as required to make the same receivable in evidence in any county court in that state, may thereafter exercise any power over such estate, . . . prosecute and defend any action relating thereto, and have all the rights and remedies which an executor or administrator appointed in that state can have or exercise. *Murray v. Norwood*, 77 Wis. 405.

The construction placed upon the above section of the statute, in *Murray v. Norwood*, 77 Wis. 405, was that the manifest intent of the provision was to give the filing of a duly authenticated copy in the county court the same legal effect which would

ferred to, and found on pages 51 to 63 of 'Exhibit one,' hereto attached; and said interveners served and filed their complaint in intervention in said action, and a copy of the same is hereto attached, and referred to and found upon pages 58 to 60 of said 'Exhibit one,' hereto attached; and that thereafter, on or about the 22d day of March, 1889, the plaintiff served and filed his answer to said 'interveners' complaint, and a copy of the same is hereto attached, and referred to and made a part hereof, and found upon pages 61 to 66 of 'Exhibit one,' hereto attached.

"(21) That the defendant herein, as the general administrator of the estate of said Jos-

eph Leighton, deceased, immediately upon his appointment and qualification as such, as hereinbefore shown, was notified of the pendency of said action in said Burleigh county, territory of Dakota, now state of North Dakota, and of the plaintiff's claim therein, and thereafter said action proceeded to trial in said district court, and the defendant herein the same contested and defended in the name of said Harvey Harris as administrator, as hereinbefore shown, and therefore invoked the jurisdiction and determination of said court, employed counsel, produced evidence, and the issues of said contest and defense prosecuted to a final determination; and such proceedings were had

be given to the record of an original appointment made by a court of the state, the language being that a copy is to be filed in any county court of the state, and not specifying the county court of a county where there are assets or where the suit is to be brought.

When a proper copy of the original appointment is duly filed in any county court, the foreign administrator or executor is placed upon the same footing as a domestic administrator or executor, so far as capacity to sue in the Wisconsin courts is concerned, the statute giving him the right to prosecute and defend all actions relating to his estate. *Murray v. Norwood, supra.*

VI. As evidence of indebtedness.

In order that a judgment or decree may be set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive it must have been rendered by a court of competent jurisdiction upon the same subject-matter, between the parties, and for the same purpose. *Aspden v. Nixon, 45 U. S. 4 How. 467, 11 L. ed. 1059.*

The laws and courts of a state can only affect persons and things within their jurisdiction, and both as to the administrator and the property confined to him, and judgment in another state is *res inter alios acta* and is not even *prima facie* evidence of a debt. *Turner v. Risor, 54 Ark. 33, following Stacy v. Thrasher, 47 U. S. 6 How. 58, 13 L. ed. 343; McLean v. Meek, 50 U. S. 13 How. 13, 15 L. ed. 277; Low v. Bartlett, 8 Allen, 236; Eia v. Edwards, 13 Allen, 48, 50 Am. Dec. 174; Brodie v. Hickley, 3 Rawls, 431.*

A judgment against an administrator in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the deceased. *Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, following Aspden v. Nixon, supra; Stacy v. Thrasher, 47 U. S. 6 How. 44, 12 L. ed. 337; McLean v. Meek, and Low v. Bartlett, supra.*

It is not competent testimony to show a right of action against either a domiciliary or ancillary administrator in another state, or to affect assets in such other state. *McGarvey v. Darnall, 10 L. R. A. 361, 134 Ill. 367, affirming 32 Ill. App. 226; Judy v. Kelley, 11 Ill. 211, 50 Am. Dec. 455; Rosenthal v. Renick, 44 Ill. 308; Eia v. Edwards, Stacy v. Thrasher, and McLean v. Meek, supra; Price v. Mace, 47 Wis. 23.*

Such a judgment, which establishes a claim against the decedent's estate, is not even *prima facie* evidence of the validity of the claim as against land situated in another state. *McGarvey v. Darnall, supra.*

Neither is it evidence against the executor or heir-at-law sued in another state. *McGarvey v. Darnall, 33 Ill. App. 226, 37 L. R. A.*

It is no evidence of indebtedness against another administrator of the same decedent in another state, for the purpose of affecting assets received by the latter under his administration, the administrators not being regarded as in privity with each other. *Rosenthal v. Renick, 44 Ill. 308, 307.*

For the reason that the parties are different and there is no privity between them. *McGarvey v. Darnall, 33 Ill. App. 226.*

The evidence adduced in the foreign suit is incompetent to prove anything with regard to the assets within the jurisdiction of the courts here. *Aspden v. Nixon, 45 U. S. 4 How. 467, 11 L. ed. 1059.*

So the record of the allowance of a claim against an administrator in Pennsylvania is not admissible as evidence in an action to establish the same claim against an auxiliary administrator in Iowa. *Creswell v. Slack, 68 Iowa, 110.*

A judgment obtained in Illinois after the death of an intestate, against his administrator appointed in Missouri, is no evidence of indebtedness in an action against the estate of the deceased in Missouri. *Rentschler v. Jamison, 6 Mo. App. 135.*

So a judgment against an administrator in Georgia was held not to be evidence of indebtedness sufficient to enable one claiming as a creditor to sustain a bill in South Carolina to set aside the gifts of the intestate as fraudulent. *King v. Clarke, 3 Hill, Eq. 611.*

Two suits, one in a foreign country between the executor and the administrator of a deceased claimant, acting under letters obtained in that country, and the other in Pennsylvania between the executor and another administrator of the claimant acting under Pennsylvania letters, are suits between different parties, and therefore neither the decree nor the proceedings in the one state are evidence in the other; the property in controversy being different in the two suits. *Aspden v. Nixon, 45 U. S. 4 How. 467, 11 L. ed. 1059.*

The record of a recovery against an administrator in Tennessee was held to be no evidence against another administrator of the same intestate in Mississippi. *McLean v. Meek, 50 U. S. 13 How. 13, 15 L. ed. 277.*

Although a judgment obtained against an executor in one state is not conclusive upon an executor in another state, yet it may be admissible in evidence to show that the demand has been carried into judgment, and that the other executors were precluded by it from pleading prescription or the statute of limitations upon the original cause of action. *Hill v. Tucker, 54 U. S. 13 How. 433, 14 L. ed. 223, wherein executors were appointed in Virginia and also in Louisiana, and judgments were obtained against the Virginia executors by the creditors, and in default of payment, the Louisiana executors were sued.*

In *Goodall v. Tucker, 54 U. S. 13 How. 439, 14 L. ed. 227*, the court affirmed the principles laid down in the preceding case of *Hill v. Tucker, supra.*

in said action from time to time by the direction and co-operation of the defendant herein that on the 28th day of August, 1891, final judgment was rendered and entered in said action, in favor of the plaintiff and the said interveners, and against the defendant Harvey Harris, as administrator of the estate of said Joseph Leighton, deceased, to be paid in due course of administration, and the other defendants in said action except Akin, for the sum of seven thousand three hundred and thirty-three dollars and eighty-five cents, and for certain costs of said action, amounting to the sum of two hundred and fifty dollars and thirty-six cents, and that said judgment is in full force and unrevoked, and

that a copy thereof is hereto attached, and referred to as, and made a part of, this allegation; and found upon pages 73 to 89 of 'Exhibit one,' hereto attached.

"(22) That the said Joseph Leighton, in his lifetime, in writing, signed by him the said Joseph Leighton, and on the 21st day of July, 1888, acknowledged the said indebtedness under the said contract for the work, labor, and service performed under and by virtue of said contract of affreightment by this plaintiff, as aforesaid, which acknowledgment was in words and figures as follows, that is to say: 'Joseph Leighton, President. W. B. Jordan, Vice Pres't. E. B. Weirick Cashier. H. B. Wiley, Asst. Cash-

Where executors of the same testator appointed by the same will, resided in different states, each qualifying in the state of his residence, it was held to be a case of exception to the rule as was likewise the case of an administrator with the will annexed; in such cases the court stating that although the judgment was not admitted to be conclusive, it was recognized as a proper basis for an action, and was permitted to go in evidence because there was a privity of right and official identity between executors whose powers emanated from the testator, and the judgment against one in one state might be rightfully brought in administration into the other state by proper proceedings against the executor. *Turley v. Dreyfus*, 38 La. Ann. 885.

In *Creswell v. Slack*, 68 Iowa, 110, the question turned upon the admission of a transcript of the record of the proceedings of the orphan's court in Pennsylvania, for the purpose of establishing a claim allowed against the administrator by the Pennsylvania court as against an auxiliary administrator in Iowa, and the court held it was not evidence and had no binding effect, there being no privity between the administrators, there being no general principle of law under which it could be held that a judgment upon the one was binding upon the other.

VII. Exceptions to the general rule.

The general rule as above illustrated is, however, like others, the subject of exceptions, imposed according to the position of the executor or administrator, as in cases where he moves within the jurisdiction of the court having assets in his hands, and where from the peculiar facts and circumstances of the case it is equitable that relief should be granted, and also in cases where, as illustrated under head V., *supra*, express provision is made by state statutes.

An executor or administrator is chargeable with assets received by him in any part of the world, but it is a different question whether, if he administers in another state and by virtue of such administration receives assets, he can be charged with them in another state, and it has been stated that if the other state were the intestate's domicile the administrator was not accountable at law in South Carolina for assets received in such other state, and that if the domicile of the deceased were in South Carolina the administrator's liability in the courts of that state depended upon the inquiry, whether his taking possession of the surplus assets from another state as administrator of the domicile would be regarded by the laws of that state as a discharge of his administration there, the court stating that the questions were ones for investigation under a plea of *plene administravit*. *Conover v. Chapman*, 2 Bail. L. 436.

A foreign executor or administrator has been held liable to be sued, in cases where he comes 27 L. R. A.

into the state bringing with him assets of the estate, to the same extent as he would be liable according to the laws of the state in which he was appointed. Thus, a foreign executor is chargeable in Alabama for all the assets retained in his hands, or which he has disposed of out of the course of his administration, and the distributees have the right to pursue the assets of the estate as long as they continued to be held by the executor. *Williamson v. Branch Bank of Mobile*, 7 Ala. 903, 42 Am. Dec. 617.

He is liable to be sued by the distributees of the estate which he represents, and to be made liable to the same extent as he would be liable according to the laws of the state in which he was appointed, and not otherwise. *Johnson v. Jackson*, 56 Ga. 323, 21 Am. Rep. 235, wherein the action was brought against the principal and sureties on an administration bond, who had moved from Alabama, by the heirs and distributees of the deceased.

So in *Lake v. Hardee*, 57 Ga. 459, where a foreign executor moved and converted the property within the jurisdiction of the Georgia court.

In *Atchison v. Lindsey*, 6 R. Mon. 36, 43 Am. Dec. 153, the court stated that the mere fact that the defendant was appointed administrator in another state, and received there the assets for which he was charged, did not of itself exempt him from all liability to be sued in the tribunals of that state for a claim growing out of his having received the assets, to the proceeds of which the complainants or some of them were entitled, the question whether or not a decree should be rendered against him depending upon the facts disclosed in his answer and upon the proof.

Therefore an administrator or executor who is appointed or who qualifies in another state and there receives assets into his hands, may be sued in the tribunals of Kentucky by the person or persons entitled to such assets, if he has removed to and settled in that state. *Manion v. Titworth*, 18 B. Mon. 532, 597; *Dorsey v. Dorsey*, 5 J. J. Marsh. 230, 22 Am. Dec. 38; *Atchison v. Lindsey*, *supra*; *Baker v. Smith*, 3 Met. (Ky.) 264.

Not, however, as a fiduciary under the laws of such foreign state, but as an executor *de son tort*. *Hopkins v. Towns*, 4 B. Mon. 124, 39 Am. Dec. 497.

In the above-mentioned case, *Dorsey v. Dorsey*, *supra*, it was expressly decided that the distributees of the decedent might enforce distribution in Kentucky, the administrator appointed in Maryland having removed and settled in that state.

In *Davis v. Connelly*, 4 B. Mon. 136, it was held, in a case where a resident of Kentucky who was sued in Ohio and died leaving executors in the former state, who qualified and became parties to the action by order of the court made upon their application, that such executors could not afterwards when sued on the judgment in Kentucky deny that they were executors.

ter. 2,752. First National Bank. Capital, 50,000. Surplus and undivided profits, \$65,000. Miles City, Montana, 7—21, 1888. J. D. Biggert, Pittsburg—Dear Sir: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay either you or Braithwaite. Yours, truly, J. Leighton.' That the sum owing to plaintiff, as shown by the allegations hereinbefore contained, was the amount, and not otherwise, referred to in said letter; and the Braithwaite mentioned therein is this plaintiff, and none other; and the said J. D.

Biggert, claiming to act and acting on behalf of said interveners, was not a stranger to the transaction. That on divers and sundry times the said Joseph Leighton acknowledged said indebtedness, to wit, on the 27th day of June, 1888, on the 22d day of July, 1888, and on the 5th day of August, 1888, as will more fully appear from pages 74 to 77, of 'Exhibit one,' hereto annexed, and made a part hereof. That again, on the 1st day of August, 1888, the said Joseph Leighton, by one George T. Webster, his attorney, duly authorized so to do, acknowledged under oath the making of the contract of affreightment hereinbefore mentioned, and the voyage, as will more fully appear from pages

So where a bill was filed by the infant heirs and administrator of the domicile of the deceased, a citizen of Kentucky, against the defendant who administered on the deceased's estate in South Carolina, but was himself a resident of Kentucky, the bill alleging that he had received assets in South Carolina, the court held that because the defendant was appointed administrator in a foreign jurisdiction and received the assets there, it was no reason why he could not be held responsible to any extent and under any circumstances in the tribunals of that state for surplus remaining in his hands, and to which citizens of that state were according to all laws entitled, *Atchison v. Lindsey, supra*, relying upon the New York cases of *Campbell v. Tousey*, 7 Cow. 64, and the Pennsylvania cases of *Swearingen v. Pendleton*, 4 Serg. & R. 389; *Evans v. Tatem*, 9 Serg. & R. 262, 11 Am. Dec. 717; *Bryan v. McGee*, 2 Wash. C. C. 367, and the case of *Dorsey v. Dorsey*, 5 J. J. Marsh. 280, 22 Am. Dec. 38.

In *Turley v. Dreyfus*, 38 La. Ann. 885, action was brought to enforce a sister state judgment against a successful representative in Louisiana, the case coming up upon appeal from a judgment sustaining an exception of no cause of action and dismissing the suit, the plaintiff alleging that he was the transferee of a judgment obtained against the executor from the chancery court of Tennessee, who was also the executor of the will in Louisiana, and the judgment being appealed from by the executor in Tennessee where it was affirmed, contradictorily with an administrator *de bonis non*, appointed to replace the executor, who had died since appeal, the court held that such judgment might be made the subject of an action in the Louisiana courts as although such judgment was not conclusive yet it was a good cause of action.

So in New York he may be sued and held responsible for assets in his hands in that state. *Campbell v. Tousey*, 7 Cow. 67.

In the above case the defendant also collected effects in that state and was sued as executor *de omni tort*, and held chargeable for all assets not applied by him in due course of administration, either under his foreign appointment, or in that state, whether such effects were received abroad and brought into the state, or received in the state. *Campbell v. Tousey*, 7 Cow. 64.

Where, however, the executors were only casually in the state of New York their residence being in another state in which the will was proved and wherein the testator died, the principal part of the property being in such other state, some being within the jurisdiction of the courts of New York, no special circumstances being shown to grant the court jurisdiction a different doctrine was applied and relief denied. *Brown v. Brown*, 4 Edw. Ch. 346, 6 L. ed. 901.

The following cases maintain the same principles: *Re Webb*, 11 Hun, 126; no matter where they may have been received; *Gulick v. Gulick*, 21

How. Pr. 38, 38 Barb. 102; *Brown v. Brown*, 1 Barb. Ch. 189, 5 L. ed. 349; *Field v. Gibson*, 56 How. Pr. 233, 20 Hun, 278; *McNamara v. Dwyer*, 7 Paige, 239, 4 L. ed. 159, 32 Am. Dec. 637; *Ordonaux v. Helle*, 3 Sandf. Ch. 512, 513, 7 L. ed. 399, 941; *Lyman v. Parsons*, 26 Barb. 572; *Lawrence v. Lawrence*, 3 Barb. Ch. 71, 5 L. ed. 331; *Kohler v. Knapp*, 1 Bradf. 241; *Metcalf v. Clark*, 41 Barb. 48; *Lockwood v. Brantly*, 81 Hun, 157; *Smith v. Webb*, 1 Barb. 230; *Black v. Woodman*, 5 Redf. 304; *Marshall v. Bresler*, 1 How. Pr. N. S. 223; *Brown v. Knapp*, 17 Hun, 126; *Despard v. Churchhill*, 53 N. Y. 122; *Re Galloway*, 21 Wend. 32, 34 Am. Dec. 209; *Swearingen v. Pendleton*, 4 Serg. & R. 389; *Evans v. Tatem*, 9 Serg. & R. 262, 11 Am. Dec. 717; *Olney v. Angell*, 5 R. I. 193, 73 Am. Dec. 63; *Ray v. Simmons*, 11 R. I. 236, 23 Am. Rep. 447; *Gravelly v. Gravelly*, 25 S. C. 1, 40 Am. Rep. 478; *Patton v. Overton*, 8 Humph. 192; *Allsup v. Allsup*, 10 Yerg. 263; *Beeler v. Dunn*, 8 Head, 87, 75 Am. Dec. 761; *Fugate v. Moore*, 38 Va. 1045; *Powell v. Stratton*, 11 Gratt. 793; *Tunstall v. Polard*, 11 Leigh, 1; *Bryan v. McGee*, 2 Wash. C. C. 367.

In *Latine v. Clements*, 3 Kelley (Ga.) 426, it was held that an action would lie against an administrator *cum testamento annexo* in that state, upon a judgment obtained against an executor in Virginia.

The courts will assume jurisdiction over such administrator, coming within the jurisdiction of the court, with property of the deceased which he wrongfully applies to his own use. *Brown v. Brown*, 4 Edw. Ch. 346, 6 L. ed. 901, 1 Barb. Ch. 193, 5 L. ed. 352; *Black v. Woodman*, 5 Redf. 304; *Marshall v. Bresler*, 1 How. Pr. N. S. 223; *McNamara v. Dwyer*, 7 Paige, 239, 4 L. ed. 159, 32 Am. Dec. 627.

The mere fact, however, that a single item of personal property is situated within one of the chancery circuits in the state of New York will not give jurisdiction before the vice-chancellor. *Brown v. Brown*, 1 Barb. Ch. 189, 5 L. ed. 349.

Equity will assume jurisdiction over foreign executors and administrators at the instance of creditors, legatees, or next of kin in special cases, in order to prevent a failure of justice, or where a hopeless remedy might otherwise occur. *Brown v. Brown, supra*; *Shultz v. Pulver*, 3 Paige, 182, 3 L. ed. 107; *Price v. Brown*, 60 How. Pr. 514, 10 Abb. N. C. 70; *Ordonaux v. Helle*, 3 Sandf. Ch. 512, 7 L. ed. 941; *Field v. Gibson*, 20 Hun, 274, 56 How. Pr. 233; *Lockwood v. Brantly*, 81 Hun, 157; *Gulick v. Gulick*, 21 How. Pr. 38, 38 Barb. 102; *Montalvan v. Clover*, 33 Barb. 190; *McNamara v. Dwyer, supra*; *Slatter v. Carroll*, 2 Sandf. Ch. 584, 7 L. ed. 712; *Re Webb*, 11 Hun, 126; *Kohler v. Knapp*, 1 Bradf. 241; *Lawrence v. Lawrence*, 3 Barb. Ch. 71, 5 L. ed. 331; *Brown v. Knapp*, 17 Hun, 126; *Despard v. Churchhill*, 53 N. Y. 122; *Colbert v. Daniel*, 38 Ala. 314; *Julian v. Reynolds*, 8 Ala. 680; *Winter v. Winter*, 1 Walk. (Miss.) 211; *Mellius v. Thompson*, 1 Cliff. 128, 131; *Chappedelaine v. Dechenaux*, 8 U. S. 4 Cranch, 306, 3 L. ed.

42 to 45, of said 'Exhibit one,' hereto annexed, and made and referred to as a part hereof.

"(23) That there has been paid plaintiff, and applied in liquidation of a part of the amount so due plaintiff, as aforesaid, from the said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, the sum of four hundred and thirteen and 92-100 (418.92) dollars, said payment being made on the 31st day of March, 1892. That therefore, and the 28th day of November, 1891, there was paid on account of said indebtedness owing to this plaintiff the further sum of two thousand dollars (\$2,000.00), which sum was paid for and in behalf of the said

Joseph Leighton by Kelly & Jordan, who had heretofore obligated themselves to pay the same for and in behalf of the said Joseph Leighton. And that the estate of the said deceased in the territory of Dakota, now state of North Dakota, has been fully administered upon, settled, and exhausted, and said administrator's final accounts presented to the county court in and for said Burleigh county, state of North Dakota, the same having exclusive jurisdiction therein, and by said court passed, allowed, and approved, and said administrator discharged from said trust, and that a copy of the order of said county court passing, allowing, and approving said final account is hereto attached, and referred to

629; *Childress v. Emory*, 21 U. S. 8 Wheat. 609, 5 L. ed. 711; *Bryan v. McGee*, 2 Wash. C. C. 337; *Patton v. Overton*, 8 Humph. 123; *Allsup v. Allsup*, 10 Yerg. 233; *Beeler v. Dunn*, 3 Head, 37, 75 Am. Dec. 761.

In order to prevent waste and to secure its application to the payment of the testator's debts, and to prevent failure of justice. *Lockwood v. Brantly*, 31 Hun, 157; *Field v. Gibson*, 20 Hun, 278.

According to the laws of the state from which the executors derived their authority, *Ibid.*; *Field v. Gibson*, 56 How. Pr. 233, 20 Hun, 278; *Re Webb*, 11 Hun, 123; *McNamara v. Dwyer*, 7 Paige, 239, 4 L. ed. 139, 32 Am. Dec. 627.

And this is so in the case of fraud upon creditors or distributees of the estate. *Patton v. Overton* and *Allsup v. Allsup*, *supra*.

The executors in such cases not being sued for any liability of the deceased or his estate, but on their own liability for the wrongful use or misapplication of trust funds which have come to their hands, equity granting the relief without proceedings before the surrogate, the estate of the deceased having been all collected and the debts paid. *Montalvan v. Clover*, 32 Barb. 190.

Whether, upon a bill filed by the chancellor, the court will entertain a suit to call foreign executors or administrators to account where they are within the jurisdiction of the courts of the state where appointed and where the bill does not show that the complainant has not full and perfect remedy in those courts, has been held to be an open question. *Brown v. Brown*, *supra*.

The court in such cases proceeding upon the ground that where there is a right there ought to be a remedy, and that where no remedy to enforce the right exists elsewhere chancery will enforce the remedy whenever necessary to prevent a total failure of justice if the property in controversy, or the person of the wrongdoer, is within the jurisdiction and control of the court. *Ibid.*

The obligation of foreign executors to the devisees or legatees offers no better reason for immunity from the process and judgments of courts of equity in other countries for their wrongful dealings with the trust fund than the case of trustees appointed by deed in a foreign country for the abuse of their trust, there being no exclusive locality for the demand of justice under such circumstances. *Montalvan v. Clover*, *supra*.

A foreign executor may on bill in equity be held to disclose the nature of the funds invested by him in the purchase of property, and to declare the holding of the same as trustee and the uses and trusts upon which held. *Clifton v. Booker*, 37 Ark. 482.

In *McNamara v. Dwyer*, 7 Paige, 239, 4 L. ed. 139, 32 Am. Dec. 627, the applicant for a discharge from a writ of *ne exeat*, appointed administrator of the deceased's estate in Ireland, was held liable for 27 L. R. A.

the estate converted by him into money, brought into the state and misapplied, the complainant claiming a share thereof, even though no letters of administration had been granted him in the state, the court stating that if it were otherwise there would be a total failure of justice.

But in *Vermilya v. Beatty*, 6 Barb. 429, the court drew a distinction between it and that of *McNamara v. Dwyer*, *supra*, in which the chancellor regarded the administrator, having assets in his hands unadministered, as a trustee for the creditors and next of kin, and held that such foreign administrator could be compelled to account in the state, yet in the case then under consideration there was no allegation that the defendant had been in possession of assets within the state, but the court was of the opinion that even if it had been alleged that the defendant had such assets, she would not be liable at law.

So in *Lockwood v. Brantly*, 31 Hun, 155, a suit against the defendant a foreign administrator, and against the corporation, to recover twelve shares of stock and to have it transferred to the name of the true owner, was held to be one in which a court of equity would interfere to enforce a trust upon or enter claims in respect thereto, and as such was maintainable against a foreign executor and administrator, the court following the case of *Gulick v. Gulick*, 32 Barb. 102; *McNamara v. Dwyer*, *supra*; *Field v. Gibson*, 56 How. Pr. 233; *Brown v. Brown*, 1 Barb. Ch. 139, 5 L. ed. 349.

One of the next of kin may call a foreign executor to account in the state of New York for assets brought there by him without the appointment of the administrator in that state in such cases in order to institute proceedings in equity to prevent a failure of justice and not as a denial of the jurisdiction of the surrogate to grant administration. *Kohler v. Knapp*, 1 Bradf. 241; *Lawrence v. Lawrence*, 3 Barb. Ch. 71, 5 L. ed. 321; *Shultz v. Pulver*, 3 Paige, 182, 3 L. ed. 109.

Circuit courts have jurisdiction of suits by or against executors or administrators if they are citizens of different states, and in certain cases where they are the real parties in interest before the court, and have succeeded by virtue of their appointment to all the rights and interests of their testators or intestates, and in suits upon promissory notes given by the deceased in certain special cases, or in bills in equity for an account. *Mellus v. Thompson*, 1 Cliff. 125, 131; *Chappedelaine v. Dechenaux*, 8 U. S. 4 Cranch, 306, 2 L. ed. 629; *Childress v. Emory*, 21 U. S. 8 Wheat. 609, 5 L. ed. 711.

Such administrator may in equity be called upon by a creditor to account for the assets in another. *Winter v. Winter*, 1 Walk. (Miss.) 211, citing *Wharton's Digest*, p. 277.

A foreign administrator may be liable to be sued in Tennessee, not in the character of a foreign administrator, but in the distinct char-

and made a part hereof, and found on pages 92 to 94, of 'Exhibit one,' hereto attached."

On motion of the defendant the court struck these paragraphs from the complaint, on the ground that they were irrelevant and redundant. This action of the court is assigned as error. To determine this question it is necessary to determine the force and effect of a judgment against an administrator in one state against an administrator of the same estate in another state. In *Johnson v. Powers*, 139 U. S. 156, 85 L. ed. 112, this subject is thoroughly discussed, and the authorities are collected and cited. In this case *Mr. Justice Gray*, delivering the opinion of the court, says: "A judgment *in rem* binds

only the property within the control of the court which rendered it, and a judgment *in personam* binds only the parties to that judgment and those in privity with them. A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the deceased. *Aspdon v. Nizon*, 45 U. S. 4 How. 467, 11 L. ed. 1059; *Stacy v. Thrasher*, 47 U. S. 6 How. 44, 12 L. ed. 337; *McLean v. Meek*, 59 U. S. 18 How. 16, 15 L. ed. 277; *Lov v. Bartlett*, 8 Allen, 259. In *Stacy v. Thrasher*,

actor of trustee for the creditors or next of kin of the estate. *Patton v. Overton*, 8 Humph. 122; *Allsup v. Alsop*, 10 Yerg. 283.

Or for those entitled to the funds in his hands. *Beeler v. Dunn*, 3 Head, 87, 75 Am. Dec. 761.

The removal from state to state is the act of the administrator which the creditors of the intestate cannot prevent, and therefore should not be prejudiced by it, the assets being administered according to the law of the state within which the administration is granted, and justice requiring that the administrator should be liable to the amount of the assets which have come to his hands in whatever state he may be found, no matter whether he has made such state his permanent residence or not. *Evans v. Tatem*, 9 Serg. & R. 232, 11 Am. Dec. 717.

In *Olney v. Angell*, 5 B. I. 193, 73 Am. Dec. 62, a bill was brought by legatees under a will admitted to probate in Wisconsin, which had never been proved, filed or ordered to be recorded in Rhode Island, against the administrator appointed upon the estate of the deceased in Rhode Island for an account and administration of the estate, and for a decree that the same be paid over to the administrator in Wisconsin. It was held that the action would lie, the parties suing in their own right and not as representatives.

So where the bill alleged that the defendant had withdrawn a deposit upon a bank and had it in his possession and refused to pay, the answer alleging that the defendant was appointed administrator in Massachusetts and withdrew the deposit as such, but did not deny that he held it as administrator in Rhode Island, but averred that he held the same as part of the decedent's estate, the court held that the defendant could be held to account directly with the plaintiff, and presumed that he held it as administrator in that state. *Ray v. Simmons*, 11 B. I. 265, 23 Am. Rep. 447.

In *Powell v. Stratton*, 11 Gratt. 792, it was held that an administrator in Mississippi was accountable for his administration in Virginia.

In *Moss v. Rowland*, 8 Bush, 505, it was held that the right of a foreign executrix to defend was not extinguished by her subsequent marriage, the Kentucky statutes to that effect not applying to foreign representatives whose rights depended upon foreign laws.

A foreign executor has been held liable to a co-executor, in order to prevent a complete or partial failure of justice, in order to maintain and enforce the trust. *Price v. Brown*, 60 How. Pr. 514.

When a foreign executor or administrator is sued in the courts of Georgia, the nature and extent of his liability will depend upon the laws of the state or county where he derived his authority to administer the assets of the deceased. *Hoskins v. Sheddson*, 70 Ga. 523; *Johnson v. Jackson*, 50 Ga. 323, 21 Am. Rep. 225.

In *Hamilton v. Taylor*, 2 Cinn. Sup. Ct. Rep. 402, a 37 L. R. A.

foreign executrix had instituted proceedings in Ohio and answered accountably, and subsequently dismissed the petition, the action afterwards proceeding to trial without objection on her part. It was held she could not afterwards object to the jurisdiction of the court.

Where a resident in a foreign state owned lands in New York, and conveyed them to a trustee and resident of that state upon certain trusts, and to remit the balance to a party residing at the grantor's domicile, for the purpose of being applied by him in payment of the grantor's debts, the grantor dying insolvent owing debts at his domicile, and in other states, leaving executors who qualified at his domicile, the court held that the creditors might file a bill in the state of New York against the trustee and executors for the purpose of having the lands sold and an account taken, and the effects distributed, upon the ground that the trust fund being real estate situated within the state of New York and the trustee a resident of the state, the jurisdiction of the court was unquestionable, and that in such a case the foreign executor might be made a party and no objection could be raised upon the ground that the creditor instituting the proceedings resided at the testator's domicile. *Slatter v. Carroll*, 2 Sandf. Ch. 524, 7 L. ed. 712.

In *Brown v. Khapp*, 17 Hun, 160, the testator died domiciled in Connecticut leaving a legacy to the plaintiff, the executor, who at the time of the death of the testator and at the commencement of suit resided in New York. Under the will passing the accounts before the Connecticut court, it was held that the New York court had jurisdiction over such executor to enforce payment of interest on the legacy, the court relying upon *McNamara v. Dwyer*, 7 Paige, 230, 4 L. ed. 122, 23 Am. Dec. 627, and *Despard v. Churchill*, 53 N. Y. 122.

In *Gray v. Franks*, 36 Mich. 332, an executor of a foreign will of a mortgagee whose will was not probated in Michigan until after the action was brought to foreclose the mortgage, was held liable in the action, the will being probated in that state before the hearing.

Where foreign executors had become, by virtue of their appointment, owners of a judgment and contracted to assign it, it was held that they were suable on such a contract outside of the state of their appointment. *Johnston v. Wallis*, 3 L. R. A. 322, 112 N. Y. 230.

So where a testator who held the lands as trustee died in South Carolina, and the executor took out letters testamentary in that state and sold the lands which were in Kentucky, and then removed to Alabama, it was held he could be sued in Alabama for the proceeds of the lands, inasmuch as his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary. *Taylor v. Benham*, 46 U. S. 5 How. 223, 12 L. ed. 120.

In *Newark Sav. Inst. v. Jones*, 35 N. J. Eq. 400, the

in which a judgment, recovered in one state against an administrator appointed in that state, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the circuit court of the United States held within another state against an administrator there appointed of the same intestate, the reasons given by *Mr. Justice Grier* have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from: 'The administrator re-

ceives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction.' 47 U. S. 6 How. 53, 12 L. ed. 340. In answer-

deceased, a resident of New York, appeared to the bill and answered, and subsequently died in New York leaving a will which was proved by the executor in New York, an order being subsequently made for revival of the suit making the executors defendants who appeared by consent and demurred to the bill. It was held that they were estopped from denying their liability as foreign executors to suit in the New Jersey courts.

Where a decree of the circuit court of the United States decreed that an administrator appointed in another state and district, but who appeared and defended the suit, was indebted to the plaintiff in a certain amount payable out of the assets of the estate, and the administrator brought a bill of review under the provisions of the Arkansas statute (Digest 1874, § 4473), in the circuit court to reverse the decree, and such court dismissed the bill for want of equity, the decree for payment binds the administrator and the assets in the state of his appointment without further action against him or the estate, and the plaintiff's claim is not barred by the settlement of the estate and the discharge of the administrator in the state of his appointment, in proceedings of which plaintiffs had no notice and were not parties. *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130. But the court intimated that the result would have been otherwise had the administrator appealed from the judgment against him. *Ibid*.

So where an executor to a foreign action pleaded *nulla in record*, payment and surrender of principal and judgment was found against him as executor and he was sued on a transcript in Tennessee, and a verdict was given against him upon which the court refused to levy *de bonis propriis* to render it leviable *de bonis testatoris*, it was held that the executor, not having pleaded the proper plea in the original suit, was personally liable to the debt. *White v. Archbill*, 2 Sneed, 538.

In *Re Galloway*, 21 Wend. 32, 34 Am. Dec. 203, proceedings were taken by way of certiorari to review proceedings relative to the issuance of an attachment of the petitioner, as a nonresident debtor, the facts showing that letters of administration had been granted to him a resident of England upon the decedent's estate, who as a resident of the state was liable under covenants contained in the lease, the administrator having received the rents and profits of the premises and refused to perform the covenants, and it was held that under the statute the executor was liable upon the covenant.

It has been said that it could not be doubted that an executor or administrator as such had no power to sue *extra territorium*, nor was he subject to suit even where he brings with him into another country the assets received in the country from which he obtained his appointment. The latter part of the above principle, however, has been denied to be the law by *Campbell v. Tousey*, 7 Cow. 67, where it was held that he could be sued as executor *de son tort*. *Calhoun v. King*, 5 Ala. 623.

In the above case an administrator in Georgia removed into Alabama bringing the deceased's estate with him and the minor distributees and 27 L. R. A.

subsequently died in possession thereof. The court granted an injunction at the instance of the distributees to prevent the sale of the property for the payment of his debts, holding that a court of equity had the power to ascertain the amount in funds of such administrator and distributees, the parties all being within the jurisdiction, in order to prevent the destruction of the funds until a settlement could be made.

The court based its opinion in the above case upon the ground that it was not a suit against the administrator for a debt due from the estate but was an assertion of title to the property itself, which being found in the state gave the court jurisdiction, the court of chancery having power to interpose and prevent the destruction of the fund until the settlement could be made, the property and all parties being before the court.

An executor who records a foreign will is not liable for effects received, in the country where the testator had his domicile. *Probate Court v. Matthews*, 6 Vt. 203; *Hapgood v. Jennison*, 3 Vt. 294; *Selectmen of Boston v. Boylston*, 2 Mass. 381.

The above decision was based upon the theory that it would be unjust and impracticable to make one who administers upon property in that state account for property received in another state or kingdom under another and the principal administration where he has or is bound to account for all effects there received and where creditors and legatees should go if they desire to avail themselves of the funds there remaining. *Probate Court v. Matthews*, *supra*.

In *Cureton v. Mills*, 12 S. C. 418, 36 Am. Rep. 700, administrators in South Carolina were held to account for the proceeds of personal property which at the death of the intestate were found in the state of North Carolina, the administrators taking out letters in both states and having therefore a right to receive the personal property in North Carolina by virtue of their administration in that state; being in legal possession they transferred it to themselves as administrators in the state of South Carolina.

In *Gravely v. Gravely*, 35 S. C. 1, 60 Am. Rep. 473, the executor of a testator domiciled in England qualified both in the jurisdiction of the domicile and in the United States, and it was held that he was liable in a suit by a legatee in this country, there being sufficient assets within the jurisdiction.

In *White v. Archbill*, 2 Sneed, 538, an executor was sued in Tennessee upon a foreign judgment and pleaded full administration of the estate in Tennessee. It was held that such plea was not available where not pleaded in the original suit.

VIII. English decisions.

An administration granted in a foreign court will not be noticed in the English courts. *Tourton v. Flower*, 3 P. Wms. 389, in which a foreign administrator was sought to be charged in the English courts, wherein it was stated that the English courts could take no notice of what was done in the spiritual court beyond the seas, and sustained the demurrer to the bill.

ing the objection that to apply these principles to a judgment obtained in another state of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem*; and that the parties

to the judgments in question were not the same; neither were they privies, in blood, in law, or by estate; and proceeded as follows: 'An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority

There is no privity between the administrator in one country and one in another; they do not derive their authority from the same person and their powers are conferred by separate tribunals: a judgment only binding the estate or the assets in the hands of the administrator within the jurisdiction of the court. *Tighe v. Tighe*, 11 Ir. Eq. Rep. 208.

Where the widow of an intestate who died in India obtained letters of administration in that country, and remitted the proceeds of the effects in government bills to her agent in England, and a creditor of the intestate took out letters of administration in the latter country and brought action against the widow's agent for money in his hands, it was held that the India letters of administration prevailed over those granted in England, and the action would lie only at the suit of the widow. *Currie v. Broham*, 1 Dowl. & R. 85.

Where a bill in equity sought an account of the estate of an intestate who died in India, possessed of a personal representative there, it was held that a personal representative of the intestate constituted in England was a necessary party, although it did not appear that the intestate at the time of the decease had any assets in England; and further that it was not sufficient in order to avoid a demurrer for want of parties, that the personal representative constituted in England out of the jurisdiction was made a party, and that process was prayed against her when within the jurisdiction, even though the bill alleged that the India court was the proper court for granting administration, and that the administratrix constituted by it was the sole legal representative. *Tyler v. Bell*, 2 Myl. & C. 89.

In *Lowe v. Farlie*, 3 Madd. Ch. 101, p. 395, of first American ed., vol. 1, the testator appointed parties residing in two foreign countries as executors and the will was not proved in England: the executors in one of such foreign countries remitted a portion of the estate to their agent in England, and a creditor subsequently filed a bill against such agent praying an account and payment of the money to the accountant general for security. The court sustained a demurrer to the bill upon the ground that no personal representative of the testator was made a party.

Where a testator died abroad, appointing executors in such country, leaving the residue of his property to his mother in England, and the executors transmitted such residue to England, but the mother having died, the amount was paid to her executors who paid her debts which exceeded the amount to which she was entitled from such testator's estate, it was held in an action brought by a creditor of such testator to obtain payment of his debts, or to have the testator's estate administered, that the foreign executors were improperly made parties to the claim, and that the plaintiff could not have relief against them without having a personal representative of such testator constituted in England, a party to the suit. *Silver v. Stein*, 9 Eng. L. & Eq. 216, 21 L. J. Ch. N. S. 312, 1 Drew. 266.

In *Anderson v. Caunter*, 3 Myl. & K. 763, one of the executors of a testator who died in India

proved the will and took possession of the assets in India and upon his death his widow and executrix proved his will and became possessed of his assets in India and subsequently removed to England where she was made a party to an administration suit of the estate of the first testator. It was held that in such a suit the original testator's estate could not be administered, and that according to the course of the court the decree against his administratrix would not be for the general administration of the estate but would only require from her an account of what she had received and paid as executrix and would be charged with the balance.

Where probate was granted by the foreign court, and some personal property being situated in England the English court granted ancillary probate to the foreign executors, it was held that such court had no right to constitute itself a court of construction of the will, nor was it entitled to entertain an administration suit founded upon such a question, and that the foreign executors might properly except to the jurisdiction, but that the English court might have authority in jurisdiction to construe the will and administer the estate so far as funds and persons in that country were concerned, where the conduct of the parties showed a consent to the jurisdiction. *Enohin v. Wylie*, 10 H. L. Cas. 1, 8 Jur. N. S. 897, 31 L. J. Ch. 402, 10 Week. Rep. 497, 6 L. T. N. S. 233.

An administrator in Ireland with assets in his hands is liable to a suit in England. *Dowdale's Case*, 6 Coke, 44.

In *Bond v. Grayham*, 1 Hare, 432, 11 L. J. Ch. N. S. 306, 6 Jur. 620, it was held that to a suit in respect of an unadministered part of a testator's estate remitted from India and remaining in the hands of an executor residing in England, but who was only constituted executor of the testator in India, such executor and personal representative constituted in England, was a necessary party.

In *Atty-Gen. v. Hope*, 3 Clark & F. 84, 8 Bligh, N.S. 44, a testator died in England possessed of personal property there and in foreign funds, the executor taking out probate in that country and paying duty on the same property situated in England. It was held that he was not chargeable with the duty in respect to the property in the foreign funds, even though he afterwards obtained such property and administered it.

In *Preston v. Melville*, 3 Clark & F. 16, trustees and executors of a will of a testator domiciled in Scotland declined to act and his next of kin obtained letters of administration of his personal estate in England from the ecclesiastical court and subsequently consented to the appointment by the court of sessions in Scotland of other persons as trustees and executors in the place of those named in the will, with like powers as those conferred by the will. It was held, such trustees having commenced action in the court of sessions against the administratrix, calling for a transfer of the personal estate received under an administration, that the personal estate in England must be administered there by the administratrix under the letters of administration granted in that country.

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from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts.' 47 U. S. 6 How. 59, 60, 12 L. ed. 848. 'It is for those who assert this privity to show where-in it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, whosoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But that is not true, either in fact or in legal construction. The judgment is against the person of the administrator that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger.' 'The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot even be prima facie evidence of a debt, for, if it have any effect at all, it must be as a judgment, and operate by way of estoppel.' 47 U. S. 6 How. 60, 61, 12 L. ed. 848, 844. In *Low v. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: 'The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor.' 8 Allen, 266." If the judgment recovered in Dakota against the administrator there is of no binding force and effect, not even effectual as evidence of a debt, against the administrator in this state, as is held by the authority just quoted, then the pleading of the same, as is done in this case, could subserve no valuable purpose, and it cannot be properly contended that the court erred in striking the same, and all reference thereto, from the complaint. Appellant contends that it was necessary to plead such judgment and proceedings in order to show that the demand sued on here had been given credit for the amount realized under the Dakota judgment. We think this position untenable. Such credit could have been given in any suit on the demand in litigation. The appellant further contends that it was necessary to plead the Dakota judgment and proceedings, in order to show that the Montana ad-

ministrator, the defendant here, is estopped from disputing the claim sued on by reason of his having taken part, as alleged in paragraph 21, stricken from the complaint, in defending said Dakota suit in the name of Harvey Harris, administrator there. We think this contention cannot be maintained. There was no privity between these two administrators. This defendant had no authority to act or bind the estate outside of the jurisdiction of his own state or appointment. See *Johnson v. Powers*, *supra*, and authorities cited therein. 1 Woerner, Administration, § 160, p. 862.

Appellant contends that, whatever force and effect the court might give the Dakota judgment and proceedings set out in the complaint, and the action of the court therein, still he has a cause of action independent thereof, by reason of the alleged new promise in writing of Leighton in his lifetime, pleaded in paragraph 22 of the complaint, which was stricken out by the court. After striking out said parts of the complaint, the court sustained defendant's demurrer thereto on the ground that the demand sued on was barred by the statute of limitations. This action of the court is especially attacked and complained of by appellant, as he says the court, by striking out paragraph 22 of the complaint, left the same demurrable, as said paragraph set up, as claimed, a new promise, made by Leighton in his lifetime, to pay the demand sued on. While perhaps it would have been more appropriate to attack this particular paragraph of the complaint by demurrer, yet whether prejudicial error was committed by the court in its action we will consider later on. Does paragraph 22 of the complaint contain and plead such a new promise to pay the demand sued on as will relieve it from the bar of the statute of limitations? It is conceded that the demand is barred unless the bar is removed by the new promise of Leighton in his lifetime, set out in said paragraph 22. We will consider this question as if said paragraph had not been stricken from the complaint. The written new promise of Leighton relied on to remove the bar of the statute of limitations in this case is as follows: "Miles City, Montana, 7-21, 1888. J. D. Biggert, Pittsburg—Dear Sir: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay either you or Braithwaite. Yours, truly, J. Leighton." The appellant relies on two other written instruments, signed by said Leighton, to relieve this demand from the bar of said statute. These instruments are as follows: "Miles City, Montana, 6-27, 1888. John Biggert, Pittsburg—Dear Sir: Have just returned, and have been looking over matters. I am not satisfied about the settlement of Eclipse trip. Please write me your understanding of it. Also, if I settle with your folks, if they will see me clear of Braithwaite, etc. Write me at once. Yours, truly, J. Leighton." "Miles City, Montana, 7-22, 1888. J. D. Biggert, Pittsburg—Dear Sir: Yours, with check, at hand. I am

anxious to see Joe better. He came out, and figured up books, and saw that we had a loss for 1, and went away satisfied, but will write him after I get his letter. I cannot wait long for your decision. You know I am very ill, and I must have this thing off my hands. I want to help you in the matter, but the suit has got to be attended to. Very truly, J. Leighton. Why don't you write me about your letter of April, '82?" These last two instruments are referred to as exhibits, and the first instrument is set out in full in said paragraph 22. Said first written instrument or letter is especially relied on by appellant as constituting such an acknowledgment of the demand sued on, and new promise to pay the same, as to take the debt out of the operation of the statute of limitations. In *Bell v. Morrison*, 26 U. S. 1 Pet. 352, 7 L. ed. 176,—a case involving the doctrine under discussion,—*Mr. Justice Story* speaking for the court, says: "To remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal: and, if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay." In *Biddell v. Brizzolara*, 56 Cal., at page 883, the court says: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the promise or intention to pay; if the expressions be equivocal, vague, and undeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways,—we think they ought not to go to a jury as evidence of a new promise to revive the cause of action." *Mr. Justice Story* in *Bell v. Morrison*, 26 U. S. 1 Pet. 362, 7 L. ed. 179. "An acknowledgment of the debt to take the case out of the statute of limitations must be clear and unambiguous, and must recognize and be directed to the particular debt and amount to an unqualified admission that it is due and unpaid." 5 U. S. Gen. Dig. p. 1399, § 526, and authorities cited. In *McCormick v. Brown*, 36 Cal., at page 185, 95 Am. Dec. 170, the court says: "The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay."

We think it cannot be contended that the two writings claimed to be acknowledgments and new promises, dated respectively 6—27, 1888, and 7—23 1888, and set out above, contain any such acknowledgment of this debt, or new promise to pay the same, as to relieve the demand sued on from the bar of the statute. The instrument dated 7—22, 1888, says nothing about this demand. The instrument, dated 6—27, 1888, shows that Leighton is not satisfied about the settlement of the Eclipse trip, and asks, "If I [Leighton] settle with your folks, if they will see me clear of Braithwaite," etc. If there is any promise in this, is it not conditional? This cer-

tainly does not come within the requirements to take it out of the operation of the statute, even if the instruments were otherwise definite and certain, in which respect it seems fatally defective. Now, as to the first instrument or letter of Leighton, chiefly relied on to take this case out of the statute of limitations, this letter, like the others, is written to one J. D. Biggert, at Pittsburgh. In this letter Leighton seems to complain of Biggert's delay. He says if he does not hear soon, he will go to Bismarck, and tender amount due, as he does not want to be bothered any more. Then he says, "Whatever is due is ready, as it has been for seven years, whenever I can safely pay either you or Braithwaite." Now, what are the legitimate inferences to be drawn from this letter and the others? First, that Leighton was ill, and was anxious to settle this matter in his lifetime; second, that he was willing, and had been for seven years, to pay whatever was due from him, when the amount could be ascertained, and he should know to whom he could safely pay such amount. It is very evident that there was a dispute as to what was due, and to whom it was payable. Leighton seemed anxious to pay when these two important matters were settled. His willingness to pay was evidently conditioned upon the ascertainment of the amount due, and when he was made secure in paying either to the parties represented by Biggert or to Braithwaite. It does not appear that either of these things was ever done, or that Leighton's letter and terms therein stated were ever accepted or acted upon in any manner by plaintiff or any other party connected with this matter. These conditions should have been shown to have been performed by plaintiff before he seeks the benefit of the alleged new promise to pay. *Bell v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 175. This is not shown to have been done. But plaintiff seems to have disregarded the terms, conditions, and overtures of settlement contained in this alleged new promise, and now, after the death of Leighton, seeks to avail himself of the benefits thereof, as if such conditions were immaterial. We think no other conclusion can be fairly reached from a proper construction of all these letters and alleged new promises to pay. In none of these letters is there an unconditional, definite, certain, and unqualified acknowledgment of this demand, or any certain demand and promise to pay the same. We are therefore of the opinion that these written instruments or letters of Leighton are insufficient to remove the bar of the statute of limitations. So holding, we see no error in the action of the court in holding the complaint bad on demurrer, or that any substantial right of appellant was prejudiced by striking said paragraph 22 from the complaint, as, in our view, the complaint did not, in any event, state facts sufficient to authorize a recovery, for the reason that the demand sued on is barred by the statute of this state.

We are of the opinion that *the judgment should be affirmed*, and it is so ordered.

Harwood and De Witt, JJ., concur.

NEBRASKA SUPREME COURT.

George HODGKINSON and Wife, *Piffs. in Err.*,

v.

Sarah HODGKINSON.

(.....Neb.....)

*An action is maintainable by a wife for such damages as she has sustained from desertion by her husband, against any person or persons who have brought about such abandonment.

(January 3, 1896.)

ERROR to the District Court for Nemaha County, to review a judgment in favor of plaintiff in an action brought to recover damages because of defendants' inducing plaintiff's husband to abandon and refuse to support her. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. E. W. Thomas and G. W. Cornell, for plaintiffs in error:

The allegations are nothing more than conclusions of the pleader, and state no facts upon which issue can be taken. There is no charge that defendants did or said anything to induce their son to abandon plaintiff, or that they did anything to alienate the affections of plaintiff's husband. Facts and not conclusions, should be alleged.

Mehrhoff v. Mehrhoff, 26 Fed. Rep. 18; *Lynch v. Knight*, 9 H. L. Cas. 577; *Westlake v. Westlake*, 84 Ohio St. 621, 83 Am. Rep. 397.

A good deal of doubt has been expressed by the courts whether a wife can maintain an action in her own name for the alienation of the affections of her husband.

Warren v. Warren, 14 L. R. A. 545, 89 Mich. 123; *Duffies v. Duffies*, 8 L. R. A. 420, 76 Wis. 874; 1 Bishop, Mar. Div. & Sep. § 1358.

If, however, the action can be maintained at all, in analogy to the action which it is admitted may be brought by a husband under similar circumstances, it must be held that the gist of the action is the loss of the comfort and society of the husband occasioned by the wrongful acts of the defendants.

Weedon v. Timbrell, 5 T. R. 857; *Cross v. Grant*, 63 N. H. 675; *Bigaouette v. Paulet*, 184 Mass. 123, 45 Am. Rep. 307; *Maxwell, Pl. & Pr.* 241; 3 Chitty, Pl. 814.

The enticement of the husband must have been malicious. There is no allegation of that kind in the petition in the case at bar, nor does the proof show anything of the kind.

1 Bishop, Mar. Div. & Sep. § 1359; *Westlake v. Westlake*, *supra*.

The parents may in good faith advise their son as to his domestic affairs and even as to

*Headnote by RYAN, C.

NOTE.—The right of action by a wife for enticing away her husband or alienating his affections is steadily finding support. The above decision strengthens the weight of authority against the few contrary decisions. See, to same effect, *Clow v. Chapman* (Mo.) 26 L. R. A. 412; *Warren v. Warren* (Mich.) 14 L. R. A. 545; *Bennett v. Bennett* (N. Y.) 27 L. R. A.

living with his wife, without being liable to an action by the wife for alienation of her husband's affections.

Huling v. Huling, 32 Ill. App. 519. See also *Waldron v. Waldron*, 45 Fed. Rep. 315; 1 Bishop, Mar. Div. & Sep. § 1359; *Bassett v. Bassett*, 20 Ill. App. 543.

The acts of the defendants that caused the alleged injury must have been malicious.

Westlake v. Westlake, *supra*; *Lumley v. Gye*, 3 El. & Bl. 216, Bigelow, Lead. Cas. Torts, 306.

Messrs. Stull & Edwards for defendant in error.

RYAN, C., filed the following opinion: The defendant in error recovered a judgment against plaintiffs in error in the district court of Nemaha county. The cause of action, as stated, was that plaintiffs in error had induced their son, her husband, permanently to abandon the defendant in error, and to refuse to provide for her support. In connection with the history of desertion brought about as aforesaid, there were allegations that plaintiffs in error had manifested the most determined and persistent disapproval of becoming grandparents, and that to prevent this consummation they had induced their son to attempt to procure an abortion, which had failed; whereupon defendant in error was driven from the house of plaintiffs in error, wherein, with her husband, she had previously been living, and the separation and abandonment complained of immediately followed. The evidence was very conflicting, but there was sufficient to sustain the averments of the petition. There was presented in the motion for a new trial a claim that, because of surprise, plaintiffs in error should have been granted a new trial. In support of this claim there seems to have been used certain affidavits, but, as there was no identification or preservation of them by bill of exceptions, they cannot be considered. No other error arising during the trial was presented or argued. The giving, and refusal to give, instructions afford no ground of complaint, for exception was taken only to a refusal to give one instruction requested, and the substantial part of that instruction was embodied in others given by the court on its own motion. It is contended, however, that this action was not maintainable by the defendant in error, and that, in any event, a recovery could only be had for the loss of services of the husband. In respect to the proposition last mentioned, it perhaps would be a sufficient answer to point out that, at common law, the services and chattels of the husband did not belong to the wife, as did those of the latter to the former, for which reason the general rule contended for is not derivable from a mere analogy, as urged in argument.

6 L. R. A. 553, and note; *Haynes v. Nowlin* (Ind.) 14 L. R. A. 787; *Foot v. Card* (Conn.) 6 L. R. A. 829. On the other side, see *Doe v. Roe* (Me.) 8 L. R. A. 833; *Duffies v. Duffies* (Wis.) 8 L. R. A. 420. With the majority is also the Iowa case of *Price v. Price*,—L. R. A.—, in which a rehearing is pending.

The right of the wife to bring this action in her own name is conferred by section 8, chapter 53, Comp. Stat., which provides that "a woman may while married sue and be sued, in the same manner as if she were unmarried." In *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553, there is a satisfactory discussion of the rights of a married woman to recover for damages to herself under the rules of the common law, and as the same are affected by the provision of our statute above quoted; and it is shown that at the common law the right to the recovery of damages existed, but could only be had by the husband and wife jointly, on the theory that during coverture the independent claims of the wife to rights of action and chattels were suspended. By the statutory provision that a woman may, while married, sue as if she were single, this condition of suspension was terminated, and the wife could then sue, just as at common law she could sue in her own name when the suspension of her right in that respect had been ended by the death of her husband. See also in support of the right of a married woman to maintain an action of the nature of that at bar, the case of *Warren v. Warren*, 89 Mich. 123, 14 L. R. A. 545.

The judgment of the District Court is affirmed.

Ames C. PENNOCK, *Appt.*,
v.
COUNTY OF DOUGLAS *et al.*

(39 Neb. 238.)

"In the absence of an express statutory mandate, a city of the metropolitan class cannot be compelled, either at law or in equity, to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable. The rule *caveat emptor* applies with full force to such a purchaser.

(February 7, 1894.)

A PPEAL by plaintiff from a decree of the District Court for Douglas County in favor of defendants in a proceeding brought to compel defendants to refund certain money which plaintiff had paid to them for an illegal tax title. *Affirmed.*

The facts are stated in the opinion.

Mr. H. W. Pennock, for appellant:

A municipal corporation must deal equitably and fairly, the same as a private individual.

*Headnote by RAGAN, C.

NOTE.—The question of right to protection as a bona fide purchase at a judicial sale is treated in an extensive note to *Riley v. Martinelli* (Cal.) 21 L. R. A. 38.

As to the rights of a purchaser on a sale for an assessment or special tax for a public improvement, see also the North Dakota case of *Rudge v. Grand Forks*, 10 L. R. A. 165.

As to purchaser of tax titles, see also *Wilson v. Butler County* (Neb.) 4 L. R. A. 590, and note. 27 L. R. A.

Wilson v. Butler County, 4 L. R. A. 590, 36 Neb. 676.

The case is entirely different from that of a tax-payer who voluntarily pays a questionable tax without objection.

Ibid.

The doctrine of *caveat emptor* will never be extended so as to permit the party in whose aid it is invoked to take advantage of his own illegal acts, nor will it be applied against the purchaser who pays a valuable consideration for that which is represented to have an existence and to be valuable, but which turns out to have no existence in fact.

Clapp v. Pinegrove Twp. 12 L. R. A. 618, 188 Pa. 42; *Wilson v. Butler County*, *supra*.

A municipal corporation is liable upon implied as well as express contracts, and such contracts may be raised by implication of law or upon application of general principles of equity.

Dill. Mun. Corp. (1881) §§ 192, 460, 750, and cases there cited; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 306, 3 L. ed. 353; *Clark v. Saline County Comrs.* 9 Neb. 616; *Pimental v. San Francisco*, 21 Cal. 362; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. 41.

The city of Omaha sold to the plaintiff certain real estate upon which it represented that it had a lien or claim. If the city had been possessed of any lien or claim upon the lots in question, the appellant would have taken that interest.

Merriam v. Hemple, 17 Neb. 345; *Reed v. Merriam*, 15 Neb. 325; *Pettit v. Black*, 8 Neb. 52.

But having no interest or lien the appellant took nothing, and the sale was without consideration on the part of the city. Is there any legal or equitable reason why the city of Omaha should not be liable for its illegal sale.

There is a line of decisions, represented by *Taylor v. People*, 66 Ill. 323, which lays down the rule of *caveat emptor* as binding and in full force, yet which draws a distinction between void sales where nothing is taken by the purchaser and those cases where the purchaser obtains that for which he bid, be it never so small or worthless.

The better authority allows recovery in cases similar to the one here presented.

Norton v. Rock County Supra. 18 Wis. 612; *Van Cott v. Milwaukee County Supra.* 18 Wis. 247; *Chapman v. Brooklyn*, 40 N. Y. 872; *Phillips v. Hudson*, 81 N. J. L. 153; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Corbin v. Davenport*, 9 Iowa, 240; *Chapman v. Douglas County Comrs.* 107 U. S. 348, 27 L. ed. 378; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Bredin v. Cranberry Twp.* 87 Pa. 441; *Gause v. Clarksville*, 5 Dill. 181.

If defendant's contention is true wherever a municipal corporation acts through its public officers and public records (and it never can act any other way), whoever deals with it as a corporation must do so with his eyes open. If he has paid his money into a city treasury as an investor, either in the purchase of its bonds, its real estate, its personal property, its taxes and special assess-

ments, or in any other manner, he is held not to be an innocent purchaser, because all the acts of the municipality are public. If he takes nothing by his purchase and loses his money he cannot complain.

If such were the rule of law, municipal corporations could and would become the greatest swindling institutions in the land. A capitalist who has invested \$10,000 in city bonds which are void for want of jurisdiction to issue (which of course would be disclosed by the records) would simply lose his money unless he could show that some fraud had been practiced upon him or that there was a mistake of fact in the transaction. But the courts have not allowed such an impractical theory to work injustice to practical business men.

Paul v. Kenosha, and *Louisiana v. Wood*, *supra*; *Lexington v. Butler*, 81 U. S. 14 Wall. 262, 20 L. ed. 809; *Marsh v. Fulton County Suprs.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *Mittenberger v. Cooke*, 85 U. S. 18 Wall. 421, 21 L. ed. 864; *Gause v. Clarksville*, *supra*; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Shirk v. Pulaski County*, 4 Dill. 208.

Real estate transfers:

Clark v. Saline County Comrs. 9 Neb. 516; *Piemental v. San Francisco*, 21 Cal. 851, "city slip" cases; *Chapman v. Douglas County Comrs.*, *supra*.

Sales of real estate for taxes:

Clapp v. Pinegrove Twp. 12 L. R. A. 618, 188 Pa. 42; *Phillips v. Hudson, Taylor v. People*, *Norton v. Rock County Suprs.* and *Van Cott v. Milwaukee County Suprs.*, *supra*; *Hutchinson v. Sheboygan County Suprs.* 26 Wis. 402; *Barden v. Columbia County Suprs.* 33 Wis. 445, 14 Am. Rep. 762; *Chapman v. Brooklyn*, and *Corbin v. Davenport*, *supra*.

In *Budge v. Grand Forks*, 10 L. R. A. 165, 1 N. Dak. 809, the property was subject to levy for the improvement, there being jurisdiction in the city to lay the tax and it was only through irregularity in the proceeding that the tax title was defeated.

In the case at bar, the real estate levied upon was not subject to the assessment. Every act which the city did take or could have taken in the premises was absolutely null and void.

The exact distinction which we claim was made in *Phillips v. Hudson*, *supra*, and *State v. Piscataway Twp.* 43 N. J. L. 358.

In Wisconsin a broader rule has been adopted, declaring that under the common law, where the title of a purchaser at a tax sale fails, he shall have a return of his money either from the party who justly owes the tax or from the municipality which illegally levied the same.

Norton v. Rock County Suprs. 18 Wis. 612; *Barden v. Columbia County Suprs.* 33 Wis. 451.

If the judgment or execution is void for want of jurisdiction over the person or property, the purchaser at such a void sale is always protected either by a reformation of proceedings or by return of his money in the hands of the officer.

Freeman, *Void Judicial Sales* (1890) § 49, and cases cited.

The doctrine of voluntary payment is not applicable to a purchaser at tax sale.
37 L. R. A.

Brisbane v. Dacres, 5 Taunt. 147.

The rule *casual emptor* does not apply to the case at bar for the reasons: First, that the contract of sale was executory; second, that the subject-matter of the sale never in fact existed.

On petition for rehearing.

Can any good reason be assigned why a supplemental levy should not be made upon the abutting property justly liable for this improvement? Can any good reason be assigned why appellant should not in this manner recover his money through the city of Omaha?

It is certain that the equitable rule of subrogation would be invoked as between individuals in like circumstance. Under the great weight of modern decisions municipalities are as much bound to act justly as individuals.

Dill. Mun. Corp. 8d ed. 460, 461, 938.

This court has held that where the title has failed under a tax deed, even where the sale had been declared void, the purchaser would be subrogated to the rights of the county to enforce its lien for taxes.

Pettit v. Black, 8 Neb. 52; *Merriam v. Hemple*, 17 Neb. 845; *Reed v. Merriam*, 15 Neb. 325.

The mistake or error which made appellant's sale void was made by the council acting judicially. Like other judicial bodies the council had the power to correct its proceedings, even where it had previously acted without jurisdiction. This it refused to do. The district court has finally determined that the council was in error. The council has the power, and now should correct its former acts and proceedings so that a purchaser at its sale shall be protected.

Freeman, *Void Judicial Sales* (1890) §§ 49, 52, 58.

Appellant has only an agreement for a deed, not a fully executed conveyance of the title, nor of any estate in the land.

In *Phillips v. Hudson*, 31 N. J. L. 143, recovery was allowed upon this ground.

Lynde v. Melroe, 10 Allen. 49; *Bretvoort v. Brooklyn*, 89 N. Y. 128; *People v. Auditor General*, 30 Mich. 12; *Hamilton v. Valiant*, 30 Md. 189; *Jenks v. Wright*, 61 Pa. 410; *Packard v. New Limerick*, 34 Me. 266; *McCormick v. Edwards*, 69 Tex. 106; *Sapp v. Brown County Comrs.* 20 Kan. 248.

There are cases even, of fully executed conveyances, in which the rule *casual emptor* will not be applied.

Clark v. Saline County Comrs. 9 Neb. 561; *Piemental v. San Francisco*, 21 Cal. 362; *Chapman v. Douglas County Comrs.* 107 U. S. 348, 27 L. ed. 878.

Messrs. W. J. Connell and A. J. Poppleton, for appellees:

For an able decision completely reviewing the cases cited in appellant's brief and demonstrating the correctness of the decree rendered in this cause in favor of appellee, see *Budge v. Grand Forks*, 10 L. R. A. 165, 1 N. Dak. 809.

Ragan, O., filed the following opinion: Ames C. Pennock brought this suit to the

district court of Douglas county against the city of Omaha, the county of Douglas, and one John Rush, the treasurer of Douglas county. The county interposed a demurrer to Pennock's petition on the ground, generally, that it did not state facts sufficient to constitute a cause of action, and, specially, that it appeared from Pennock's petition that the claim sued for therein had been by him presented to the board of supervisors of Douglas county, and by them rejected, and that he had not prosecuted an appeal from the order of said supervisors rejecting said claim. The city of Omaha also demurred to Pennock's petition on the ground that the same did not state a cause of action. There was no appearance by, or service upon, Rush. The district court sustained the demurrers, and dismissed Pennock's case, and he comes here on appeal.

His counsel thus stated the facts in this case: "The petition alleges, for first cause of action, that in the year 1888 the city council of the city of Omaha created, by ordinance, paving district No. 6, comprising a portion of St. Mary's avenue, in said city. That in the year 1884 said city council passed an ordinance providing for the curbing and guttering of said street in said paving district, and levied a tax upon the abutting property to pay for the same. That in the same year said city council passed an ordinance providing for the paving of said avenue in said paving district, and levying a paving tax upon the abutting property to pay for the same. That lot eight (8), in block two (2), in Kountze & Ruth's addition to the city of Omaha was levied upon for said purpose, and the city treasurer was directed to collect said special assessments as other taxes. That in September, 1885, said city treasurer certified to the county treasurer of Douglas county the amount of said special assessments which were then due and delinquent upon said lot, and said county treasurer, after advertising the same in the manner provided by law, sold said lot to the plaintiff at private tax sale on the 28th day of December, 1885. That the plaintiff received of said treasurer a certificate of tax sale in the usual form. That the plaintiff paid to the county treasurer the full amount of said special assessments and interest, amounting to \$45.98. Some time after said tax sale to the plaintiff, the owner of said lot, with other adjacent property holders, applied to the city council, by written petition, for relief against said special assessments, on the ground that the same were illegal and void. That said council refused to grant the relief asked. That on the ——— day of September, 1887, and more than three months before the time of redemption had expired, the plaintiff served the notice required by section 123 of the revenue law, for the taking out of a tax deed. That after serving the said notice, and before two years from tax sale had expired, the owner of said lot applied to the district court of Douglas county for a perpetual injunction restraining the collection of said special assessments, and any further proceedings under said sale; also, praying that said assessments be ad-

judged illegal and void, and no lien upon said lot. On the 20th day of December, 1888, final decree was rendered in said cause, granting the request of said plaintiff, and perpetually enjoining plaintiff herein from enforcing his tax sale against said property, and declaring that said special assessments were illegal and void and no lien upon said lot. That no appeal has ever been taken from said decree, and the same is in full force and effect, and that plaintiff's consideration at said tax sale has wholly failed. That afterwards the plaintiff applied to the county commissioners of Douglas county for repayment of the money expended at said sale, which was by said commissioners refused. That afterwards the plaintiff applied to the city council of the city of Omaha likewise for reimbursement of the money so expended at said tax sale, which was by said city council refused. That plaintiff had used due care and diligence in the purchase of said lot for taxes, and had no means of knowing, or reasons for suspecting, that said lot was not legally and properly assessed for said improvements, and that, through the representations of the city and its officers, he had been induced to purchase at said tax sale. That, by reason of the illegal acts of the city in the premises, the consideration of said sale had entirely failed. That the city council has authority, under a special clause of the statute, to make a supplemental assessment and levy upon the property abutting on St. Mary's avenue, to correct any error, omission, or mistake in the first assessment or levy, and that said city may thus fully reimburse itself in the premises. Second, third, and fourth causes of action contain similar allegations with reference to adjacent lots bought by the plaintiff for the same special assessments, at the same time, and under the same conditions. Prayer: (1) That the county of Douglas be required to refund to the plaintiff the amount so paid at said void tax sale, with interest; (2) that in case said county be held not liable, that John Rush, the then county treasurer of said county, who made said illegal sales, be required to pay said amount, with interest; (3) that in case neither the county of Douglas nor John Rush be held liable, that the city of Omaha be adjudged to be liable to the plaintiff as for money had and received from the plaintiff; that in that case the city be adjudged to pay to the plaintiff the amount so paid by the plaintiff, with interest at the rate of seven per cent per annum, and for such other relief as may be in accordance with equity and justice."

If appellant's claim is one for which Douglas county was liable, then, to entitle him to recover against the county, he should have filed such claim with its county clerk, had it passed upon by the county board of supervisors or commissioners, and appealed from their decision, if the same was unsatisfactory, to the district court. In no other manner could the district court acquire jurisdiction of a suit against the county, founded on such a claim as the one sued on here by the appellant. Comp. Stat. 1893, chap. 18, § 87; *Brown v. Otoe County Comrs.* 6 Neb.

111; *State v. Buffalo County Comrs.* Id. 454; *Dixon County Comrs. v. Barnes*, 13 Neb. 294; *Richardson County v. Hull*, 24 Neb. 586.

Appellant alleged that he duly filed his claim against Douglas county, and that it was rejected by the supervisors or county commissioners thereof; but it does not appear from the record before us that appellant has ever appealed from the order rejecting his claim, much less that the present suit is a prosecution of such an appeal. The judgment of the district court, then, dismissing appellant's suit against Douglas county, was right. It may be that Douglas county would have been liable for appellant's claim had he pursued the remedies provided by the statute. Comp. Stat. 1898, chap. 77, § 181; *Richardson County v. Hull*, *supra*; *Roberts v. Adams County*, 18 Neb. 471; *Wilson v. Butler County*, 26 Neb. 676, 4 L. R. A. 589. But that question is not before us, and we express no opinion on the point.

The question presented by this appeal is this: In the absence of an express statutory mandate, can a city of the metropolitan class be compelled to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable? The learned counsel for appellant contends that the rule *caeset emptor* does not apply to such a purchaser, and in support of this contention, and that the question stated above should be answered in the affirmative, has furnished us an able and exhaustive brief and argument, in which he has cited many authorities. We have carefully examined all the cases cited by him, and it is not to be denied that the contention of counsel is supported by the decisions of the courts whose opinions are entitled to much weight. The rule contended for by appellant seems to be the doctrine of the supreme court of Iowa. In *Corbin v. Davenport*, 9 Iowa, 289, it is said: "A purchaser at an invalid sale of property by a city for taxes may recover from the city the amount of the purchase money and interest." It does not appear from the opinion that it was predicated upon a statute making cities liable in such cases. Such, also, seems to be the rule in Wisconsin. In *Norton v. Rock County Suprs.*, 18 Wis. 612, it is said: "Where a tax sale is void, the county is liable to the holder of certificates issued on such sale for the amount paid, with interest. The statute makes it the duty of the treasurer to refund the money in such cases, on demand, to the purchaser or his assigns; but the liability of the county does not depend upon this statute, and whatever remedy it gives is cumulative to the right of action for money had and received." This case was cited with approval in *Van Cott v. Milwaukee County Suprs.*, 18 Wis. 247. In *Chapman v. Brooklyn*, 40 N. Y. 872, the city of Brooklyn caused an assessment to be levied upon certain lots to pay the expense of grading and paving a certain avenue. The admitted benefits of this improvement to the two lots were assessed against parties who

were not the owners of them. By the law in force in such cases, judgment for the amount of the assessment was rendered against the persons so assessed; executions issued on such judgment, and returned unsatisfied. The lots were then put up for sale by the street commissioner, and sold to a purchaser, who paid over the amount of the bid, and received the certificate of sale. The money was transmitted by the street commissioner to the city treasurer. An action was then brought against the city, by the assignee of this certificate, to recover back the money paid, on the ground that the assessment proceedings were absolutely void for want of jurisdiction, the assessment not having been made against the owner of the lots. The court held that the assessment was void because not made against the owner of the lot, and, by a divided court, that plaintiff could recover the money paid to the city, on the ground of an entire failure of consideration. In *Phillips v. Hudson*, 31 N. J. L. 143, that court said: "Where there was a sale of real estate to pay for an improvement in the city of Hudson, and a declaration of sale delivered in pursuance of a void ordinance, held, that the purchase money could be recovered back in an action of assumpsit against the city." This case was also decided by a divided court. The foregoing are all the authorities cited by counsel for the appellant which can be said to be squarely in point, and support his views. Counsel, however, refers us to the following: *Pettit v. Black*, 8 Neb. 52; *Reed v. Merriam*, 15 Neb. 323; and *Merriam v. Hemple*, 17 Neb. 845,—as authority for the doctrine for which he argues. These cases, however, do not support appellant's contention. In each of these cases, while the tax deeds which the purchaser obtained at the tax sale were wholly void, the taxes for which the property was sold were valid liens on the property, and, furthermore, the decisions in these cases were based on a statute. Counsel also cites us to *Wilson v. Butler County Comrs.*, 26 Neb. 676, 4 L. R. A. 589, but this was a suit by Wilson against the county, and the opinion is predicated on a statute. Another Nebraska case cited by counsel is *Clark v. Saline County Comrs.* 9 Neb. 516. In that case Saline county conveyed a tract of land to one Hunt, and paid him \$500 in money, in consideration of which Hunt agreed to build a bridge across the Blue river. Hunt assigned his contract to Clark, and conveyed him the land. Clark built the bridge, and the county accepted it. The title to the lands having failed, Clark sued the county for the value of the bridge, and the court held that he was entitled to recover. But there is a wide distinction between the legal status of a purchaser of property sold at a tax sale and that of one who builds an improvement for a county, and receives land or other property in payment for such improvement, the title to which fails. Appellant's case is not within the principles of the case just cited. *Pimental v. San Francisco*, 21 Cal. 352; *Taylor v. People*, 66 Ill. 322; *Louisiana v. Wood*, 103 U. S. 294, 26 L. ed. 153; and *Chapman v. Douglas County Comrs.* 107 U. S. 348, 27

L. ed. 378,—also cited by appellant's counsel,—are analogous in principle to *Clark v. Saline County Comrs.*, *supra*, and need not be further noticed.

As opposed to the rule contended for by appellant's counsel are *Lynde v. Melrose*, 10 Allen, 49, where it is said: "If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase. No precedent for maintaining such a suit is known, and the plaintiff's counsel rests his argument solely upon the ground that defendants have received the amount of the tax without consideration. . . . There is a plain distinction between the right of a person to recover from a town the amount of a tax unlawfully assessed upon him, and the claim of a purchaser under a collector's deed, whose title proves defective. . . . A purchaser is a mere volunteer in the payment of taxes. He has the same means of knowing when it is legally assessed as the town has. He buys the title without warrant except such covenants as he takes from the collector, and he must rely upon them. Beyond these covenants his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable or wholly unproductive; but no one has taken his property without his consent, or with any contract, expressed or implied, to reimburse him if his bargain proves a losing one." Such is the rule in the state of Indiana. In *Churchman v. Indianapolis*, 110 Ind. 259, it is said: "Money voluntarily paid on a demand in the nature of a tax—and a street assessment is such—cannot be recovered back, in the absence of an express statutory provision authorizing such a recovery. The doctrine of *caveat emptor* applied as fully to sales for assessments for street improvements as to any other analogous class of sales. The recital, in a deed executed by a city treasurer upon the sale of lands in satisfaction of an assessment for a street improvement, that, 'it appearing from the records of the common council of this city in the city clerk's office that the aforesaid lands were legally liable for such taxes, is not a representation of fact upon which the grantees had a right to rely.' To the same effect, see *State v. Casteel*, 110 Ind. 174; *Worley v. Cicero*, 110 Ind. 208; *Howard County Comrs. v. Armstrong*, 91 Ind. 528; and *Logansport v. Humphrey*, 84 Ind. 467, where it is said: "A purchaser at a tax sale assumes all risks, and if the sale proves invalid, has no remedy against the municipality." This also seems to be the rule at present in New Jersey. In *State v. Picataway*, 43 N. J. L. 353, it is said: "A municipality is not bound to refund the purchase money received on a tax sale merely because there has been illegality in the proceedings which defeats the title of the purchaser, as the rule of law applicable to such a case is that the municipality is under no obligation to refund the purchase money because the title is void. A purchaser is a volunteer, and buys at his own risk." This also seems to be the doctrine in California. In *Loomis*

v. Los Angeles County, 59 Cal. 456, it is said: "In an action against a county to recover purchase money paid by the plaintiff at a void tax sale there is no rule of law authorizing plaintiff to recover." See also *Harper v. Rowe*, 53 Cal. 233. This also seems to be the rule in New York, notwithstanding the case of *Chapman v. Brooklyn*, *supra*. See *Swift v. Poughkeepsie*, 87 N. Y. 511; *Phelps v. New York*, 113 N. Y. 216, 2 L. R. A. 626. Such is the rule in Kansas. In *Sullivan v. Davis*, 29 Kan. 28, it is said: "The rule *caveat emptor* is, except as limited or qualified by express provisions of statute, universally applicable to all purchasers at tax sales." See also *Saline County Comrs. v. Geis*, 23 Kan. 381; *Sapp v. Brown County Comrs.*, 20 Kan. 243; *Wabunsee County Comrs. v. Walker*, 8 Kan. 431; *Phillips v. Jefferson County Comrs.* 5 Kan. 412. In *San Francisco & N. R. Co. v. Dinwiddie*, 18 Fed. Rep. 789, it is said: "An assessment made in strict accordance with the state constitution relating to the assessment of railway property, which violates the provisions of the fourteenth amendment to the Constitution of the United States, is void; but the payment made under it is not a payment under duress, but is voluntary, and cannot be recovered back." In *Cooley on Taxation* (1st ed. p. 328) it is said: "A tax sale is the culmination of the proceedings which are matters of record; and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or contain any contingency to defeat them. A tax purchaser clearly cannot be, in a strict technical sense, a 'bona fide purchaser,' as that term is understood in law, because a bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it. But a tax purchaser is always deemed to have such notice when the records show defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and rely implicitly upon the action of the officers, assuming what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed, and this presumption stands for evidence in many cases, but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is that the taking of any one important step is the jurisdictional prerequisite to the next, and it cannot, therefore, be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it." In *Desty on Taxation* (section 850) it is said: "Except as limited and qualified by express statutory provisions, the rule [*caveat emptor*] applies to all purchasers at tax sale, and, if the public has nothing to sell, the purchaser gets nothing. Purchasers are bound to know, at their peril, that the supposed delinquent is in fact delinquent; that he has been lawfully assessed, and has failed to make payment. . . . The purchaser at a municipi-

pal sale for taxes buys at his own risk, and at his peril investigates the proceedings. A county does not guarantee tax titles except as the statute may provide, and cannot be made to refund money upon the failure of such titles."

We are urged by counsel for appellant to hold the city of Omaha liable in this case upon moral grounds, but we cannot do so. The city did not ask appellant to purchase at its tax sales. He was a "volunteer," with all that that term implies. He bought without warrant or covenant of any kind, and bid what he considered the venture worth; and under these circumstances, and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title. *Rawle, Covenants*, § 831, and cases there cited. In this case appellant knew, when he made the purchase, that in case of redemption he would receive a return on his investment, unusually large. If the owners of the property failed to redeem the same, he could, under the statute, foreclose his lien, and obtain title to valuable property for a very small part of its actual worth. Appellant claims that he should be given

all these advantages for unusual profits, but at the same time he should be fully indemnified against any risk of loss. In no other line of business—under no other circumstances—would such a claim be made. In the interest of the public revenue, and as an inducement to buy at tax sales, our law presents tempting offers to the speculator; but, until the legislature shall so expressly declare, the courts will not place the responsibility upon cities of refunding money paid by purchasers for property at sales made thereof for taxes. *Budge v. Grand Forks*, 1 N. Dak. 309, 10 L. R. A. 165. A consideration of the authorities reviewed above leads us to the conclusion that the rule *caesat emptor* applies with full force to purchasers of property at tax sales, and constrains us to the conclusion that, in the absence of a statute therefor, no municipality can be compelled, either at law or in equity, to refund money which it has received from sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor.

The decree appealed from must be affirmed.
The other Commissioners and the Judges concur.

Rehearing denied.

FLORIDA SUPREME COURT.

Nathaniel WEBSTER, Impleaded, etc., *Plff.*
in Err.,

John CLARK, Son & Co.

(24 Fla. 637.)

1. One who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out.
2. When one does not allow the public or individual dealers to be deceived by the appearances of a partnership, the true test of whether a partnership does in fact exist between the parties is to be found in their intent as shown by the contract which they make, and names amount to nothing when the substance of the agreement shows them to be inapplicable.
3. Where parties enter into a trade arrangement upon such a basis as that they have a community of interest in the capital stock engaged in the business, and also a community of interest in the profits resulting therefrom, the uniform rule is that they will be held to be partners in such a venture.
4. Where the agreement under which a business arrangement is carried on,

and which is claimed to be a partnership, is in writing, and free from ambiguity or doubt, its legal effect must be determined as a matter of law, and the intention of the parties gathered therefrom, but, if the terms employed leave the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect.

(December 11, 1894.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of plaintiff in an action brought to recover the purchase price of certain billiard and bar-room supplies furnished by plaintiff to an alleged partnership of which defendant was a member. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. W. Cockrell & Son for plaintiffs in error.

Mr. W. B. Young, for defendants in error:

The instrument shows a purpose to put the property, purchased and owned equally by the parties, into the business and to establish a community of profit and loss between the parties thereto and they thereby became co-partners in the undertaking.

Paul v. Cullum, 183 U. S. 549, 38 L. ed. 432; *Dubos v. Hoover*, 25 Fla. 720; *Davis v. Sylvestre*, Mont. L. Rep. 5 Q. B. 143 (see 5 Lawyer's Gen. Dig. p. 1574); *Dams v. Kempster*, 146 Mass. 454; *Wipperman v. Stacy*, 80 Wis. 845; *Corey v. Cadwell*, 86 Mich. 570.

*Headnotes by MARRY, J.

NOTE.—In connection with the extensive review in the above case of the authorities on the question what constitutes a partnership, see *Tyler v. Wadingham* (Com.) 8 L. R. A. 657, and note; *Seabury v. Crowell* (N. J.) 11 L. R. A. 126; *Dutcher v. Buck* (Mich.) 30 L. R. A. 776.

37 L. R. A.

See also 36 L. R. A. 282.

Mr. J. E. Hartridge also for defendants in error.

Mabry, J., delivered the opinion of the court:

Defendants in error as partners under the firm name of John Clark, Son & Co. sued plaintiff in error and E. Rigney as late partners doing business in the firm name of E. Rigney & Co., in an action of assumpsit for goods sold and delivered to the latter firm by the former. Webster interposed pleas that he was never indebted as alleged, and that he was not a partner of Rigney under the firm name and style of E. Rigney & Co., as set up in the declaration. Rigney did not defend. A trial before a referee resulted in a judgment in favor of plaintiffs below against defendants Webster and Rigney, as late partners doing business under the firm name of E. Rigney & Co., for the amount of plaintiffs' demand, and Webster sued out a writ of error from the judgment. Rigney has refused to join in the writ of error, and the prosecution of the same here is on behalf of Webster alone.

Rigney bought the goods sued for, being such as are usually sold in a saloon business, and the only question involved is whether or not Webster can be held liable as a partner of the firm of E. Rigney & Co. Plaintiffs introduced in evidence the following instruments in writing, viz.:

"State of Florida }
"County of Duval }

"This indenture made this fifteenth day of February, A. D. 1886, by and between Nathaniel Webster, of Gloucester, Mass., of the first part, and Edward Rigney, of Jacksonville, Fla., of the second part, witnesseth: That the party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved and contained on the part and behalf of the party of the second part to be paid, kept and performed, hath leased and demised, and by these presents doth lease and demise, unto the party of the second part for the full period and term of fourteen months from the date of these presents, the billiard and bar room on Julia street in the Everett hotel in the city of Jacksonville, Fla., with all the furniture contained therein, excepting the bar and bar fixtures and billiard tables and their equipments, which are to be paid for and owned equally by Nathaniel Webster and Edward Rigney. And the party of the second part shall pay unto the party of the first part the sum of two hundred and eight dollars and thirty-three cents per month in advance, and also such other sum of money as shall equal one half of the net profits of the billiard and bar room hereinbefore mentioned. And it is also distinctly understood and agreed by both parties that the net profits may consist of cash and goods on hand after all necessary bills and expenses shall have been paid.

"Nathaniel Webster, (Seal)

"Edward Rigney, (Seal)

"Signed, sealed and delivered }
in presence of S. I. Bradley, }
P. F. Wethington. }

27 L. R. A.

"Jacksonville, Fla., Feby 15th, 1886.

"It is understood that there shall be no net profits until Mr. E. Rigney receives as compensation for his services and for the use of money advanced by him to pay for the bar and bar fixtures and billiard tables and billiard fixtures and to carry on the business, a sum equal to the amount of rent paid Mr. Nathaniel Webster. "Nathaniel Webster, Witness: "Edward Rigney."

"S. I. Bradley,
"P. F. Wethington,

Witnesses were examined for plaintiffs and defendants, and among them Rigney testified as a witness for plaintiffs, and Webster testified in his own behalf. It appears from the record that all objections to the testimony were reserved for final discussion and disposition by the referee, but it is not shown that any objections were made to testimony either before or at the final hearing.

It appears from testimony before us that J. M. Lee operated the Everett hotel in Jacksonville as proprietor during the season of 1885 and 1886, and for that time he let Webster have the wine and saloon privilege of the hotel for \$1,000. On settlement between Lee and Webster this amount was reduced in consequence of the late opening of the hotel to the sum of \$338.88. Lee receipted E. Rigney & Co. for the reduced amount, and it is recited in the receipt that the understanding was that Rigney & Co. should pay \$1,000 for the season of 1886 and 1887. In arranging for the wine and liquor privilege of the hotel, Lee negotiated with Webster personally, and while he knew that Rigney was to have charge of the bar room in the hotel, he did not know what was the understanding or contractual relation between Webster and Rigney.

Rigney testified that he and Webster were equal partners in the saloon business in the Everett hotel, and that the partnership was carried on under the written agreements above recited. He stated that the firm name of the partnership was not set out in the agreement because Webster did not want it known that he was a partner in the business, and that he (Rigney) did not disclose the fact unless it was necessary to do so. In making application for U. S. revenue license, which he did in the name of E. Rigney & Co., he was informed that the individual names of the partners would have to be set out in the sworn application, and in the presence of Webster the application was made before the revenue officer in the name of Edward Rigney and Nathaniel Webster, doing business in the firm name of E. Rigney & Co. The deputy revenue collector testified that he, by request, went to where Webster and Rigney were in the hotel and informed them of the necessity of inserting the individual names of the partners in the application for license, and that Webster's name was inserted in his presence, and that he then stated that he was a partner in the business. Rigney also stated that for the season of 1886 and 1887 he paid Webster \$500, one half of the hotel privilege, and a check for this amount, payable to the order of Webster and indorsed by him, was introduced in evidence. J. H. Spillman, a trav-

eling salesman at the time for a manufacturing establishment of billiard tables and saloon fixtures, testified for plaintiffs that he visited Jacksonville and sold billiard tables to Nathaniel Webster for E. Rigney & Co., and that Webster stated to witness that he was a partner in the company of E. Rigney & Co. Also that Rigney informed witness that Webster was doing the buying for the firm. W. H. Hellen testified that he was bartender at the saloon in the Everett hotel for ten or twelve weeks, and during that time Nathaniel Webster was often in the bar, and told witness what to do. On one occasion Webster directed witness to open the bar earlier in the morning than he had been in the habit of doing, and would order drinks and not pay for them, and they were not charged to him.

The goods sued for, it seems, were bought by Rigney in person, and the original entries were against him individually, but the journal account of plaintiffs was against E. Rigney & Co.

Webster denies that he was ever a partner of Rigney, and states that the only relation between them was that of landlord and tenant under the written agreements hereinbefore mentioned, and which had not been changed during the continuance of the saloon business by Rigney in the Everett hotel. He says that the writings were not intended to create a partnership, and that it was understood between the parties thereto at the time that no partnership should exist thereunder. The purpose of the writings, as testified to by Webster, was to definitely fix the relation of landlord and tenant, and that the rent was fixed at so much certain, and a further sum dependent upon the net profits of the business to be conducted by Rigney. One witness testified that he frequently visited the bar with Webster, and that the latter when ordering drinks would pay for them as other customers, and that witness saw no difference in that respect between Webster and other customers. Rigney, in rebuttal, denied that it was understood at the time the writings were drawn up that no partnership was to exist between the parties; but, on the contrary, it was distinctly understood that they were equal partners under the agreements, and that before the execution thereof, Webster wrote letters to him in reference to a copartnership between them. The record shows that in portions of letters from Webster to Rigney reference is made to the purchase of cash machines for the saloon business, and Webster says in the letter that he wrote to parties "describing our bar, and inquiring of them if we could not make one machine answer our purpose; that we should not have but one cashier for both bar and billiard room." And after stating that two machines had been ordered, he says: "I thought we might save the price of both machines in one season." The saloon business was conducted in the name of E. Rigney & Co. There was no testimony in reference to a knowledge on the part of the plaintiffs of the facts above recited, or of any connection of Webster with the firm of Rigney & Co. before the goods were sold and delivered.

27 L. R. A.

It is contended for plaintiff in error that if Webster held himself out, or permitted himself to be held out, to the world as a partner of the firm of E. Rigney & Co., liability for the goods sued for would attach to him, although he was not in fact a partner of said firm. It is true that one who holds himself out, or permits himself to be held out, as a partner may be held liable as such, independent of the actual existence of such relation; but the liability in such a case rests upon the principle of estoppel, that by holding himself out, or permitting himself to be held out, as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the person so held out as a member of the firm. As the liability in such a case rests solely upon the ground that one cannot be permitted to deny a partnership relation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no just foundation for holding one liable as a partner when in fact he was not one, although held out as such, when the creditor did not know of the holding out and did not act upon the supposition that the person sought to be charged was a partner in the firm when dealings were had with and credit given to said firm. The rule is correctly stated in the case of *Thompson v. First Nat. Bank of Toledo*, 111 U. S. 529, 28 L. ed. 507, where it was held that a person who is not actually a partner, and who has no interest in the partnership, cannot by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out. *Wood v. Pennell*, 51 Me. 53; *Cook v. Penrhyn State Co.* 36 Ohio St. 135; *Hicks v. Oram*, 17 Vt. 449; *Seabury v. Bolles*, 51 N. J. L. 103, 11 L. R. A. 136. In this connection it may be stated, as was observed in the case of *Thompson v. First Nat. Bank of Toledo*, that there may be cases in which the holding out has been so public and so long continued that a jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. On the testimony before us it cannot successfully be maintained that the plaintiffs below were entitled to a judgment on the ground that Nathaniel Webster held himself out to the world as a partner of Rigney, if he were not in fact such partner. There is no testimony that the plaintiffs believed, or had any reason to believe, that Webster was a partner. There is testimony that he stated to the revenue officer and to the traveling salesman Spillman that he was a partner, but we do not know that plaintiffs were ever informed of such declarations before the goods were sold to Rigney & Co. The further fact, testified to by another witness, that Webster was often in the bar-room and gave directions to the bartender, in the absence of any showing that plaintiffs were cognizant of such facts, if they existed, will not justify a finding against Webster solely on the ground that he held himself out to the world as a partner. If the finding of the referee can be sustained on the testimony before us, it must be on the

ground that Webster was in fact a partner of the firm of E. Rigney & Co.

As to partnership liability, it was formerly broadly laid down that every one who shared in the profits of a trade or business ought also to bear his share of the losses, for the reason that, by taking a part of the profits, he takes a part of the fund of the business upon which the creditors had a right to rely for payment. This was the rule announced in the case of *Waugh v. Carter*, 2 H. Bl. 235. In the application of this rule the courts began to add qualifications and to make distinctions that were not of easy application. It was said in some cases that a sharing in the profits in order to render one liable as partner must be a participation therein as principal, and the test applied in other cases was that the party entitled to a part of the profits was a partner if he had a lien thereon as against the private creditors of the other members of the firm. The question was very much discussed in England in the case of *Cox v. Hickman*, 8 H. L. Cas. 268, and it seems to be generally conceded that this case modified materially the rule formerly announced on the subject. It is said of this case that it brought back the English law to the true rule. The facts, in brief, were, that two merchants became embarrassed and assigned their partnership property to trustees with direction and authority for them to carry on the business in a new name, and pay the net profits ratably among the creditors of the assignors, and after the creditors were paid, the residue to go to the assignors. The creditors joined in the deed of assignment, and a majority of them had authority to make rules for the conduct of the business, or to end it if they saw proper. Debts were contracted by the trustees in conducting the business under this management, and it was held that the creditors were not liable as partners for the debts. Several opinions were rendered in the case, and those of the majority do not seem to rest upon the same grounds. It has been considered that the decision put the liability of one partner for the acts of his copartner upon the doctrine of the liability of a principal for the acts of his agent, the test of liability being in the fact that one has authorized the managers of the business to carry it on for him, and that while the right to participate in the profits was cogent, it was not conclusive evidence that the business was carried on in part for the persons receiving a part of the profits. There is found in the books a great deal of discussion on the subject of partnership liability. The following authorities, among the many, contain a thorough review of the decisions on the old rule, as it is called, and the modifications thereof: *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Parchen v. Anderson*, 5 Mont. 488, 51 Am. Rep. 65; *Boston & O. Smelting Co. v. Smith*, 18 R. I. 27, 43 Am. Rep. 8; *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Denny v. Cabot*, 6 Met. 82; *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 836; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465. This court, in the case of *Dubos v. Hoover*, 25 Fla. 720, quoted with approval the definition of a partnership given by Judge Story, viz.: 27 I. R. A.

"Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." Story, Partn. 6th ed. § 2. It seems that when Judge Story wrote his book on partnership he conceived the liability of one sought to be charged as a partner to rest upon the law of principal and agent, and his view is quoted with approval in one of the opinions delivered in the case of *Cox v. Hickman*.

A reference to agency as a test of partnership has not, it seems, proven a correct guide in many cases, as agency results from partnership rather than partnership from agency. It is said in *Meehan v. Valentine*, *supra*: "Such a test seems to give a synonym, rather than a definition, another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent." In this case it is said: "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." Judge Cooley says for the court in *Beecher v. Bush*, *supra*, "that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of a partnership are to be found." The same view is announced in the recent English case of *Mollwo v. Court of Wards*, L. R. 4 P. C. 419. And in section 49 of his work on Partnership, Judge Story says: "In short, the true rule, *ex aquo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then, that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then, that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

Where the agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing and free from ambiguity or doubt, its legal effect must be determined as a matter of law, and the intention of the parties gathered

therefrom. We quote the language of *Judge Cooley* in the case referred to as expressive of the correct rule: "It is nevertheless possible for parties to intend no partnership and yet form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'" The last expression is quoted by him from *Chancellor Kent* in *Post v. Kimberly*, 9 Johns. 470. The test of partnership, then, is to be found in the intent of the parties themselves as shown by the contract which they make. Where parties enter into a trade arrangement upon such a basis as that they have a community of interest in the capital stock engaged in the business, and also a community of interest in the profits resulting therefrom, the uniform rule is that they will be held to be partners in such a venture. *Dame v. Kempster*, 146 Mass. 454. On the other hand, it has always been held that an agent or servant, whose compensation is measured by the profits of a partnership business, is not thereby made a partner. In *Holmes v. Old Colony R. Corp.*, 5 Gray, 58, it was held that a railroad corporation by leasing a house owned by it to a party to be run as a hotel, the lessee to pay a certain sum annually and half the net proceeds arising from keeping the house, and keep an account open for inspection by the corporation, and have free passage over the railroad for himself and all persons employed and all articles used in carrying on the hotel, did not thereby become partner in the hotel business. The mere leasing of a hotel for a certain part of the net profits will not make the lessor a partner in the hotel business. This was decided in *Beecher v. Bush*, *supra*. Nor does the renting of a building for a saloon under an agreement to take half of the profits made out of the business done therein as rent make the renter a partner in the business. *Thayer v. Augustine*, 55 Mich. 187, 54 Am. Rep. 361. In another case the plaintiff contributed towards the business his manufactory, shops, tools, implements and machinery and the land upon which they were situated; the defendants were to furnish a certain sum as capital, and labor to carry on the business. Defendants were to account to the plaintiff at reasonable periods for the proceeds of the business or the profits thereof, and all daily transactions were to be entered on the books, to which plaintiff was to have access, and at stated periods an account was to be taken of the profits which, after deducting the costs and expenses of running the works and certain expenses, were to be divided between the parties. It was held that there was a community of interest in the capital to carry on the business, and also a community of interest in the profits, and a partnership was thereby created. *Wood v. Beath*, 28 Wis. 254.

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The writings produced in evidence in the case before us must be considered together as one instrument. They were executed on the same day, and it is not questioned that they were intended to express the agreement of the parties on the subject to which they relate. The agreement contains formal parts of a lease, reciting, in substance, that in consideration of the rents, covenants, and agreements therein contained to be paid, kept, and performed on the part of the second party, the first party doth lease and demise for the term of fourteen months the billiard and bar room on Julia street in the Everett hotel in the city of Jacksonville for \$208.88, in advance, per month, and a further sum equal to one half of the net profits of the billiard and bar room mentioned. There are clauses as to the ownership of the bar and bar fixtures, billiard tables and their equipments, and as to the ascertainment of the net profits. The mere form of the agreement cannot alone determine its legal effect, nor is the difference between receiving a sum equal to one half of the net profits, and a sharing in the profits themselves, material, if it was in fact intended by the instrument that Webster should have one half of the net profits of the bar business. If the agreement amounts to nothing more than a lease from Webster to Rigney of the Everett billiard and bar room for \$208.88 per month and a further sum equal to one half of the net profits resulting from the bar and billiard business conducted in the room, it is clear from the authorities that a partnership would not thereby be created. The fact that deductions are to be made from the net profits to an amount equal to the sum to be paid as rent, would make no difference. The other clauses in the agreement referred to, and which we are not at liberty to disregard, indicate, in our judgment, that something more than a mere lease of the bar and billiard room was contemplated by the parties in reference to the business carried on in the room. The "bar and bar fixtures and billiard tables and their equipments" were to be paid for and owned equally by both parties. If the term "bar and bar fixtures and billiard tables and their equipments" cannot be held to embrace the entire stock, including the liquors and wines, engaged in the business, they do include a portion of the capital stock employed. The net profits arising from the billiard tables are to be considered under the agreement in ascertaining the additional sum to be paid to Webster, and bar fixtures are customary equipments for the conduct of a saloon business. Webster, as is clearly shown by the agreement, was to be half owner in such equipments, as well as the billiard tables, and it has been uniformly held that where parties have a community of interest in the capital employed, and also a community of interest in the profits, they are partners as to third parties. The proof shows that Webster in person bought the billiard tables for the bar business conducted by E. Rigney & Co., at the same time stating to the seller that he was partner in the business. But in addition to the clause that Webster was to be an equal owner of the "bar and bar fixtures and bill-

lard tables and their equipments," other provisions indicate, it seems to us, a joint interest by Webster and Rigney in the bar business. There were to be no net profits until Rigney received as compensation for his services and for the use of money advanced by him to pay for the bar and bar fixtures and to carry on the business, a sum equal to the rent paid to Webster. This means the fixed sum of \$208.33 per month which Webster was to receive. This implies that Rigney was to receive out of the net profits compensation for his services and for the use of money advanced by him to pay for the bar and bar fixtures and to carry on the business, a sum equal to the sum to be paid to Webster as rent. The bar and bar fixtures, billiard tables and their equipments were, beyond question, the joint property of both parties, and an agreement that Rigney was to be remunerated out of the net profits to the extent of \$208.33 per month for money advanced by him to pay for the bar and bar fixtures and to carry on the business, implies that he had expended more than his share in paying for the bar and bar fixtures and to carry on the business. The terms "money advanced by him to pay for the bar and bar fixtures and to carry on the business" naturally imply that such was the case. The fact that compensation for Rigney's services was also provided for out of the net profits

arising from property in which Webster unquestionably had a joint interest tends to strengthen the view that both parties were interested in the bar business as joint owners.

While the rule is clear that a written contract free from ambiguity cannot be varied by parol testimony, yet if the language employed leaves the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect. The weight of the testimony in the present case is to the effect that both Webster and Rigney considered themselves as partners under the instrument in question.

In our judgment the written agreement discloses a partnership transaction in which both parties had a community of interest in the capital stock employed in business, and also a community of interest in the profits resulting therefrom; and this being the case they were partners as to third persons and liable as such. The fact that the real transaction is sought to be concealed under the guise of a lease, as is apparent, cannot change the legal effect of the agreement, and is unimportant in arriving at the real intent of the parties as expressed in the entire instrument.

The conclusion we have reached is, that *the judgment appealed from should be affirmed, and it will be so ordered.*

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

PHILADELPHIA & READING R. CO.,

Plff. in Err.,

v.

Abraham SMITH.

(64 Fed. Rep. 672.)

1. **The doctrine of contributory negligence** does not apply to prevent a person recovering for injury caused by nuisance because he has sustained other and additional damages of the same character through separate acts or omissions of his own.
2. **Notice of damage caused by nuisance and a request to remove it** must precede an action against a party who did not originally create it.
3. **Repairing and preserving a railroad embankment** does not make a lessee of the road liable for continuing it as a nuisance in the absence of any notice or request from the person injured.

(November 26, 1894.)

ERROR to the United States Circuit Court for the District of New Jersey, to review

NOTE.—As to the question of the necessity of notice to make one liable for continuing a nuisance which had been created by others the above case presents a valuable and sufficient review of the authorities.

As to landlord's liability for nuisances, see *Wason v. Pettit* (N. Y.) 5 L. R. A. 794, and *note*; *Ahern v. Steele* (N. Y.) 5 L. R. A. 449; *Lufkin v. Zane* (Mass.) 17 L. R. A. 251.

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a judgment in favor of plaintiff in an action brought to recover damages for the alleged obstruction by defendants of the flow of water from a spring on plaintiff's land.

Reversed.

The facts are stated in the opinion.

Before Acheson and Dallas, *Circuit Judges*, and Wales, *District Judge*.

Mr. John R. Emery for plaintiff in error.

Mr. R. V. Lindabury, for defendant in error:

If a nuisance is erected before a man becomes the owner of the property, and he uses it having knowledge of its injurious results, he is liable.

Wood, Nuisances, § 882; *Staple v. Spring*, 10 Mass. 77; *Moore v. Browne*, 3 Dyer, 819b; *Dickson v. Chicago, R. I. & P. R. Co.* 71 Mo. 375; *Pierce v. German Sav. & Loan Soc.* 72 Cal. 183; *Irvine v. Wood*, 51 N. Y. 228, 10 Am. Rep. 608.

Notice was not necessary, because the defendant has actively maintained and continued the embankment by repairing and stoning the same when without such repairing and stoning it would probably have been washed away long before this by the very waters which it wrongfully obstructed.

Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 469; *Walter v. Wicomico County Comrs.* 35 Md. 893; *Wasmers v. Delaware, L. & W. R. Co.* 80 N. Y. 216, 36 Am. Rep. 608; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 155.

The evidence was sufficient to establish an ancient watercourse.

Earl v. De Hart, 12 N. J. Eq. 268, 72 Am. Dec. 395.

Dallas, Circuit Judge, delivered the opinion of the court:

On May 14, 1879, the Delaware & Bound Brook Railroad Company leased its railroad to the Philadelphia & Reading Railroad Company, plaintiff in error, and the latter company entered under the lease. Long prior to the demise, an embankment forming part of the roadbed had been so constructed as to prevent the flow of water through a small run, fed by springs, on land of the plaintiff below; and a ditch had been dug along the foot of the embankment to conduct the water to the Raritan river and there discharge it. The first count of the declaration avers that this ditch "fails altogether to drain the water of said springs from the plaintiff's said farm;" and, on behalf of the plaintiff, evidence was adduced to show that the defendant allowed it to become filled, and that, although the plaintiff had cleaned his spring run out once after the railroad ditch was dug, such cleaning proved to be useless, because the spring run had no outlet. This was contradicted by the witnesses for the defendant, and upon the question thus presented the court instructed the jury that, if any portion of the plaintiff's damage was due to his failure to keep the run in proper condition on his own land, "he could not recover for such portion;" "that if he, by any act of omission or commission, permitted the ditch upon his own property to become so clogged up or filled up that the water, instead of going down to the property of the defendant, went out over his own property, soaked through the ground, and over the top of it, so as to render it acid or boggy, for that part of the damages he cannot recover." The defendant was not satisfied with this, but asked for further instruction "that the plaintiff was bound to keep open his spring-run ditch upon his own land, and if the situation of the ditch was such that, from freshets or other causes, the ditch became filled, he cannot recover, if his negligence to keep the ditch open contributed to his injury." This point was evidently framed upon the theory that if the plaintiff's neglect had caused him any damage, he could not recover at all,—not even for that which had been caused wholly by the defendant; and it was disaffirmed upon the ground that failure to keep his spring run open would not bar his right of recovery to the extent of any damage which actually resulted solely from the defendant's wrong, even if the plaintiff had been additionally damaged through his own want of care. In this there was no error. The doctrine of contributory negligence has no application. One who decisively contributes to bring a mischief on himself may not impute it to another, but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained other or additional damage of the same character through separ-

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ate acts or omissions of his own. In such cases, each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other. This view of the law was appropriately applied by the court below, and therefore the second assignment of error is not sustained.

The remaining assignments relied upon relate to the cause of action set out in the second count. That count alleges that the embankment already mentioned diverts the ancient course of the water of the Raritan river, in times of freshet, to the injury of the plaintiff's land, and this allegation is to be now accepted as true. It also avers that the defendant became the lessee and possessor of the railroad after the embankment had been erected, but "has since continued, used, and maintained it," and of these facts there is no doubt. It further alleges, however, that the plaintiff "requested the said defendant to remove the said obstruction," but of such request no proof whatever was made or evidence offered, and thus arises the most important question in the case, viz., Is the appellant liable, without request or notice, for the damage caused to the appellee by the existence of this embankment, although the appellant did not erect it, and has maintained and used it only as a part of its roadway?

From the report of *Penruddock's Case*, 5 Coke, 101, it appears that the house of the defendant had been built by his feoffee on his own freehold, but so near to a house which was afterwards, and before suit brought, conveyed to the plaintiff, that the former discharged water upon the latter. The plaintiff brought his action *quod permittat*, and one of the points presented and considered was whether the action would lie against the feoffee of him who had erected the house which caused the nuisance, and it was held by the king's bench, affirming the judgment of the common pleas, that it would, but only after request for abatement. The court said: "And if it be not reformed after request made, the *quod permittat* lies against the feoffee, and he shall recover damages if he do not reform it; but without request made it doth not lie against the feoffee, but against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself."

The judgment in the *Case of Rolf*, which was decided about fifteen years earlier, seems to have been to the same effect, but the *Penruddock Case* has, for about three centuries, been regarded as the leading one on the subject, and as settling the law of England with respect to it. Pollock on Torts, which was first published in 1896 or 1887, has already passed through three editions, and in the latest of these its eminent author still retains his citation of that case as authority for the proposition, which he lays down without hesitancy or qualification, that "if one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable, and the purchaser is also liable if, on request, he does not remove it." If it had been deemed

necessary, other authorities might have been added in support of this statement, and among them the case of *Jones v. Williams*, 11 Mea. & W. 176, in which Baron Parke followed the *Case of Penruddock*, and quoted with approval Jenkins' Sixth Century, case 57 (where he assumes the *Penruddock Case* to have been referred to), for this recital of the law: "A. builds a house so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a *quod permittat* for it, before he makes a request to C. to abate it, for C. is a stranger to the wrong. It would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

It is not necessary to make any further reference to the English Reports. The industry of appellee's counsel has not enabled him to show that the doctrine maintained in the cases we have mentioned has been discarded by the English courts, and it is entirely safe to assume that it has not been. It is, however, contended that it has been departed from, or materially qualified, in this country, and especially in the state of New Jersey, where the subject matter of this controversy is situated. If this was so, it would, we think, be unfortunate; for, in our opinion, the requirement of notice in cases of this sort imposes no hardship upon plaintiffs, and is, in fairness, due to defendants. A grantee should not, of course, be held responsible for the creation of an injurious structure by his grantor, and, if not notified of objection, he may be ignorant of its harmful nature, or may legitimately presume that it is voluntarily submitted to; and therefore a plaintiff ought not to be permitted to recover damages for injury alleged to have been done to him by the maintenance of a pre-existing condition during a period when, with full knowledge of his hurt, he had made no complaint of it, nor requested the removal of its cause. As was said in *Central Trust Co. of New York v. Wabash, St. L. & P. R. Co. infra*, "The subject has been fully considered by the courts both in England and in this country," and with the same result, viz., "that, where the party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought." There may be some divergence in expressions of different judges, but that this is a correct statement of the effect of the decisions there can be no doubt. *Central Trust Co. of New York v. Wabash, St. L. & P. R. Co.* 57 Fed. Rep. 441; *Plumer v. Harper*, 8 N. H. 88, 14 Am. Dec. 333; *Ourtee v. Thompson*, 19 N. H. 471; *Carlston v. Redington*, 21 N. H. 291; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; *Noyes v. Stillman*, 24 Conn. 15; *Conchocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449; *McDonough v. Gilman*, 8 Allen, 264, 80 Am. Dec. 72; *Nichols v. Boston*, 98 Mass. 89, 98 27 L. R. A.

Am. Dec. 132; *Grigsby v. Clear Lake Water Works Co.* 40 Cal. 396; *Castle v. Smith* (Cal.) 36 Pac. Rep. 859.

It is, however, further contended that in this particular case notice was not requisite—First, "because the defendant has made use of the embankment ever since it acquired possession of the same, with a knowledge of its injurious results; and, second, because the defendant has actively maintained and continued the embankment by repairing and stoning the same." The assertions of law and of fact embodied in these propositions have had our careful consideration, but we have not been convinced that either of them is well founded. We are by no means satisfied that knowledge by a defendant of the damage caused to a plaintiff renders a request to abate unnecessary. The general principle that ordinarily actual knowledge supersedes a requirement of notice is not overlooked, but here not only is notice required to direct attention to the damage occasioned by the nuisance alleged, but a request to abate is also needed to inform him who continues it that it is not assented to. As was said in *Johnson v. Lewis, supra*, the plaintiff "should be presumed to acquiesce until he requests a removal of the nuisance;" and, if this view be correct, knowledge of the injury done, even if tantamount to notice of that fact, is still not equivalent to all that is requisite, for it does not rebut the presumption of acquiescence. But it is not necessary to pass upon this point, and we do not do so. For the present purpose, it is sufficient to say that we find upon the record before us no evidence whatever that the appellant actually knew of the hurt done by the embankment, and that nothing appears which, in our opinion, would warrant us in charging it with constructive knowledge of it.

As to the second proposition, it must be admitted that the appellant has maintained the embankment; that it uses it as part of its roadbed, and for that use has repaired and preserved it. Does it follow that this action, though brought without notice or request, can be maintained? There certainly is nothing in the *Penruddock Case*, or in any of those which follow its lead, upon which an affirmative answer to this inquiry could be based. There are cases to the effect that a feoffee or lessee is liable, without request, where he increases the nuisance; but where this is shown he is held to be liable to the extent of the increase only, and this upon the ground that to that extent the nuisance is a new one, and arises from his own act. This principle of liability has been applied, too, in cases where the cause or means of nuisance was not added to, but where the use made of it was such as to be in itself a nuisance, and, consequently, a new wrong. Of these, *Moore v. Browne*, 3 Dyer, 319b, is an example. It was an action on the case for diverting the water of a conduit pipe. It appeared that the husband of the defendant had attached to the main a small pipe with a cock, thereby drawing water, at his pleasure, to serve his house. The wife continued to draw after his death, and for this

she was held liable as for a new diversion. The distinction between such a case and that now under consideration is manifest. Continuance in the active commission of a wrong, by the use of pre-existing means, is one thing, but the use of a wrongful structure in a manner and for a purpose wholly disassociated from the wrong is quite another and a very different thing. The use of this embankment by maintaining tracks on it neither renders it more injurious, nor inflicts any separate injury. If it had been constructed for the purpose of accumulating water, and the appellant had used the water so accumulated, the cases would be more like; as it is, they are essentially dissimilar. If the complaint was, not merely of the maintenance of the embankment by the defendant, but that the defendant backed up and used the water, there would have been no necessity to allege who erected it, or that request had been made for its removal, because the conduct of the defendant itself would have been the basis of the action, and not the presence of an embankment which it had not constructed. There is another class of cases, represented by *Irvine v. Wood*, 51 N. Y. 228, 10 Am. Rep. 608, in which it is held that, where a positive legal duty is attached to the possession of property, a failure on the part of its possessor to discharge that duty is not justified by the fact that its performance was rendered necessary by the condition in which the property had come into his hands. But what duty with respect to this embankment, either to the appellee or to the public, has the appellant neglected? It is not only admitted, but is insisted, that it has been kept in repair, and it is not pretended that the appellant has been guilty of any want of care to the damage of the appellee. No, it is the existence of the embankment which is complained of, and to assert that there is, in the absence of request, a duty to remove it, is to beg the question at issue, not to solve it. *Irvine v. Wood*, and other like cases, do not determine it, for they did not involve nor induce its consideration.

But it has been insisted that, although the views we have expressed may prevail in England, and throughout the United States generally, they are not in accord with the law of New Jersey, and therefore we have given to the decisions of the courts of that state especial consideration. The earliest of these is to be found in the report of the case of *Pierson v. Glean* (1838) 14 N. J. L. 86, 35 Am. Dec. 497. There the question was whether a party upon whose land a dam had been erected by a prior owner was, without request, liable for the nuisance thereby occasioned, and it was held that he was not. The defendant had set up, by pleas, that no request had been made, and to those pleas the plaintiff demurred. In the opinion of the court (Hornblower, *Ch. J.*), the law on the subject is said to have been then settled; and the *Penruddock Case*, and others, are referred to as supporting this statement and conclusion: "As well, then, upon the good sense and common justice of the case, as upon the ground of unquestioned authority, 27 L. R. A.

I am of the opinion that the demurrer ought to be overruled."

In *Beavers v. Trimmer* (1855) 25 N. J. L. 97, the defendant demurred to the declaration, assigning for cause: "(1) That there is no allegation that the defendant erected the dams, etc.; (2) that there is no averment of a request to remove them."

And as to these two causes the court, citing *Pierson v. Glean* and other authorities, said: "Where the action is brought for the erection or continuance of a nuisance, it is necessary to allege that the defendant erected or continues it; and if the action is not brought against the original erector, but against the feeless, lessee, etc., a special request to remove it must be alleged."

Then followed the decision in *Morris Canal & Bkg. Co. v. Ryerson* (1859) 27 N. J. L. 457; and it is argued that by it the two preceding cases were overruled, or at least so modified and limited as to render them ineffective in the present case. The first of these suggestions encounters the objection that no intention to supplant the earlier cases is expressed in the later one; and the alternative position rests upon a construction of the judgment in the *Ryerson Case* which is inaccurate and inadmissible. *Pierson v. Glean* was explained and distinguished,—not overruled; and, although the learned judge who delivered the opinion had concurred in the judgment in *Beavers v. Trimmer*, that case was not even mentioned. In *Morris Canal & Bkg. Co. v. Ryerson* the action was brought for damage done to the plaintiff's land by the defendant's use of, and omission to repair, certain works of its canal, for the creation of which it was not responsible; and in a single sentence of the opinion of the court we have the substance of the utmost which it contains to give color to the view which the appellee asks us to take of it as a whole. That sentence is, "An action may be maintained against a party who continues a nuisance erected by another, without a request to abate it;" and the question which confronts us is, What is the precise thought intended to be expressed by this inexplicit language? In what sense were the words "continues a nuisance" used; or, to put it differently, what was in mind as constituting a continuance of a nuisance? If this question can be satisfactorily answered, all difficulty as to the true purport and effect of the opinion may be overcome. In the first place, it may be said that it is scarcely conceivable that a different significance was purposed to be ascribed to the term "continuance of a nuisance" from that which had been theretofore attached to it. The *Penruddock Case* was not rejected, and the decisions which uphold its rule, though to some extent critically discussed, were not disapproved. It was said that *Penruddock's Case* does not support the doctrine which was contended for in the case which was under consideration, but it was not intimated that the doctrine which it does support is not in conformity with the law of New Jersey. It was pointed out that it was not necessary to question the correctness of the decision in *Pierson v. Glean*, for, admitting its author-

ity in its broadest extent, its principle was not pertinent. Indeed, the opinion in the *Ryerson Case* cannot be carefully read without discerning that the object of its author was, not to discard or overthrow an established doctrine, but to demonstrate its inapplicability to a particular case. The right of the defendant to maintain the works there in question was upheld (page 467), and the instruction of the trial judge that there was no liability except for faulty construction or failure to repair was approved, the court saying: "Although one of the counts of the declaration claims damages resulting from the erection of the dam and embankment, yet the charge of the court clearly excludes from their consideration all damages resulting from that cause alone."

In short, the defendant's liability was maintained (irrespective of the omission to repair, which was the actual basis of the decision) solely upon the ground of continuance of nuisance; and, as we have before said, the only question is as to what was in contemplation as evidencing or constituting a continuance. If it was intended to affirm that any use whatever of a structure which had been wrongfully erected amounts to a continuance of the wrong, even though the acts of user are not themselves injurious, and do not newly cause or add to the original injury, then indeed this opinion would conflict with the uniform current of authority. But we do not think that it is fairly subject to such interpretation. It contains this defining language: "Whether there be in fact a continuance of the nuisance by the defendant is a question of evidence. If the defendant, by any active participation of his, assent to the wrong, . . . he continues the nuisance."

There must be assent to the wrong, and to establish this there must be evidence of active participation in the wrong. Use of the thing complained of, for a purpose entirely apart from the hurt it occasions, is not enough. Such a use is, with respect to the injury, passive, and not active. It involves no participation in, no adoption or partaking of, the wrong committed by the creator of the injurious thing. The illustrations which accompany the definition we have quoted make this very clear. It is said: "If, for instance, he [defendant] repairs the dam, and holds back the water upon his neighbor for use of his own mill or canal, he continues the nuisance, . . . but, if the defendant simply suffer a dam erected upon his land by a former owner to remain without being used by him, it is no continuance of the nuisance."

The distinction is obvious. One who by repairing a dam causes water to accumulate on another's land, and uses that water for his own mill or canal, actively participates in the wrong itself, and partakes of the very element of direct injury. He continues, not the dam merely, but the nuisance committed by its means. But where a dam is suffered to remain without being used as or for the purposes of a dam (and the character of use referred to in both illustrations must be taken to be the same), there is no use of it as a wrongdoing agency, and consequently there is not a continuance of the nuisance. What

has been said makes it unnecessary for us to further comment upon the opinion in *Morris Canal & Bkg. Co. v. Ryerson*. The following passages from it do not require explanatory discussion. They indicate its general tenor, and support, we think, our apprehension of its import. In speaking of *Moore v. Browne*, *supra*, it is said: "The clear principle of the case is that an act of hers, appropriating the water to her use, thus recognizing and sanctioning the wrongful act of her husband, was a continuance of the wrong."

Of the *Penruddock Case*, it is said: "It is obvious that the defendant did no act assenting to the wrong, or appropriating it to his use, and thereby adopting or continuing the nuisance. He was therefore no more liable for the injury than he would have been if a stranger had entered upon his premises, and placed a nuisance there without his assent. The case is in strict accordance with the principle adopted in *Hughes v. Mung* [8 Harr. & McH. 441], viz., that the defendant's living in the house did not amount to a continuance of the nuisance by him."

With respect to *Bewick v. Cunden*, Cro. Eliz. 403, it is observed: "But, the case being again argued, the court held that the action could not be maintained, on the ground that there was no offense done by the defendant, for he did not do anything; and therein the case was distinguished from the case in 4 Assiz. pl. 8, for there the using was a new nuisance."

And in discussing *Pierson v. Glean* it is remarked: "It is not the erection of a dam, but the holding back of the water upon the plaintiff's land, that constitutes the nuisance; and had the plaintiff, instead of demurring to the plea, replied that the defendant had so held back the water, and had, by means of the gates, from time to time, overflowed the plaintiff's lands, the case would have been brought directly within the authority of *Moore v. Browne*."

A few lines further on it is stated that the complaint in the *Ryerson Case* was: "Not that the defendants wrongfully maintained the dam, but that they neglected to maintain and keep in repair the guard bank erected to secure the plaintiff's land from injury resulting from the erection of the dam. If it was the defendant's duty to maintain and keep in repair the guard bank, no notice can be necessary to sustain an action for damages resulting from neglect of such duty."

So that it appears that the point which is controlling here was not necessarily for consideration there; and the circumstance that the facts of that case did not require that the agency of nuisance should be distinguished from the nuisance committed by the use of the agency no doubt accounts for the frequent, but not universal, employment in the opinion of the word "nuisance" to designate the instrumentality by means of which the wrong is effected, as well as to denote the wrong itself,—the injurious use. That this indiscriminate application of the word "nuisance" was not, however, made in deliberate disregard of its distinctive appropriateness in cases where the wrong is committed by use, is evidenced by the remark before

quoted,—that “it is not the erection of a dam, but the holding back of the water upon the plaintiff’s land, that constitutes the nuisance.”

In conclusion, we do not doubt that, not only in England but in the United States as well, and especially in the state of New Jersey, the rule of *Penruddock’s Case* is firmly

established; and we are satisfied that it has not undergone any modification nor been subjected to any qualification which renders it inapplicable to the present case. We are therefore of opinion that in refusing to apply it upon the trial, there was error; and solely upon this ground *the judgment of the Circuit Court is reversed.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Samuel T. FIELD, *Appt.*,

o.
LAMSON & GOODNOW MANUFACTURING CO.

(162 Mass. 888.)

1. The holder of preferred stock, even if it was issued in compromise of a debt of the corporation to him, is a stockholder and not a creditor, under a statute giving the holders of such stock all the privileges of other members of the corporation, including the right to vote upon the stock.

2. A guaranty by a corporation of dividends upon preferred stock in accordance with a statute permitting a guaranty of such dividends payable cumulatively, out of net profits, does not make the dividend payable at all

events, but only devotes the profits to the payment of dividends upon such stock in preference to common stock.

3. The declaration of a dividend out of net profits contrary to the judgment of the directors is not required by a guaranty by the corporation of dividends upon preferred stock in accordance with a statute simply permitting a guaranty of such dividends payable cumulatively out of net profits.

4. The right to dividends on preferred stock which are payable out of net profits cannot be enforced in an action at law, even if there are net profits out of which they might be paid, if no dividend has been declared.

5. A court of equity cannot compel the declaration of a dividend on preferred stock out of net profits from which the directors have a right to make the dividend payable

NOTE.—Preferred, guaranteed and interest-bearing stock.

I. Power to issue.

a. *In the first instance.*

b. *Given by change of charter or articles.*

II. Estoppel to deny validity.

III. Nature of interest created by.

IV. Rights and preferences as to assets.

V. Rights and preferences in dividends.

a. *In general.*

b. *Payment out of capital.*

c. *Payment when capital is impaired or debts unpaid.*

d. *Guaranteed dividends.*

e. *Preference over common stock.*

f. *Accumulations and arrears.*

VI. Remedy to obtain or protect dividends.

VII. Guaranty of dividends by outside party.

VIII. Interest-bearing stock.

IX. Special stock.

X. Reduction of shares.

XI. Miscellaneous matters.

I. Power to issue.

a. *In the first instance.*

All kinds of shares of stock which have any peculiar advantages over other shares may be considered in some respects preferred stock, but as will appear below, in addition to a mere provision for preference over other shares in respect to payment of dividends there sometimes is added a guaranty of some sort, making what is called guaranteed stock. So, also, stock has sometimes been issued with an express provision for interest as distinguished from dividends. Another kind of stock called special stock, with a provision for its redemption and other peculiarities, is issued under the Massachusetts statutes.

A railroad company has not power to guarantee a specified dividend on its stock as a premium to induce a subscriber to take it, even if the guaranty is in part consideration of necessary services.
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unless such power is expressly granted. *Memphis Grain & Elevator Co. v. Memphis & C. R. Co.* 88 Tenn. 708.

As to effect of guaranty, see *infra*, V., d.

The right of a corporation to issue preferred shares in the first instance, that is, before any vested rights of stockholders have accrued, is discussed in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 150, in which it is said: “We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. . . . Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder.” This is now well settled doctrine in this country as will appear from the statements following.

Lack of any authority in the charter for the issue of preferred stock will not prevent stock otherwise properly issued from being valid as preferred stock if it was issued by the original authority and consent of all the shareholders, or has received their subsequent ratification, or long acquiescence. *Higgins v. Lansingh*, 154 Ill. —.

Where all stockholders consent a corporation may lawfully issue preferred stock in the absence of any provision to the contrary. *Havemayer v. Bordeaux Co.* (Ill. C. C.) 8 Nat. Corp. Rep. 127.

Where the charter does not prohibit the issue of preferred stock and the amount of stock issued does not exceed the limit allowed by the charter, the issuance of preferred stock is not unlawful. *Hazlehurst v. Savannah, G. & N. A. R. Co.* 48 Ga. 12.

A claim that distinctions between preferred stock and common stock could not be made in the organization of a corporation by the purchasers of a railroad at a judicial sale was made but not decided in *Mackintosh v. Flint & P. M. R. Co.*, 38 Fed. Rep.

cumulatively, where for half the time for which the dividends are claimed there were no net profits, and the condition of the corporation is such that the court cannot say that the payment of dividends might not injure the concern, or that the withholding of them might not be judicious.

(November 28, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Franklin County, in favor of defendant in an action brought to compel payment of dividends upon plaintiff's stock in the defendant corporation. *Affirmed.*

The Lamson & Goodnow Manufacturing Co., was prior to July 20, 1885, a manufacturing corporation organized under the laws of the commonwealth, with a capital stock of

\$300,000. On that day its debts were so large and so pressing that a compromise agreement was effected between it and its creditors for the purpose of avoiding compulsory winding-up proceedings. This agreement provided that the creditors who signed it should take in lieu of their claims preferred stock and bonds of the corporation in certain proportions, and upon certain terms, prescribed by the compromise agreement.

The stock was to be preferred stock with a guaranteed dividend. The agreement was carried out and the plaintiff holding some of the stock upon which the guaranteed dividend had not been paid brought this suit to compel payment.

Further facts are stated in the opinion.

350, where the objection was made by persons who had no shares of stock but were demanding some by virtue of certain certificates which called for stock after five consecutive annual dividends had been made on preferred stock and these had not yet been paid.

In *Anthony v. Household Sew. Mach. Co.*, 5 L. R. A. 575, 16 B. L. 571, it appeared that no power to issue valid preferred stock existed at the time a contract therefor was made, but the reason of this incapacity does not appear, and the power was afterwards obtained.

In England the power to issue preference shares depends on the memorandum and articles of association.

Without passing on the question of right an injunction was refused against the issue of preferred shares of stock in the case of *Fielden v. Lancashire & Y. R. Co.*, 2 DeG. & S. 581, on the ground that more mischief was likely to be done by interfering at that stage than by refusing to do so.

Where power to create preference shares up to a certain limit was expressly given, it was held that the issue of such shares beyond that limit could not be permitted, although the company was authorized to increase its capital by the issue of "new shares." *Melhado v. Hamilton*, 21 Week. Rep. 619, 28 L. T. N. S. 578, affirmed in 29 L. T. N. S. 864, 21 Week. Rep. 874.

Power to issue preference shares is not found in a provision of articles of association that directors may increase the capital by issuing new shares of such nominal value as may be determined on. *Moss v. Syra*, 22 L. J. Ch. 711, 11 Week. Rep. 1048.

An injunction against the issue of some of the shares with a preferential dividend under resolution and where the articles contained no power in this respect, was granted on the application of shareholders who were not present at a general meeting of the shareholders which authorized such issue, although they had notice of it. *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drew. & S. 514, 18 Week. Rep. 631, affirmed in 4 DeG. J. & S. 672.

The decision is based on the proposition that the articles of association constitute the contract, and that the issue of part of the shares with a preferential dividend is an alteration of the contract of any shareholder who does not assent thereto.

Expressly refusing to express his own opinion as to the correctness of the decision in the case of *Hutton v. Scarborough Cliff Hotel Co.*, Sir G. Jessel, M. R., decided in *Harrison v. Mexican R. Co.*, L. R. 19 Eq. 358, 12 Moak, Eng. Rep. 793, 44 L. J. Ch. 403, 32 L. T. N. S. 82, 23 Week. Rep. 403, that the implication against the right to issue preferred shares where the memorandum of the association was silent on the subject, might be repudiated where the articles of association contemporaneous therewith contained clear provisions on the subject.

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The creation of new shares to be called preference shares with a right to preferential dividends of 5 per cent is held in *Re South Durham Brewery Co.*, L. R. 31 Ch. Div. 261, 55 L. J. Ch. 179, 63 L. T. N. S. 923, 24 Week. Rep. 123, reversing the decision of the judge below, to be within the power of the company where its articles of association contemporaneous with the memorandum authorize the increase of capital with or without special privileges and priority over the original shares.

Where the original articles of association gave power to create additional share capital which might be issued as preference shares if so resolved by a general meeting, and such shares were issued pursuant to a resolution giving them a preference, it is said that they had exactly the same status or qualification as if the memorandum of association had in terms authorized their issue with such preference. *Re Biddgewater Nav. Co.*, L. R. 39 Ch. Div. 1, 26 Am. & Eng. Corp. Cas. 886, 57 L. J. Ch. 809, 56 L. T. N. S. 476, 36 Week. Rep. 769.

The exchange of ordinary shares of stock fully paid by surrender to the company for new preference shares is held valid in *Eichbaum v. City of Chicago Grain Elevators* [1891] 3 Ch. 460, 65 L. T. N. S. 704, where the exchange was pursuant to special resolutions in accordance with the memorandum and articles of association of the company. Counsel objected not only to the exchange of shares as such, but to the preference that would result in discrimination against other shareholders. As to this point counsel for the company argued that the proposed issue of preference shares was authorized by the memorandum and articles of association, and that the only preference would be created under the powers of the constitution itself. The court without discussion of this point further than to say that the powers conferred were being strictly pursued, did not seem to consider the point of lack of consideration for such transfer. It seems that the whole of the capital had been issued and all shares paid up, some of them being held in America, and the proposition was to provide for the exchange by ordinary shareholders of their existing shares for preference shares preferred as to capital as well as dividend. An arrangement with American shareholders to permit this exchange by British shareholders is recited in the statement of the case. It would seem from the case that the objector was one of those entitled to exchange his shares for preference shares and so not within any discrimination "even if such existed as to the American shareholders." But the court does not discuss the question further than is above stated.

The sale of preferred shares at a discount is not within the power of a company limited by shares formed and registered under the Act of Parliament of 1863, under which a shareholder's liability is limited by the amount unpaid upon his shares.

Mr. Samuel T. Field, appellant in propria persona:

It is shown that there were net profits from which the defendant could have made the payments which the plaintiff seeks to recover in this action.

If the net profits have been sufficient in amount to pay said installments their payment is not subject to any other condition or to any discretion of the directors of the corporation. If so it might have been so stated in the certificates. But the certificate runs thus: "The holder of the stock represented by this certificate is entitled to dividends upon it at six per cent for each year from the time of its issue cumulatively, before any dividends shall be paid upon any of the stock of said company except the preferred

stock issued under said act, which dividends are guaranteed by said company, a vote to that effect having been passed prior to its original issue."

Morawetz, Priv. Corp. 3d ed. § 459; *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 417.

In *Henry v. Great Northern R. Co.*, 1 DeG. & J. 606, the following language is used: "We think the guarantee here in question will bear the construction that the preference stockholders shall be entitled to 5 per cent semi-annual dividends when there are profits to pay them and not otherwise."

See also *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 834, 5 Am. Rep. 575; *Lockhart v. Van Alstyne*, 81 Mich. 82, 18 Am. Rep. 156.

The defendant owes a debt; the dividends,

(*Ooregum Gold Min. Co. of India, Limited v. Roper*, 41 Am. & Eng. Corp. Cas. 550), and a provision in the English Companies Act of 1867, section 26, that every share shall be taken subject to the payment of the whole amount in cash, unless otherwise determined by a contract in writing, does not change this rule.

Issuing preference shares for dividends on such shares to be taken by the shareholders at par, is held to be *ultra vires*, and that each shareholder who was not willing to accept them was entitled to have the proceeds of the whole applied ratably, if they could be lawfully issued at all. *Hoole v. Great Western R. Co.* L. R. 3 Ch. App. 222, 16 Week. Rep. 220, 17 L. T. N. S. 153.

The shares being unsalable except at a discount, the court considered that the issuing of them directly to the shareholders for dividends amounted to selling them at a discount.

b. Given by change of charter or articles.

An apparent conflict of decisions exists as to the power to issue preferred shares without consent of all the shareholders, where a corporation has been organized with common shares only.

The power to issue preferred stock under statutes which simply allow the increase of stock and articles of association which give no such authority, and where unanimous consent of the existing stockholders was not shown, is denied in *Bard v. Banigan*, 99 Fed. Rep. 13, and the decisions affirmed on the ground of estoppel as *Banigan v. Bard*, 184 U. S. 291, 38 L. ed. 922.

So a leading New York case holds that when shares of ordinary stock have been issued under a by-law which divides the whole amount of capital stock into equal shares without any provision for a preference, the by-law is as much the law of the corporation as if its provisions had been a part of the charter, and the purchasers of such stock acquire vested rights which cannot be changed without their consent by any subsequent action of the corporation giving a preference to other shareholders, even where there is power given in the charter to alter, amend, add to, or repeal by-laws at pleasure. *Kent v. Quicksilver Min. Co.* 78 N. Y. 159.

Following that case it is held again that it is not within the implied power conferred upon a corporation or its stockholders to change the relative value of its shares after they have been issued, without consent of the stockholders. *Campbell v. American Zylonite Co.* 11 L. R. A. 596, 123 N. Y. 455.

This was the case of an attempt to authorize the issue of some preferred shares to a creditor in substitution for shares surrendered by stockholders for that purpose and the unregistered owner of shares who had taken them by assignment was held entitled to hold the shares unaffected by an at-

tempt made without his consent to change the relative value of the company's shares, although his assignor, the apparent owner of the shares, joined in the consent and surrendered his proportion of the shares to be canceled.

The above cases did not involve the question of statutory changes or authority. But several American cases hold that such power may be given by statute, even against dissent of prior shareholders. A change in the charter of a corporation authorizing the issue of preferred stock in order to obtain necessary funds is held not to be such an alteration of the contract of the previous subscriber to the corporate stock as to relieve him from his subscription. *Everhart v. Westchester & P. R. Co.* 23 Pa. 320.

And a statute authorizing the issue of preferred stock by a corporation which already has stockholders is held not to be an infringement upon the rights of a minority of the stockholders who refuse their assent. *Curry v. Scott*, 54 Pa. 270.

So in Vermont a statute authorizing a corporation to issue preferred stock and guarantee a certain dividend on it in order to raise money, is held not an infringement on the rights of a previous subscriber to the stock so as to release him from his subscription. *Rutland & B. R. Co. v. Thrall*, 25 Vt. 532.

So in Kentucky the constitutionality of a statute amending the charter of a corporation so as to authorize the issue of preferred stock when the funds of the company had been exhausted and more must be procured by mortgage or by the issue of preferred stock, or in some other way, in order to carry on the corporate enterprise, is upheld in *Covington v. Covington & C. Bridge Co.*, 10 Bush, 69, on the ground that it is only a mode of pledging the revenues of the company to obtain money instead of pledging the franchise or other property.

In England the question is merely that of the power of the corporation to change its articles without express authority under act of parliament, and does not involve any question of constitutional right as against such an enactment.

The majority of the shareholders of a corporation have no right at a general meeting to alter the articles of association so as to authorize the issue of new shares with a preferential dividend where the original articles did not provide for it. Although the statute provides for modifying the regulations of the company, as this provision relates to the management and not to the altering of the constitution. *Hutton v. Scarborough Cliff Hotel Co.* 3 Drew. & S. 521, 11 Jur. N. S. 549, 13 L. T. N. S. 57, 13 Week. Rep. 1069.

A provision in articles of association that capital produced by the issue of B shares should be invested, and that the income, and, so far as neces-

so called, were actually due and payable when the action was brought, under the statute, by the force of which the stock was issued; there was a clear contract to pay annually, at a definite time, a definite sum to the holders and owners of the preferred stock, subject only to the contingency that the net profits of the corporation should be sufficient to meet the payment, and the facts show that such contingency has been met and that the profits are more than sufficient to pay the amount claimed.

The action is upon a contract by which the defendant obligated itself, if there were net profits, to pay certain specified sums at certain times in consideration that the plaintiff would assign his claims against said corporation and take the company's stock.

any, the capital, should be applied to make good a preferential dividend on A shares, is held to alter the conditions in the memorandum of association which stated the objects of the company to be the cultivation of lands and other similar purposes, and to do all such other things as the company might deem incidental and conducive to those objects, and therefore to violate section 12 of the English Companies Act of 1862 which prohibits any alteration in the conditions of such memorandum. *Guinness v. Land Corporation of Ireland*, L. R. 22 Ch. Div. 349, 52 L. J. Ch. 177, 47 L. T. N. S. 517, 81 Week. Rep. 341.

Notwithstanding the fact that this decision prevented the company "from doing that upon the expectation of doing which everybody has subscribed his money," the court with regret felt obliged to hold the application of any capital to such preferential dividends invalid. Expressly stating their belief in the honesty and fairness of the promoters of the company and its management, it was said that the provision could not be upheld without enabling almost every company managed by dishonest promoters to drive a coach and four through the companies act.

The right to issue new shares with preference if so resolved having existed under the constitution of the company from its inception, it is said that the substitution of new articles could make no alteration in this respect. *Re Bridgewater Nav. Co.*, L. R. 39 Ch. Div. 1, 28 Am. & Eng. Corp. Cas. 868, 57 L. J. Ch. 800, 58 L. T. N. S. 476, 36 Week. Rep. 769.

But in this case the court held that as the preference shares had been issued and no attempt made to remove the holders from the register, they must be regarded as shareholders on the dissolution of the corporation.

II. Estoppel to deny validity.

The preference of shareholders as among themselves being a matter of contract and one which would seem to involve no danger of injury to the public generally, there seems no reason for denying the operation of the principle of estoppel with respect to rights in preferred stock.

In *Bard v. Bannigan*, 39 Fed. Rep. 18, Shipman, J., expresses disapproval of the Massachusetts cases which hold that the purchaser of invalid special stock can recover back the money paid therefor from an assignee or receiver when the company has become insolvent.

As to these Massachusetts cases see *infra* under heading, IX., *Special stock*. Whether there is any rational distinction between special and preferred stock in relation to the doctrine of estoppel or not, it may be observed that all the cases respecting preferred stock recognize that an estoppel may ex-

Williams v. Parker, 136 Mass. 204; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Redf. Railways*, p. 592; *Bates v. Androscooggin & K. R. Co.* 49 Me. 492; *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411; *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 452; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 178.

Mr. Henry Winn, for appellee:

The plaintiff is a stockholder, not a creditor. He is a profit sharer to the full extent. He is a co-manager by his vote of company affairs.

The terms of his certificate entitle him to "dividends" "out of net profits in preference and priority" to the holders of any other stock. These, unless controlled by the con-

dict against denying its validity at least when its issue did not violate any express provision of statute.

After the consideration has been received by a corporation for the issue of preferred stock to which all the stockholders consented, there is a plain estoppel against contesting the validity of the stock. *Havemayer v. Bordeaux Co.* (Ill. C. C.) 3 Nat. Corp. Rep. 127.

Stockholders cannot dispute the validity of the issue of preferred stock which was issued with their sanction and under their covenant and assurance that it should have the same validity as if issued pursuant to law. *McGregor v. Home Ins. Co. of Newark*, 38 N. J. Eq. 181.

On the ground that preference between shares of stock is a matter of mere contract among the stockholders where a contract for the construction of a railroad provided for the giving of preferred stock to the contractors in payment for their work, it was held that the stockholders of the company who enjoyed the benefits of the contract without objection, were estopped afterwards to contest the power of the company to issue preferred stock. *Haselhurst v. Savannah, G. & N. A. R. Co.* 42 Ga. 13.

Holders of common stock cannot repudiate the issue of preferred stock which has been taken and paid for and the profits of which have been used in paying for real estate of the corporation, without any return of the consideration paid by the holders of the preferred stock, especially where the complaining stockholder or the prior owners of their shares voted in favor of issuing the preferred stock. *Hill v. Cincinnati Hotel Co.* (Cin. Super. Ct.) 25 Ohio L. J. 425. Affirmed by the supreme court on motion for leave to file petition in error.

A corporation or the holder of stock or scrip therein cannot compel an accounting for dividends received on preferred stock on the ground that the issue of such stock was *ultra vires*, after they have received full value for the stock, authorized its issue, paid dividends on it, and in many ways treated it as valid for twenty-two years. *Higgins v. Lansingh*, 154 Ill. —.

Even a non-assenting stockholder is denied the right to object to the issue of preferred stock, although it was issued for 40 per cent of its face value, where with knowledge or abundant means of knowledge he fails to object for ten years after the issue of the stock and the exercise of the rights of stockholders by the holders thereof. *Taylor v. South & North Ala. R. Co.* 4 Woods, C. C. 575, 13 Fed. Rep. 152.

Tacit acquiescence and delay in action by a minority of stockholders who do not assent to the act of the corporation creating preferred shares of stock, may amount to indefensible laches and estoppel against contesting the validity of the pref-

text, indicate that he is a stockholder merely.

Neither the statute authorizing the stock (Acts 1885, chap. 849), nor the certificate, nor his fundamental contract with the company under which his title was created, provides for him anything more than "dividends" out of "net profits" under a guaranteed preference. The court will not construe such an interest to be a debt.

The holder of preferred stock is not entitled to dividends absolutely, even if there be net earnings, for it may be necessary to use them to keep up the property for the good of the business, and to pay the debts which have priority to the plaintiff's right.

The duty to declare a dividend is on the

profits are in hand, is, within reasonable limits, discretionary in its nature.

There is no promise for its performance to be drawn in favor of the separate shareholder of this case. He cannot maintain assumpsit. His remedy, if any, is in equity, wherein some representative of the creditors who have priority over him, and the various parties affected, may be summoned in to defend their interests, and the directors may be ordered to declare a dividend if they ought.

Wiltiston v. Michigan, S. & N. I. R. Co. 13 Allen, 401; *Barnard v. Vermont & M. R. Co.* 7 Allen, 516; *Chaffes v. Rutland R. Co.* 55 Vt. 110; *Pittsburg & C. R. Co. v. Alleghany County*, 68 Pa. 126; *Nichols v. New York, L. E. & W. R. Co.* 15 Fed. Rep.

III. Nature of interest created by.

The main case of *FIELD v. LAMSON & G. Mfg. Co.* is in full accord with the prior cases in respect to the nature of the interest of a preferred stockholder.

The issue of preferred stock in exchange for common stock for the extra payment of five dollars per share was claimed in *Kent v. Quicksilver Min. Co.* 78 N. Y. 159 (affirming *Kent v. Quicksilver Min. Co.* 12 Hun, 53, and *Hoyt v. Quicksilver Min. Co.* 17 Hun, 160), to be merely a mode of obtaining money which constituted a borrowing; but the court said it was not a borrowing but a preference of one class of stockholders to another, giving the first class a perpetual, inextinguishable prior right to a portion of the earnings of the company before the other class might have anything therefrom. See on this question as affecting right to issue preferred stock against dissent of existing shareholders cases in division I., b, as to change of charter or articles.

Holders of preferred stock are subject to the statutory liability of stockholders equally with the holder of common stock. *Railroad Co. v. Smith*, 48 Ohio St. 219.

The fact that a transferee of stock from a director of a corporation took it on his representation that it would have a preference in the division of the profits, which was not true, does not relieve the purchaser from liability in respect to the shares as a contributory of the company on its winding up, although it may give a remedy against the director personally. *Re National Patent Steam Fuel Co., Ex parte Worth*, 4 Drew. 529, 23 L. J. Ch. 589.

Calling stock "preferred stock" does not *per se* define the rights in such stock, but these depend on the statute or contract under which it was issued. *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 233.

That holders of certificates are called preferred stockholders and the payments guaranteed to them are called dividends, does not determine their status, but they may nevertheless by virtue of their contract be in fact creditors and not stockholders. *Burt v. Rattle*, 81 Ohio St. 116.

Holders of certificates are not stockholders or members of a corporation although the certificates are called preferred stock, where the corporation guarantees certain semi-annual dividends thereon and also the final payment of the entire amount at a specified time, with a right to convert the certificates into common stock, securing the performance of its contract by a mortgage, where the holders have no right to vote and do not participate in either the profits or losses of the corporation, with an express declaration that they shall not be individually liable to creditors of the company. *Ibid.*

Bond-holders of a corporation who exchange their bonds for preferred stock which is entitled to

ferences, at least where the issue of preferred stock is not expressly prohibited by the charter or any statute. Such is the case where for four years with ample knowledge or means of knowledge on the part of all stockholders the certificates of preferred stock were dealt in by the public, recognized in annual reports of the directors, and quoted in the daily public prints as different from the ordinary stock. *Kent v. Quicksilver Min. Co.* 78 N. Y. 159.

So the holder of such stock may be estopped from denying its validity. Thus a director who was active in passing a resolution for the issue of preferred stock, which the company had no lawful power to issue, and in inducing other persons to take it and in giving credit to the corporation on the ground that such stock had been taken, who actually paid his money into the company for such stock, held it for over two years while the corporation was struggling, and voted upon it at two elections, was denied the right to recover back the money paid by him from the effects of the corporation after it became insolvent. *Banigan v. Bard*, 124 U. S. 291, 33 L. ed. 922, affirming *Bard v. Bannigan*, 39 Fed. Rep. 13.

And holders of preferred stock who have accepted it in payment of work as contractors in building a railroad for the corporation, and received interest on it for several years, are estopped from questioning the power of the company to issue such stock in order to avoid being considered stockholders instead of creditors, especially where neither the state nor common stockholders have ever objected to the issue of the preferred stock. *Branch v. Jesup*, 106 U. S. 468, 37 L. ed. 279, affirming *Branch v. Atlantic & G. R. Co.* 3 Woods, C. C. 431.

Neither can a city which has made a subscription to the preferred stock of a railroad company avoid the payment of her subscription on the ground that the railroad company had no power to issue preferred stock when neither the company nor any other stockholders are objecting. *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395.

An unauthorized alteration of certificates of stock by striking out the words "preferred" and "on which the company guarantees 10 per cent interest payable annually" does not release the holder from liability as a stockholder to a creditor of the company, where he has held the stock and been active in the management of the corporation for about ten years, knowing that this stock was included in the amount necessary to give the company a right to do business. *Tama Water Power Co. v. Hopkins*, 79 Iowa, 652.

Holders of preferred stock authorized and created by the holders of common stock, cannot claim to be the only stockholders where for more than twenty years they have stood by while the holders of the common stock have elected the managers and performed all other acts as stockholders of the company. *Higgins v. Lansingh*, 154 Ill. 301, 97 L. R. A.

575; *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 423; *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575; *Cook, Stock & Stockholders*, 8d ed. § 267; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Jackson v. Newark Pl. R. Co.* 81 N. J. L. 277; *Voss v. Grant*, 15 Mass. 510.

The guaranty of dividends cannot be construed as a contract for the absolute payment of dividends, as a debt, when net profits are made.

If it were an absolute guaranty that when net profits are made there should be a dividend at all events, they might be taken away from the creditors who are preferred to him, and if the profits be no more than enough to meet these dividends, the company might be-

preferred dividends out of the net earnings "if earned in the current year but not otherwise," are no longer creditors but stockholders. *St. John v. Erie R. Co.* 60 U. S. 23 Wall. 126, 23 L. ed. 742, affirming 10 Blatchf. 371.

The relation of a holder of preferred stock is in some of its aspects similar to that of a creditor, but he is not a creditor save as to dividends after the same are declared, nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor; he cannot by virtue of the same certificate be both. Whether he is the one or the other depends upon the particular construction of the contract he holds with the company. *Miller v. Batterman*, 47 Ohio St. 141.

Certificates of preferred stock are decided to be stock and not credits or certificates of indebtedness of the corporation for the purpose of taxation, where the certificates call for certain dividends guaranteed by the corporation and also by another corporation and secured by mortgage, with a provision that no further or other mortgage should thereafter be made to the prejudice of the holders of such stock, and that the holders should not have the right to vote upon the stock. *Ibid.*

The court in this case said it might not be easy to determine satisfactorily what office the mortgage should perform, if it could not be operative against creditors of the company, as the court held it could not be, but regarded the mortgage as indicating that the holders of the certificates were nevertheless to be regarded as stockholders, else the clause about prejudicing their rights by other mortgages would have been unnecessary, and that the option to foreclose thereunder gave merely a mode for winding up the corporation on petition of the stockholders.

Stock entitled to perpetual preferential dividends but conferring no right to vote, is nevertheless stock in a corporation within the meaning of a statute imposing *ad valorem* duty on sale of stock. *Ulverstone & L. R. Co. v. Inland Revenue Comrs.* 2 Hurst. & C. 555, S.C. *sub nom.* *Furness R. Co. v. Inland Revenue Comrs.* 33 L. J. Exch. 173; 10 Jur. N. S. 1123, 10 L. T. N. S. 161, 13 Week. Rep. 10.

A statute authorizing a county to issue bonds "in subscription for preferred stock" of a railroad company providing that it should receive preferred stock which should bear interest at the rate of seven per cent per annum, means that the preferred shall be capital stock of the company differing from other stock only in the matter of dividends. And any certificates which show that the county was not to be regarded as a shareholder of the company do not meet the requirements. *State v. Cherau & C. R. Co.* 16 S. C. 524.

So-called "income bonds" reciting that the income of the corporation is specifically pledged to their payment, principal and interest, in preference to the payment of dividends on the capital stock, give the holders no right to object to the execution by the corporation of a subsequent mortgage to secure other bonds to obtain funds for the use of the company. *Garrett v. May*, 19 Md. 177.

A lease of a railroad company which attempted to place preferred stockholders in the position of creditors by providing for payments of dividends to them as if they were creditors which would make a breach of trust to the disadvantage of other creditors of the company, was prevented by injunction, although this provision of the lease might have been insufficient to deprive such creditors of their rights. *Phillips v. Eastern R. Co.* 138 Mass. 123.

Under a statute in relief of an embarrassed railway company providing for the issue of different classes of irredeemable debenture stock to the holders of existing securities and another class of debenture stock from existing arrears of interest on debentures with a suspense period of ten years during which no action should be brought against the company except in respect of liabilities contracted thereafter, the holders of debenture stock were held to have no right to bring a suit without leave of the court during that period for interest accruing after the passage of the act on the principal for which debenture stock was held. *London Financial Assn. v. Wrexham, M. & C. Q. R. Co.* L. R. 18 Eq. 556, 30 L. T. N. S. 491.

The state is held to have a certain and valuable interest in preferred stock of a railroad company, so as to make the board of public works as its representative a necessary and proper party to a suit affecting the validity of such stock, which had been pledged or mortgaged to the board, and where the state also had a lien on the entire property of the company for payment of its debt on failure of dividends on the stock held by the state. *Ragland v. Broadnax*, 23 Gratt. 401.

Shares of capital stock of a church corporation which are declared redeemable in money when the holder takes up a permanent residence elsewhere, are held valid to sustain an action of *indebitatus assumpsit* against the corporation, in *Davis v. Second Universalist Meeting House Props.* in Lowell, 8 Met. 321.

Deeds of trust given to secure the performance of an undertaking by a corporation to pay dividends or interest semi-annually on guaranteed preferred stock and ultimately to pay for the stock itself, are in the strictest sense mortgages to secure the payment of money which may be foreclosed by valid sale of the land. *Fitch v. Wetherbee*, 110 Ill. 475.

The question in this case related to the right of redemption from such sale turning on the question whether the sale was a judicial sale or a sale under a power.

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that the capital need not be made up before declaring a dividend, although the capital was being lost. The court says: "If this property was a property of another nature, the case would stand in a very different position." While the capital stands impaired it is not clear that the directors can properly declare a dividend. *Cook, Stock & Stockholders*, 2d ed. §§ 199, 546; *Lockhart v. Van Alstyne*, *supra*; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Williams v. Western U. Teleg. Co.* 98 N. Y. 189; *Wood v. Dummer*, 8 Mason, 308; *Re Ebbw Vale Steel, Iron & Coal Co. L. R. 4 Ch. Div. 827*; *Re Kirkstall Brewery Co. L. R. 5 Ch. Div. 585*. McCullough's Definition of Profits, quoted *Coitness Iron Co. v. Black*, 6 App. Cas. 329.

IV. Rights and preference as to assets.

The question what interest preference shareholders take in the surplus assets of a corporation on its dissolution must depend on the contract between the members of the company contained in the articles, if, and so far, as they bear on the subject. The preference may be given both as to dividend and in the distribution of the assets, or as to dividend only. *Re Bridgewater Nav. Co. L. R. 39 Ch. Div. 1*, 26 Am. & Eng. Corp. Cas. 386, 57 L. J. Ch. 309, 58 L. T. N. S. 476, 35 Week. Rep. 709.

Where the parties do not enter into a contract as to the mode of division of surplus assets they are to be divided on equitable principles and in the above case it was first decided that a fair rule is to divide them among the holders of all the shares of the company in proportion to the amount paid up thereon. But on appeal the house of lords held *sub nom. Birch v. Cropper*, 61 L. T. N. S. 621, S. C. *Re Bridgewater Nav. Co.* 14 App. Cas. 525, 33 Am. & Eng. Corp. Cas. 586, modifying the decision below, that after payment of debts and costs of liquidation and repayment to shareholders, both ordinary and preference, of the capital respectively paid on their shares, a division must be made among all such shareholders in proportion to the amount of their shares irrespective of the amount paid in by them.

Preferred shareholders are on equal footing with ordinary shareholders on the winding up of the corporation where its articles provide that subject to difference in dividing profits the shares should rank equally and that the holders should be equal in respect to their status and liability for debts. *Griffith v. Paget*, L. R. 6 Ch. Div. 511, 25 Week. Rep. 523, 46 L. J. Ch. 493, 37 L. T. N. S. 141.

There being no provision made for the breaking up of a company and the sale of its property and a division of surplus capital, but the contract of the stockholders providing merely for preferential dividends where no profits have ever been made and no dividend declared, any surplus must be distributed among the shareholders according to their capital without reference to their rights in respect to dividend. *Re London India Rubber Co. L. R. 5 Eq. 519*, 18 L. T. N. S. 580, 15 Week. Rep. 384, 37 L. J. Ch. 236.

Reserve funds set apart by a canal company for (a) depreciation of steamers, (b) insurance, (c) canal improvements, which have not been used while the company was doing business, and which were made up of profits which would have been distributed in dividends to the ordinary shareholders except for the caution exercised in setting them aside to meet unforeseen contingencies and possible losses and depreciations, do not on the winding up of the company, leaving a surplus for shareholders, constitute a part of the capital or assets for distribution among both preference and ordinary shareholders, but are income which should be given to 27 L. R. A.

If the directors have refused to pay dividends on this preferred stock, acting according to their honest discretion, the court, in the absence of any evidence of fraud or intended oppression, will not interfere to compel the directors to declare or the company to pay such dividends.

For the directors are personally responsible for the debts of the company if making a dividend whereby the company is rendered insolvent, to the extent of such dividend (Pub. Stat. chap. 100, § 60, cl. 1), and the law intends they shall have a fair discretion in the matter.

Belfast & M. L. R. Co. v. Belfast, 77 Me. 458; *Cook, Stock & Stockholders*, 2d ed. § 539; *Ely v. Sprague*, Clarke, Ch. 351, 7 L.

the ordinary shareholders from whom it had been withheld. *Re Bridgewater Nav. Co.* [1891] 2 Ch. 317.

Preferred stock reciting that it is a "first claim upon the property of the corporation after its indebtedness," and entitled to 7 per cent annual interest from the net earnings of the company, does not give the holders any priority of lien over the claims of subsequent creditors; but the general rule applies that stockholders can be paid only when other liens have been paid. *King v. Ohio & M. R. Co.* 2 Fed. Rep. 30.

Preference over common stockholders and not over creditors in the distribution of the assets of a corporation is given to holders of certificates of preferred stock which was made a first claim upon the property after its indebtedness, as well as entitled to preference in dividends. *Warren v. King*, 108 U. S. 389, 27 L. ed. 769.

The court says the preferred shareholders are not preferred as to reimbursement of principal or as to the right to net earnings, over any one but the holders of common stock, and that while the certificate calls for payment of "interest" on such stock before any dividend on the common stock, the so-called interest is really a dividend because it is to be paid on stock and out of net profits.

An exception to the ordinary rule which limits the preference of holders of preferred stock to the matter of dividends out of the net earnings is found in *Totten v. Tison*, 54 Ga. 130, in which certificates of stock were issued under a statute authorizing the company to borrow money and secure the loan by mortgage, and were indorsed with the statement that they represented preferred stock with a guaranty of 15 per cent annually for two years when they were to be redeemed or converted into common stock at the option of the holder. The court held that these holders were entitled to claim the rights of creditors in the assets of the company on its insolvency. It was regarded that the relation of creditor was stipulated for in the original contract between the parties.

Under the Pennsylvania Act of 1872, authorizing corporations to issue preferred stock calling for not more than 12 per cent payable out of net earnings, and the Act of 1873 authorizing the issue of different classes of preferred stock with preferences in rates and order of payment of dividends or in redemption of principal, with right to redeem on terms prescribed in the issue, and providing that the company may specifically appropriate for dividends or redemption the revenues from any specific department of business or the proceeds of any specified portion of its assets, or property, provided no injustice shall be done to the existing rights of creditors or other stockholders, a holder of preferred stock is a real estate company to which the company is bound to apply any fund remaining in its treasury to redeem at par on demand of the holder, cannot claim the right to redemption

ed. 140; *Williams v. Western U. Tele. Co.* 98 N. Y. 192; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 14; *King v. Bank of England*, 2 Barn. & Ald. 620; *Pratt v. Pratt*, 83 Conn. 457; *Elkins v. Camden & A. R. Co.* 86 N. J. Eq. 238.

No dividends accruing prior to August 10, 1890, though not yet declared or paid, can be recovered by the plaintiff. For they were appropriated under the Indenture of Compromise, articles 15 and 16, for the benefit of the defendant in payment of its obligations, and belong to it.

Davis v. Second Universalist Meeting-House Proprs. in Lowell, 8 Met. 321; *Bates v. Androscoogin & K. R. Co.* 49 Me. 491; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445.

out of any other specific assets to the injury of creditors or stockholders by crippling the business. *Culver v. Reno Real Estate Co.* 91 Pa. 307.

Holders of preferred stock are to be first paid in the distribution of the capital of a corporation before ordinary stockholders can share therein, under N. J. Rev., 191, which is regarded as making a legislative declaration of such preference by providing for a proportional distribution to the general stockholders "after payment of creditors, and costs and expenses, and the preferred stockholders," when a corporation is being wound up under that Act. *McGregor v. Home Ins. Co. of Newark*, 83 N. J. Eq. 181.

The fact that a corporation is being wound up by its officers and not under direction of the court does not change the right of preferred stockholders to preference in the assets where they are entitled thereto on a winding up under the statutes. *Ibid.*

A preference as to capital as well as dividends entitling the preference shareholders to priority in surplus assets is created where in the exercise of lawful power a company raised capital by the issue of preference shares entitled to preferential interest at 10 per cent per annum, the amount of the shares to be repaid on six months' notice with 25 per cent bonus, and such payment of interest, repayment and bonus to be made before any dividend, interest, or other money should be paid to the original shareholders. *Re Bangor & P. Slate & Slab Co. L. R. 20 Eq. 69*, 32 L. T. N. S. 389, 23 Week. Rep. 735.

V. Rights and preferences in dividends.

a. In general.

A by-law providing for dividends on preferred stock establishes the terms of a contract between the company and stockholders who take stock relying on the by-law. *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411.

The right of preferred shareholders to dividends payable out of the net earnings only cannot restrict the right of the company to conduct its operations in good faith as it may see fit, although a different management might have created or left net earnings. *St. John v. Erie R. Co.* 80 U. S. 22 Wall. 128, 22 L. ed. 743.

Directors have the power to devote the profits of any given year to objects which are legitimate and proper, such as necessary improvements, although this may prevent the payment of dividends on preferred shares, where the holders are entitled "to non-cumulative dividends . . . in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors." *New York. L. R. & W. R. Co. v. Nickala*, 119 U. S. 296, 3027 L. R. A.

Morton, J., delivered the opinion of the court:

The plaintiff is the holder and owner of thirty shares of preferred stock in the defendant company. Part of them he obtained from the trustee as a creditor of the company, under the indenture of compromise, and part of them he acquired by purchase from another person. Although the shares differ in important respects from common shares in the defendant company, we think that the plaintiff must be regarded as a stockholder, and not as a creditor. *Williston v. Michigan, S. & N. I. R. Co.* 18 Allen, 401; *Williams v. Parker*, 136 Mass. 204; *St. John v. Erie R. Co.* 80 U. S. 22 Wall. 128, 22 L. ed. 743; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18

L. ed. 363, reversing 15 Fed. Rep. 575, as the provision quoted does not give an absolute right to dividends except where the directors declare them or ought to declare them.

The issue of preferred stock bearing the right to dividends of 6 per cent semi-annually "until the net earnings of the road shall be sufficient to pay an interest of 6 per cent per annum on all stock issued," etc., is held to require a whole year to be taken into account in determining the sufficiency of net earnings to pay the dividend on all the stock, and not merely the period of six months. *Bates v. Androscoogin & K. R. Co.* 49 Me. 491. See also *Hoole v. Great Western R. Co.* L. R. 3 Ch. 292, 16 Week. Rep. 260, 17 L. T. N. S. 153.

Payment of the required amount to a trust company to entitle the holder of preferred stock in a railroad company to an equal number of shares in a new company which succeeded the former, entitles a shareholder to dividends on the shares of the new company where the dividend is subsequently declared, although he has not yet surrendered his old shares and obtained the new ones. *Ellsworth v. New York, L. E. & W. R. Co.* 19 N. Y. Week. Dig. 211.

This case appears to be affirmed by the memorandum decision affirming a case of the same name in 98 N. Y. 648.

Undeclared and undivided dividends on preferred stock which have been earned are incidents to the shares and pass by assignment of the latter. *Manning v. Quicksilver Min. Co.* 24 Hun. 360.

The sale or assignment of guaranteed stock carries with it as an incident a right to dividends previously accrued, but which has been repudiated by the corporation and the earnings which should have been appropriated thereto otherwise applied. *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483.

The court holds the case to be substantially the same as that of *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157, although in the *Boardman* case there was no dividend due or enforceable when the plaintiff took his stock, but became subsequently enforceable for a period reaching back to a time before he acquired the stock. Without attempting to present here any cases except those respecting preferred stock, it may be said that cases as to common stock agree with these.

A transfer of shares of stock after the declaration of dividends but before the time of payment thereof, carries with it the right to the dividends. *Burroughs v. North Carolina R. Co.* 67 N. C. 376, 12 Am. Rep. 611.

This case seems to be opposed to other cases on the effect of transfers of ordinary stock, and no distinction seems to be reasonable. Opposed decisions are *Hopper v. Sage*, 112 N. Y. 530; *Spear v. Hart*, 3 Robt. 420. That such dividends will pass by a residuary bequest in case of the death of the shareholder before the time of payment but

Am. Rep. 156; *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 875; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 178; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445; *Chaffee v. Rutland R. Co.* 55 Vt. 110; *Cook, Stock & Stockholders*, 8d ed. §§ 267, 271. The stock was issued under and in accordance with the provisions of Stat. 1885, chap. 349. By section 2 of that Act it is expressly provided that the holders of preferred stock "shall be entitled to all the privileges of other members of said corporation, including the right to vote upon such stock, in person or by proxy, at all corporate meetings." Independently of other considerations, this provision plainly puts the pre-

ferred shareholders upon the footing of members of the corporation. By section 8 of the Act it is provided that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act," thus removing the objection which might otherwise be made under *Williams v. Parker, supra*, that it is the policy of the commonwealth to regard special stockholders, and, by parity of reasoning, preferred stockholders, as creditors. It is immaterial how or where the plaintiff obtained his shares. The preference belongs to the stock, and not to the stockholder; otherwise the stock would be preferred as long as it was held by a creditor who was a party to

after they are declared, is held in *De Gendré v. Kent*, L. R. 4 Eq. 223, 16 L. T. N. S. 604.

b. Payment out of capital.

No dividends on preferred stock can be claimed unless there are net earnings, where the right to dividends is based on a statute which declares merely that the holders shall be entitled to dividends not to exceed 7 per cent per annum before any dividend shall be paid on other stock. This statute does not give the absolute right to dividends but merely declares a preference as between stockholders. *Elkins v. Camden & A. R. Co.* 35 N. J. Eq. 228.

A prohibition against paying dividends out of capital applies to payment of dividends from moneys paid to a railway company by contractors for delay in completing their work, where it is admitted that the delay was attributable to the company's default in delivering possession of the land to the contractors, and that the amount must be repaid to a contractor out of the capital. *Salisbury v. Metropolitan R. Co.* 33 L. J. Ch. N. S. 249, 22 L. T. N. S. 839.

A dividend declared and paid under a delusive balance sheet when there were no funds properly applicable thereto can be recovered back on the winding up of the company, although the court will not lightly interfere with the payment of dividends honestly paid on estimates of assets which subsequently prove erroneous. *Re County Marine Ins. Co., Rance's Case*, L. R. 6 Ch. 104, 40 L. J. Ch. 277, 23 L. T. N. S. 823, 19 Week. Rep. 291.

A dividend actually declared and paid cannot be recovered back in winding up the company on the ground that it was never earned, if it was declared in good faith on the basis of estimated value of assets which were in jeopardy and were subsequently lost. *Re Mercantile Trading Co., Stringer's Case*, L. R. 4 Ch. 475, 33 L. J. Ch. 606, 20 L. T. N. S. 558, 17 Week. Rep. 604.

Payment to shareholders of interest out of capital is a breach for which the directors are liable. *Re National Funds Assur. Co.* L. R. 10 Ch. Div. 118, 48 L. J. Ch. 163, 39 L. T. N. S. 430, 27 Week. Rep. 302.

The liability of directors on the winding up of a corporation for the amount of moneys abstracted from capital to pay preferential dividends is enforced in *Re Alexandra Palace Co.*, L. R. 21 Ch. Div. 149, 51 L. J. Ch. 655, 46 L. T. N. S. 780, 30 Week. Rep. 771, in which they were held liable jointly and severally for the amount of the dividends paid out of insurance money, and as to other dividends paid from money borrowed for the purpose they were held jointly and severally liable for such a sum as would enable the liquidator to pay on all debts proved such a dividend as would have been payable on all debts other than those for such bor-

rowed money in case no proof of these had been made.

See further, as to guaranteed dividends, *infra*.

c. Payment when capital is impaired or debts unpaid.

Preferred stock is intended to have special advantages and be exempt from a general statute prohibiting dividends while the capital is impaired, at least so far as respects an impairment of the capital existing when the preferred stock was issued, where the statute authorizing its issue gave the alternative right to raise money by the sale of mortgage bonds and plainly declared that the holders of the preferred stock should be entitled to dividends of 7 per cent per annum out of the net earnings, which should be cumulative, and at the time of the statute the company was so indebted that it must have been apparent that dividends must be paid before supplying the previous impairment of capital in order to make any inducement to purchase the preferred stock. *Cotting v. New York & N. R. R. Co.* 54 Conn. 154.

Dividends on preference shares sold to obtain additional capital for making a great expenditure in the restoration of a reservoir which had burst, declared for the time during which no income was produced by the company because the reservoir was in process of construction, are held properly attributable to capital, being in substance interest on unproductive capital. *Bardwell v. Sheffield Water Works Co.* L. R. 14 Eq. 517, 41 L. J. Ch. 700, 20 Week. Rep. 969.

In this case the right to pay dividends when no income was made was not considered, the only question being as to whether they were to be attributed to income or capital.

An injunction against the declaration of dividends on preferred stock until provision had been made by means of a sinking fund or otherwise for the replacing of capital lost or sunk or expended in the purchase of the waste property of the company, was denied where the articles of association declared that in case of dispute as to the amount of net profits, the decision of the company at a general meeting should be final and the proposed dividend had been ordered at such a meeting. *Lambert v. Neuchâtel Asphalte Co.* 51 L. J. Ch. 862, 47 L. T. N. S. 73, 30 Week. Rep. 913.

One ground of denying an injunction against dividends on preferred stock while floating or unsecured debts are unpaid in *Stevens v. South Devon R. Co.*, 9 Hare, 815, 31 L. J. Ch. N. S. 816, was the lack of power in the court to interfere with the internal management of the corporation, and it is said that the principle applicable to partnerships should apply.

So an injunction against the declaration of any dividends by a railway company until all its works were completed was denied in *Browne v. Monmouthshire R. & Canal Co.*, 12 Beav. 33, 20 L. J. Ch.

the indenture of compromise, and would lose its privileges when it passes into the possession of one who was not a party to that instrument.

The principal question relates to the right of the plaintiff to dividends, and involves—First, the construction of section 8 of the Act aforesaid; and, secondly, whether this action can be maintained, or, if not, whether there is a remedy in equity. Section 3 provides that “the holders of said preferred stock shall be entitled to dividends upon the same annually, out of the net profits, in preference and priority to the holders of any other stock of said corporation, to the amount of such rate per cent thereon, not exceeding seven per

cent, as may be determined by vote of said corporation prior to issue of the same, which rate per cent of priority shall be expressed in the certificates of said preferred stock, and shall also share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock at said rate per cent, and dividends to the holders of such preferred stock, at the rate per cent fixed upon shall be paid for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any other stock of said corporation, and if so voted and expressed in the certificates, may be guaranteed by said corporation.” Prior to the issue of said preferred stock,

N. S. 497, 15 Jur. 475, on the ground that the court had no jurisdiction to interfere merely to prevent violation of duty to the public, and also that misapplication of income was the subject of internal regulation.

A tramway company which had failed to set apart a reserve fund adequate for its maintenance until it had become worn out, was held to have no right to declare a dividend to preferred stockholders without making any provision for restoring the tramway. *Dent v. London Tramways Co. L. R. 16 Ch. Div. 844, 50 L. J. Ch. 190, 44 L. T. N. S. 91; Davison v. Gillies, L. R. 16 Ch. Div. 347, note, 50 L. J. Ch. 192, note, 44 L. T. N. S. 92, note.*

But holders of preferred shares the dividends on which depend on the profits of the particular year only, are entitled to dividends out of the net profits after deducting therefrom a proportionate amount of what is needed for the restoration of the road, and cannot be deprived of their dividends in order to make good what the company has erroneously applied to dividends in previous years. *Dent v. London Tramways Co. supra.*

Without adopting the rule that all debts must be paid before a corporation can be compelled to pay dividends on preferred stock, the right to dividends was denied in *Belfast & M. L. R. Co. v. Belfast, 77 Me. 445*, in case of a corporation which had in addition to its bonded mortgage debt an outstanding note which was regarded as given for temporary purposes in anticipation of rents receivable.

In a later case concerning the same corporation the court required a dividend on preferred stock to be made amounting to about \$16,000 where the company had an annual rental from the lease of its railroad amounting to \$36,000, and bills payable amounting to about \$9,000 only, while its sole indebtedness was a mortgage debt of \$150,000 on a road which cost a million dollars, and the company had sufficient means or credit to provide for the debt without reserving these funds for that purpose, although the debt was soon to mature. *Hazeltine v. Belfast & M. L. R. Co. 79 Me. 411.* See also on this point the main case of *FIELD v. LAMSON & G. MFG. CO.*

Scrap for dividends on preferred stock having been issued without right by a corporation which had no surplus profits properly applicable thereto, a holder of such scrip is held entitled to payment thereof where the company alone contests its validity after it has honored a large part of such scrip by converting it into bonds, at least when it appears that the company's debt has been largely reduced and it does not appear that the company would be embarrassed by treating plaintiff's scrip as it had other similar scrip. *Chaffee v. Rutland R. Co. 55 Vt. 110.*

A stockholder is not charged with constructive notice of the financial condition of the corporation making it improper to declare dividends so far as to prevent him from holding scrip which was issued
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for dividends as a valid claim against the company where the conduct of the corporation is such as to estop it from denying the validity of such scrip. *Ibid.*

See further as to guaranteed dividends, *infra*.

d. Guaranteed Dividends.

See also *Memphis Grain & Elevator Co. v. Memphis & C. R. Co. 85 Tenn. 703, supra, I. a.*, and *Dickinson v. Chesapeake & O. R. Co. infra, XL*.

Except where so-called guaranteed stock is in the nature of an absolute obligation to a creditor of the corporation rather than a contract with a shareholder, there is force in the objection against any dividends which cannot be paid out of income but which can be paid only by drawing upon the capital. Sustaining this objection with practical unanimity, the courts, as in the main case of *FIELD v. LAMSON & G. MFG. CO.*, have construed general language guaranteeing dividends on stock to mean that dividends should be paid out of profits if any were made, but not otherwise.

Certificates of stock in the usual form but indorsed “5 per cent semi-annual dividend guaranteed,” issued under a resolution for the issue of preferred capital stock with a semi-annual dividend of 5 per cent guaranteed by the company, were held in *Lookhart v. Van Alstyne, 81 Mich. 78, 18 Am. Rep. 156*, to entitle the holder to the dividend only when there were profits to pay them, but with the right to have arrears of one year made up from the profits of another year.

Judge Cooley writing the opinion in this case says that a contrary view involves extraordinary results, as it might require the dissipation of the assets of the company to pay so-called dividends and make a conflict of interest between the common and preferred shareholders respecting the management of the corporation.

So it was held in *Taft v. Hartford, P. & F. R. Co., 8 R. I. 810, 5 Am. Rep. 575*, that the holder of preferred and guaranteed ten per cent stock on which dividends are to be paid before any dividends shall be paid on any other stock of the company is entitled to dividends only out of the net earnings of the company and has no claim until dividends are earned.

And to similar effect is the decision in *Feld v. Roanoke Investment Co. (Mo.), Jun: 30, 1894*, denying rescission of a contract for preferred stock on failure to pay the agreed annual interest so called.

And in *Miller v. Ratterman, 47 Ohio St. 141*, where the question was whether so-called preferred and guaranteed stock, guaranteed not only by the corporation which issued it but by another also, and secured by mortgage, should be deemed to be stock or credits for purpose of taxation, the court held it to be stock and that dividends were payable thereon only out of profits, although the guaranty was in general terms expressing no such limitation.

the corporation and the directors determined by vote the rate of dividend to be paid, and the form of certificates to be issued. The certificates issued to the plaintiff were in the form thus determined, and so much of them as is now material is as follows: "Said stock is issued under and subject to an act of the general court of the commonwealth of Massachusetts approved June 18, 1885, entitled 'An act to authorize the Lamson & Goodnow Manufacturing Company to issue preferred stock;' and its holder has all the rights provided for the holders of such preferred stock by this act. The holder of the stock represented by this certificate is entitled to dividends thereon annually out of net prof-

its, in preference and priority to the holders of any stock of said corporation, except the preferred stock issued under said act, to the amount of six per cent, which rate per cent was determined by vote of said corporation prior to its original issue; and said holder is also entitled to share *pro rata* with the holders of the common stock in any excess dividend in any year above a dividend on the whole of said stock of said company at said rate of six per cent. The holder of the stock represented by this certificate is entitled to dividends upon it at six per cent for each year from the time of its issue, cumulatively before any dividends shall be paid upon any stock of said corporation except the preferred

To the same effect was the decision in *Chaffee v. Rutland R. Co.*, 55 Vt. 110, that a corporation has no right to declare dividends on guaranteed preferred stock, which is entitled to dividends from the earnings and income in preference to dividends on common stock, although there is a provision that no mortgage shall be made by the company to take precedence of such stock in the application of its income, where there are no surplus earnings if the floating debt and current expenses were first paid and the only earnings and income was rental insufficient to pay the operating expenses and floating debt.

The application to arrears of dividends due on guaranteed stock of funds obtained by borrowing is not necessarily illegal or subject to injunction, where the money which should have paid the dividends had been applied to capital purposes. *Mills v. Northern Railway of Buenos Ayres Co.*, L. R. 5 Ch. 621.

A contract by a corporation that the dividends accruing on certain stock transferred by it in payment for patents should amount to a certain sum before May 17, which is executed by payment thereof, is held not to preclude the stockholder's right to claim the whole of another dividend declared in July following, since no dividend accrues until it is declared. *Parks v. Automatic Bank Punch Co.* 14 Daly, 424.

The resolution of a board of directors for the issue of guaranteed stock calling for certain dividends before any dividends on the other stock, is held properly considered in evidence to explain the real character of guaranteed stock issued thereunder. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157.

e. Preference over common stock.

Nothing can be paid by discretion of the directors to ordinary stockholders until the preferred shareholders have received a dividend of 7 per cent, where the statute gives the latter a right to such a dividend before any dividend shall be paid on the common stock. *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 233.

Holders of a small portion of the shares of preferred stock which were entitled to dividends out of net earnings before any payment on the other stock, were held to have the preference as if they were the only preferred shareholders where the others had relinquished their shares in exchange for consolidated stock, by which the greater part of the preferred shares had been retired, and that was also exchanged for common stock on different and less favorable terms. *West Chester & P. R. Co. v. Jackson*, 77 Pa. 621.

Where 10 per cent was fixed as the maximum rate of dividend on certain shares, and 7 per cent was the maximum rate on other shares, in the act for the formation of the company, a declaration of a dividend of 8 per cent on the former and 7

per cent on the latter was made and the court refused to interfere so as to compel a dividend in proportion to the maximum rates. *Maughan v. Leamington Priors Gas Co.* 15 Week. Rep. 333.

Holders of preferred stock are entitled to 7 per cent dividends before the holders of common shares get anything, and to further dividends only after the common stock has also received 7 per cent, after which both kinds of stock share equally, where the indenture under which the stock was issued provides for 7 per cent dividends on the preferred stock "before any dividend shall be declared upon other unpreferred shares . . . and to an equal dividend with said other shares of the net earnings of the company beyond said 7 per cent." *Bailey v. Hannibal & St. J. R. Co.* 84 U. S. 17 Wall. 96, 21 L. ed. 611, affirming 1 Dill. 176.

The declaration of a 10 per cent dividend on all the stock, common and preferred, but payable in preferred stock to holders of such stock, and in common stock to holders of common stock, is sustained against objection by owners of bonds and common stock, in *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 373, where the company had power to issue additional preferred stock and the holders of preferred stock were entitled to 7 per cent dividends before anything was given on the common stock, and after the 7 per cent dividend on the latter, was entitled to 3 per cent more and then both were to share equally in any surplus, while at the market value of the stock or at its nominal value the holders of preferred stock were not getting more than they were entitled to.

The holder of preferred stock is not estopped from asserting his right to preference given by statute simply because for some years the holders of preferred stock without objection have allowed dividends to be shared with holders of the ordinary stock, who were not entitled thereto. *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 233.

Creditors of a corporation who under a scheme of arrangement accept debenture stock with certain preferences, do not thereby lose their previous priority with respect to a judgment creditor who has sued out an elegit and who does not accept and is not bound by the scheme. The court while seeking to prevent prejudice to the rights of such creditor by the scheme, declined to allow him to acquire a priority over others by refusing to accept it. *Stevens v. Mid-Hants R. Co.* L. R. 8 Ch. 1064, 42 L. J. Ch. 694, 29 L. T. N. S. 818, 21 Week. Rep. 858.

Special resolutions altering the application of revenue as between preference and ordinary shareholders in a manner beneficial to the preference shareholders, are held in *Ashbury v. Watson*, 54 L. J. Ch. 986, 54 L. T. N. S. 27, 38 Week. Rep. 882, L. R. 30 Ch. Div. 373, 16 Am. & Eng. Corp. Cas. 833, to be invalid as a violation of a statutory provision prohibiting the alteration of a condition contained in the memorandum of association ex-

stock issued under said act, which dividends are guaranteed by said company, a vote of said company to that effect having been passed prior to its original issue." It is to be observed that the act only authorizes the payment of dividends on the preferred stock out of net profits, and that, to secure their final payment in case there should be no net profits or a deficiency at any time, but should be net profits later, the dividends are made payable cumulatively. The certificates follow the act; and we think that the effect of the guaranty which the act authorized, and which was voted by the company, and is contained in the certificates, was not to make dividends of 6 per cent payable at all events,

and whether there were net profits or not, but to add to the statutory liability the direct undertaking of the company that the net profits should be devoted first of all, as between the preferred stockholders and the holders of any other stock, common or special, to the payment of preferred dividends. In the strict sense of the word, "guaranty" or "guarantee" applies to an undertaking by another, though it is sometimes used in the sense of "warranty" or "warrant." *Wiley v. Athol*, 150 Mass. 434, 6 L. R. A. 843. To give it in the present case the effect of rendering the company absolutely and at all events liable for the dividends would be inconsistent with the provision authorizing

cept in certain other matters. Whether such misappropriation can be ratified was questioned, but in any event it was held that there was not sufficient proof of ratification.

L. Accumulations and arrears.

Nearly all the cases support the right to have arrearages of dividends on preferred shares which are due to lack of profits paid out of profits of subsequent years as soon as they become sufficient although there is no express provision therefor as there is in the main case. But one case was found to the contrary. That is *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, in which it was held that a by-law providing for dividends on preferred stock not exceeding 6 per cent, then a like dividend on the common stock, and for a division of any surplus on all the stock *pro rata*, shows an intent to have all net earnings divided every year so that dividends on preferred cannot be cumulative, that is, to have arrearages of one year paid out of the earnings of another. As to this the same court declares in *Haseltine v. Belfast & M. L. R. Co.*, 79 Me. 411, that it was a decision very liberal to the common stockholders, giving them the benefit of the doubt.

Several of the cases allowing the claim to arrearages of dividends, but not all of them, were cases of guaranteed dividends.

Thus in *Boardman v. Lake Shore & M. S. R. Co.*, 34 N. Y. 157, it is held that dividends are cumulative and a specific charge upon accruing profits to be paid as arrears before any other dividends are divided upon the common stock where there is an absolute guaranty of "the payment of dividends as aforesaid" included in a certificate of stock entitled to ten per cent dividends out of the net earnings.

The same is held in *Prouty v. Michigan, S. & N. I. R. Co.*, 1 Hun. 655, 4 Thomp. & C. 230, in which case the court approves the rule that such arrears are to be paid as part of the guaranteed dividends unless there is some agreement to the contrary. Also in *Lockhart v. Van Alstyne*, 31 Mich. 75, 15 Am. Rep. 155.

So payment of arrears of dividends out of subsequent profits is held lawful in *Stevens v. South Devon R. Co.*, 9 Hare, 816, on stock having a guaranty of 6 per cent dividends per annum.

The same rule of allowing arrears of dividends to be paid from subsequent profits was upheld in respect to guaranteed half-shares issued under an act which allowed a shareholder who had a share half paid up to have his share divided into a guaranteed half-share, and a deferred half-share, the former of which should have preference in dividends applicable to the share. *Matthews v. Great Northern R. Co.*, 5 Jur. N. S. 234.

It is the same where the shareholders are in general terms given the right to a dividend of ten per cent

per annum payable half yearly, and also to a *pro rata* participation in surplus dividends after ten per cent had been paid to the ordinary shareholders. There also a deficiency of dividends on preference capital may be made good out of subsequent profits. *Webb v. Earle*, L. R. 20 Eq. 556, 44 L. J. Ch. 608, 24 Week. Rep. 44.

The right to have arrears of dividends on preferred shares paid out of subsequent profits is affirmed also in *Crauford v. Northeastern R. Co.*, 3 Kay & J. 723, 8 Jur. N. S. 1098. The court in this case considers that the word "dividend" is not necessarily restricted to the profits of any definite period.

Shares having preference in payment of dividends are held entitled to have arrearages paid out of profits under a general provision for preference. In *Orry v. Londonderry & E. R. Co.*, 29 Beav. 263, 7 Jur. N. S. 508, 30 L. J. Ch. 290, 9 Week. Rep. 301, 4 L. T. N. S. 131.

Arrearages of dividends remaining unpaid for lack of net profits are held payable out of such profits when earned, where preference shares of various kinds have been issued, some of them calling for "interest or preference dividend in perpetuity;" others providing for "preference to the payment of dividends on the ordinary shares." *Henry v. Great Northern R. Co.*, 1 DeG. & J. 606, 4 Kay & J. 1, 32, 27 L. J. Ch. 1, 8 Jur. N. S. 1133.

The fact that a statute has directed the profits of a particular half year to be applied in replacing a certain loss, leaving no surplus to be divided in dividends, was held not to exclude the right of the preferred shareholders to have the arrearages paid from subsequent profits. *Ibid.*

Certificates purporting to carry interest at 6 per cent per annum in perpetuity, referred to in a subsequent act of parliament as entitled to "dividends," which the statute provided should be paid before dividends on other shares, were held to give the right to have arrearages of dividends paid out of subsequent profits when the statute was construed with reference to a later one providing for other shares called debenture shares, the interest on which was given a preference over the "interest or dividend" on the guaranteed or preference shares and the arrears thereof. *Sturge v. Eastern Union R. Co.*, 7 DeG. M. & G. 155, 31 Eng. L. & Eq. 406, 1 Jur. N. S. 713.

Holders of preference shares entitled to first payment of a dividend and to participate equally in any further dividends after an equal dividend to the ordinary shareholders had been made, and which are entitled to have arrears of dividends made up out of subsequent profits, must permit the ordinary shareholders to have arrears made up in the same way before the preference shareholders can participate in any surplus profits beyond the amount of their preference. *Allen v. Londonderry & E. R. Co.*, 25 Week. Rep. 524.

Bonds secured by mortgage issued to preferred

dividends on preferred stock to be made from net profits. It cannot be supposed that the legislature having provided for the payment of dividends from net profits, and by implication forbidden their payment from anything else, would, in almost the next sentence, authorize the company to incur a liability which might compel it to pay dividends, though its business was conducted at a loss. A construction which attached such a meaning to the guaranty which the company was authorized to give would nullify the provision in regard to the payment of dividends from net profits. In the case of *Williams v. Parker*, *supra*, not only was there no provision in the statute that the dividends should be

payable from net profits, but the statute expressly provided that the company was "to give its guaranty that each share of said stock shall receive semi-annual dividends of four dollars on each share;" and the guaranty accordingly was held to be an absolute one. That case was much stronger than this. Generally, the use of the word "guaranteed," as applied to dividends upon preferred stock, whether in connection with the word "preferred" or alone, has not been held to import an absolute liability. *Williston v. Michigan S. & N. I. R. Co.*, *Taft v. Hartford P. & F. R. Co.*, *Lockhart v. Van Alstyne and Boardman v. Lake Shore & M. S. R. Co.*, *supra*; *Miller v. Ratterman*, 47 Ohio St. 141; *Sterens*

stockholders for their dividends which had been earned, represent in fact a loan of the amount of the dividends to the company, and payment in one year of the bonds representing several years dividends does not violate a provision that the dividends are not cumulative. *Wood v. Lary*, 47 Hun. 550. Appeal dismissed on other grounds, 124 N. Y. 83.

Interest on arrears of dividends due to preferred stockholders from the time the net earnings of the corporation applicable thereto were misappropriated to holders of common stock is allowed in *Prouty v. Michigan S. & N. I. R. Co.*, 1 Hun. 655, 4 Thomp. & C. 230.

VI. Remedy to obtain or protect dividends.

Where the holder of preferred stock brings an action not upon the stock, nor technically for dividends, but upon a contract for the payment of specified sums at certain times in consideration of his taking stock, it was held that verbal inaccuracies or omissions would not constitute such a variance between the description of his stock set out according to their tender and the instruments offered in evidence as would require their exclusion. *Bates v. Androsoggin & K. R. Co.* 49 Me. 491.

A suit for specific performance of a contract guaranteeing certain dividends on preferred stock is a proper remedy for the stockholders where the corporation improperly refuses to declare or pay the dividends. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157.

Such a condition of the finances of a corporation as would justify payment of dividends is necessary to authorize the payment of scrip or certificates for dividends payable as soon as the treasurer is "able to pay." *Richardson v. Vermont & M. R. Co.* 44 Vt. 613.

The court can interfere in behalf of the holders of preferred stock to compel the distribution of net earnings as dividends where there are sufficient earnings possessed by the company and the contract to pay dividends is upon the sole condition of such earnings. *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411.

A Massachusetts case holds that a foreign corporation cannot be compelled by a suit in equity to pay dividends on guaranteed preferred stock, but such remedy must be left to a court which has general jurisdiction over the corporation. *Williston v. Michigan S. & N. I. R. Co.* 13 Allen, 401.

So one ground of the decision in *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 373, was that an injunction against the issue of stock dividends by a foreign corporation was not authorized by the code. Although its general language might be construed more liberally, the court thought it was not intended to extend the right of action against foreign corporations further than it existed under previous statutes, which did not authorize it except 27 L. R. A.

in cases of attachment of property for collection of a debt or the redress of a wrong.

But a later case holds that the New York statute authorizing actions against foreign corporations "for any cause of action" entitles the holder of preferred stock in that state to maintain an action to compel a foreign corporation to apply net earnings to dividends on his stock. *Prouty v. Michigan S. & N. I. R. Co.* 1 Hun. 655, 4 Thomp. & C. 230.

A holder of guaranteed stock which has a preference in dividends over common stock and recites that payment of the dividends was guaranteed, is a member of the company and not a creditor such that he can sue at law for the dividends. *Williston v. Michigan S. & N. I. R. Co.* *supra*.

See also on this point the main case of *FIELD v. LAMSON & G. MFG. CO.*

But an action of general assumpsit was sustained by the holder of scrip which the company was estopped to repudiate where it had refused payment in money or bonds as promised and as had been done with other scrip. *Chaffee v. Rutland Co.* 55 Vt. 110.

On a creditor's bill by holders of guaranteed stock for themselves and others to enforce a contract for participation in dividends all such guaranteed stockholders are entitled to come in and participate although they have not been plaintiffs in the record or represented by counsel, and those who have not been thus represented are liable for counsel fees. *Gordon v. Richmond, F. & P. R. Co.* 81 Va. 621.

The objection that stockholders should have been made parties to an action against a corporation for dividends on preferred stock is held untenable in *Prouty v. Michigan S. & N. I. R. Co.* 1 Hun. 655, 4 Thomp. & C. 230.

Common stockholders are not necessary though they may be proper parties to an action by preferred stockholders to compel payment of dividends from earnings which they allege have been diverted to permanent improvements and additions. *Thompson v. Erie R. Co.* 45 N. Y. 463.

Directors or other officers of a new consolidated corporation are not necessary or proper parties to an action by holders of preferred stock of one of the merged corporations to enforce a right to dividends, where the new company has assumed the obligations of the old ones, but the cause of action is against the corporation alone. *Chase v. Vanderbilt*, 62 N. Y. 307.

In a suit by the holder of preferred stock against a foreign corporation to obtain dividends a motion after the referee's report directing judgment to substitute as defendant a new interstate corporation into which the foreign company had been merged by consolidation, was granted, but reversed on appeal on the ground that the substitution would make the referee's decision against the officers of the original defendant binding on the officers of the new company and thus apply to them an ad-

v. *South Devon R. Co.* 9 Hare, 815; *Henry v. Great Northern R. Co.* 1 De G. & J. 606; *Sturge v. Eastern Counties R. Co.* 7 De G. M. & G. 158; *Cook, Stock & Stockholders*, 3d ed. §§ 267-275. In some instances its use has led to preferred dividends being regarded as cumulative. *Stevens v. South Devon R. Co.*, *Henry v. Great Northern R. Co.* and *Boardman v. Lake Shore & M. S. R. Co.* *supra*. But although, in the present case, that effect cannot be given to it, since it is expressly provided that the dividends shall be cumulative, we think that that fact, in view of the provision already noted, that the dividends are payable from net profits, should not cause the guaranty to be regarded

as an absolute one. Moreover, the preferred stockholders are entitled to dividends as dividends, and not as interest, and as members of a corporation, and not as creditors. Thus, it is provided that "the holders of said preferred stock shall be entitled to dividends," etc. They are to share with holders of common stock in excess divided above a dividend upon the whole stock at the rate fixed for the preferred stock. "And dividends to the holders of such preferred stock . . . shall be paid . . . cumulatively before any dividends shall be paid upon other stock," etc. Though the company was authorized to issue the stock in payment of its indebtedness, there is no provision in the act that

judication made against others. *Prouty v. Lake Shore & M. S. R. Co.* 52 N. Y. 302.

A preferential shareholder is held entitled to an injunction against a dividend prejudicial to his rights when there are not sufficient funds to make it. *Sturge v. Eastern Union R. Co.* 7 De G. M. & G. 158, 81 Eng. L. & Eq. 406, 1 Jur. N. S. 712.

Preferred stockholders cannot have an injunction against the execution of a new mortgage by the corporation for a lawful purpose and in a lawful manner and the issue of bonds secured thereby, on the ground that payment of interest thereon may interfere with the payment of dividends on the stock, although if the preferred stock is entitled to dividends subject only to the payment of interest on prior mortgages such payment of interest on the new mortgage to their detriment may be prevented. *Thompson v. Erie R. Co.* 42 How. Pr. 68, 11 Abb. Pr. N. S. 158.

Holders of preferred stock in a railroad company were held barred by laches from relief against a railroad corporation which had purchased the road on foreclosure of a mortgage given by a company which held possession of it under an *ultra vires* agreement attempting to make a perpetual transfer, where their delay in beginning proceedings had allowed the intervention of other equities by virtue of assignments and mortgages. *Boston & P. R. Corp. v. New York & N. E. R. Co.* 13 R. I. 260.

The same decision was affirmed and held *res judicata* in *Emerson v. New York & N. E. R. Co.* 14 R. I. 555.

VII. Guaranty of dividends by outside party.

See also *Miller v. Ratterman*, 47 Ohio St. 141, *supra*, in division No. III.

A guaranty by one corporation of certain dividends on the stock of another company with which it makes a contract, is a matter between the corporations to which the stockholders of the latter company are not a party and gives them no right to interfere with a modification of the agreement between the corporations. *People v. Metropolitan Elev. R. Co.* 26 Hun, 62.

A guaranty of dividends on the capital of a company made to the company on the sale of its business is within the power of the company to change and in part release by a subsequent arrangement. *Sheffield Silver, Nickel & Plated Co. v. Unwin*, L. R. 2 Q. B. Div. 214, 46 L. J. Q. B. 299, 36 L. T. N. S. 245, 25 Week. Rep. 498.

A guaranty by one corporation to another of a certain dividend on the capital stock of the latter, is held to be a contract between the corporations subject to the fair exercise of the power of the directors to modify the contract, notwithstanding objection from the holders of the stock on which the dividends had been guaranteed. *Flagg v. Manhattan R. Co.* 20 Blatchf. 142, 10 Fed. Rep. 412.

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VIII. Interest-bearing stock.

Stock bearing interest without restricting it to payment out of income is generally held invalid, although a few cases have treated the question as doubtful, or held the stock lawful.

A provision for interest on railroad stock until the road is opened is involved in *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100, in which the power of the corporation to issue it was not disputed and the issue by officers without authority was held to have been ratified.

An agreement by a corporation to pay interest on stock subscribed and paid for, until twelve miles of its railroad should be completed and in operation, is held within the discretion of the directors under a charter which, although not recited, is said to confer upon the directors "power of that enlarged and plenary character usually found in the charters of railroad corporations in this state." *Milwaukee & N. I. R. Co. v. Field*, 12 Wis. 340.

To the same effect as to the validity of a contract for interest on advance payments for stock is the decision in *Racine County Bank v. Ayers*, 13 Wis. 512, in which the stipulation was for interest on the amounts paid in on stock until dividends should be declared from the earnings. In both the above cases the question involved was the liability of a subscriber for payments on his stock and the time for payment of interest does not seem to have been considered.

A provision in a subscription for stock that interest should be allowed on all sums assessed and paid until a railroad is put in operation by the company, but without specifying any time for payment of the interest, is upheld as a just condition between the subscribers and construed not to require payment of interest until the road went into operation. An objection that it reduced the stock below the amount subscribed was held untenable. *Rutland & B. R. Co. v. Thrall*, 36 Vt. 536.

A later case in the same state is to the same effect, holding that a corporation has authority to stipulate for interest on sums paid in on stock subscriptions while its railroad is in process of construction, payable when surplus earnings enable the company to pay it. *Richardson v. Vermont & M. R. Co.* 44 Vt. 612.

The same contract is construed in Massachusetts to the same effect holding that a contract by a railroad company to pay interest on sums received on stock subscriptions until the road goes into operation without specifying any time for payment does not make the interest payable until the road has gone into operation and earned an income. *Waterman v. Troy & G. R. Co.* 8 Gray, 433; *Wright v. Vermont & M. R. Corp.* 12 Cush. 66.

The above cases give slight ground for holding that a corporation may contract to pay interest on stock otherwise than from income unless expressly authorized by statute. On the other hand the

these creditors, who have accepted the stock in payment of their debts, are henceforth to be regarded in any other light than that of stockholders. The fact that the dividends were payable cumulatively out of net profits, at the rate of 6 per cent, in preference to any other stock, well may have operated as a sufficient inducement to creditors to exchange their demands against the corporation for preferred stock, especially if the prospects of successful business were good, as it fairly may be assumed that the parties interested supposed them to be. Creditors may also have thought that this was far better than insolvency. Good and sufficient reasons can be found for the action of the creditors in

exchanging their demands against the company for its preferred stock, without construing the guaranty as importing an absolute undertaking on its part to pay dividends at the specified rate. Some of them are stated in the preamble of the indenture of compromise.

Neither do we think that the guaranty can be regarded as an undertaking that, whenever there were net profits, they should be divided without regard to the circumstances or situation of the company, among the preferred stockholders. The act itself does not in terms compel such a division; and we see nothing in it to take the case out of the general rule that, in the first instance, the de-

power is very effectually negatived by the cases following.

A provision in a preliminary contract for subscription to stock that dividends by way of interest should be paid during the construction of a railroad is contrary to public policy and void. *Troy & B. R. Co. v. Tibbitts*, 18 Barb. 307.

Payment of interest periodically on stock out of the capital of a company before any earnings are made is within a prohibition against paying dividends out of the capital. *Pittsburg & C. R. Co. v. Allegheny County*, 68 Pa. 128.

The guaranty of a corporation to pay interest on stock "as soon as paid" was previously held in *Miller v. Pittsburg & C. R. Co.*, 40 Pa. 237, 80 Am. Dec. 570, to call for no interest on stock which was not fully paid up, even if the guaranty was valid, which seems to have been questioned by the court.

Without express authority of law a corporation has no power to issue some certificates of stock bearing interest and others not, and it is against public policy to uphold such contracts for payment of interest until the completion of a railroad of the company, even if made with all stockholders equally so far as to divert the funds of the company from its corporate purposes, leaving its debts unpaid. *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

In this case a statute expressly prohibiting the payment of interest to stockholders while its debts were unpaid for labor or materials, or when it would reduce the capital stock, was referred to, and it was held that even if it did not apply to the case in hand the same rule would govern under another statute which made no express provision on the subject.

A provision in the articles of association authorizing directors to pay interest on paid-up capital while another provision prohibits dividends except out of profits, is not intended to authorize the payment of interest out of capital but only out of income. *Re National Funds Assur. Co. L. R. 10 Ch. Div. 118*, 48 L. J. Ch. 163, 27 Week. Rep. 302, 39 L. T. N. S. 430.

Nor can such payment of interest to shareholders before any profits have been realized be authorized by resolution at a general meeting of the company, but will be restrained by the court as an impairment of the capital to the prejudice of creditors. *Macdougall v. Jersey Imperial Hotel Co.* 2 Hem. & M. 523, 10 Jur. N. S. 1043, 34 L. J. Ch. 23, 12 Week. Rep. 1142, 10 L. T. N. S. 843.

A later English case holds that the payment of interest out of the capital when there are no profits is *ultra vires* notwithstanding any provision in the articles of association. *Re Sharpe* [1892] 1 Ch. 154.

A claim of statutory authority to pay interest has been made in a few cases.

A provision in a subscription to a railroad company that application should be made to the legis-

lature for authority to issue a limited number of shares to be applied in paying interest on installments of money paid by subscribers, until the road should earn an income, is construed in *Manice v. Hudson River R. Co.*, 8 Duer. 423, and it is held that this did not require a subscriber to take such shares instead of cash in payment of the interest due him, but that the interest was to be paid from the proceeds of the sale of such shares.

A provision in a subscription to increase stock issued to obtain funds for the extension of a railroad that interest on installments paid in should be allowed until the completion of the extension, and that the new stockholders should not participate in any of the profits made during that period, was held in *McManus v. Philadelphia & R. R. Co.*, 58 Pa. 330, to be unauthorized by mere statutory authority to issue increased stock in all respects upon the footing of the original stock, and a vote of stockholders that the directors might dispose of it as they should deem advisable.

A certificate issued by a dental college for a share of its real estate property, "drawing an interest of 6 per cent," is held in *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 133, to give the holder no right of action for interest before dissolution of the corporation or other proceedings to divide the respective interests in the property, no time for payment of interest being specified.

To the same effect is *Bryant v. Ohio College of Dental Surgery*, 1 Cin. Super. Ct. Rep. 67.

Where a binding obligation to pay interest exists under a resolution to allow interest on installments as paid and carry to the account of the stockholder and issue stock certificates in payment when the amount is sufficient, a transfer of stock after interest has accrued thereon does not carry the right to the interest. *Ohio v. Cleveland & T. R. Co.* 6 Ohio St. 490. But see *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

What is called \$75 stock and \$50 stock, although it was to be of equal rank and value with other stock for which \$100 per share was paid, is held entitled to interest only for the amount actually paid thereon, where a corporation had stipulated to pay interest during the construction of its railroad on sums actually paid in on subscription. *Richardson v. Vermont & M. R. Co.* 44 Vt. 612.

Scrp issued by a railroad company to represent its obligation for interest on payments for stock while the road was building, reciting a vote which authorized the issue of the scrip and the payment thereof when the treasurer was able to pay it, gives no claims against the corporation until money comes into the treasury. *Cunningham v. Vermont & M. R. Co.* 12 Gray, 411.

On such scrip the court will require payment if the corporation is able to pay, but where the necessary expenses are large and constant and expensive repairs required, and sudden and great

cision of the question whether there shall or shall not be dividends lies with the company or its agents. Looking at section 8 in connection with the rest of the act, we think that the reasonable construction of it is that if there are net profits which, in the fair judgment of the company or its agents, taking all the circumstances into account, are or should be available for dividends, then the preferred stockholders are entitled to receive dividends on their stock at the rate fixed by the vote of the company, and expressed in the certificates, before any dividends are paid on any other stock, and that, if the company has passed any dividends, the preferred stockholders are entitled to

have them made good to them before any dividends are paid on any other stock. This conclusion derives some support from the concluding sentence of section 8, already referred to,—that “the provisions of law relative to special stock,” upon which corporations are expressly required “to pay a fixed half-yearly sum or dividend” (Pub. Stat. chap. 106, § 42; *Williams v. Parker, supra*), shall not be held to apply in the case of stock issued under this act. If under section 6, in connection with Pub. Stat., chap. 106, § 60, the officers could be made liable for a dividend which the law compelled them to declare, or for a debt which they could not prevent (which we do not decide), then that

contingencies may at any time require a large outlay of money, the court may refuse to compel payment of a dividend on such scrip although the corporation has on hand money enough to pay a portion of the interest called for by the scrip. *Barnard v. Vermont & M. R. Co.* 7 Allen, 512.

The word “interest” is held to refer to dividends when used in articles of association in reference to payment upon shares of stock. *Harrison v. Mexican R. Co.* L. R. 19 Eq. 258, 12 Moak, Eng. Rep. 798, 44 L. J. Ch. 403, 32 L. T. N. S. 82, 23 Week. Rep. 403.

IX. Special stock.

In Massachusetts the statutes beginning with the Act of 1855, chapter 142, provide for a peculiar kind of stock called special stock the characteristics of which are that it is limited in amount to two fifths of the actual capital, is subject to redemption by the corporation at par after a fixed time to be expressed in the certificates, entitles the holder to a half-yearly sum or dividend upon it as a debt of the corporation, and does not make him liable in any event for the debts of the corporation beyond his stock, while the issue of such stock makes the general stockholders liable for the debts and contracts of the corporation until the special stock is fully redeemed. *American Tube Works v. Boston Mach. Co.* 120 Mass. 5; *Williams v. Parker*, 136 Mass. 204; *Reed v. Boston Mach. Co.* 141 Mass. 454.

For redeemable stock, see also *Davis v. Second Universalist Meeting-House Proprs.* in Lowell, 8 Met. 321; *Totten v. Tison*, 54 Ga. 129, and *Culver v. Reno Real Estate Co.* 91 Pa. 397, under headings Nos. III. and IV.; also, *Re Dioldo Pier Co. infra*.

A vote to issue special stock under the Massachusetts statutes can be passed only by three fourths of the general stockholders at a meeting duly called for that purpose, and a notice of a meeting to vote on an issue of preferred stock is insufficient to authorize a vote for special stock. *American Tube Works v. Boston Mach. Co. supra*.

The records of a meeting duly called for the issue of special stock must show that the requisite three fourths of the stockholders actually voted in favor of the issue of the stock and merely showing that three fourths of them were present is not sufficient by reason of any presumption that they voted for the issue. *Ibid.*

This special stock under the Massachusetts statutes is shown by *Williams v. Parker, supra*, to be distinct from all ordinary preferred stock, and to make the holders creditors of the corporation for the dividends guaranteed.

A holder of special stock issued under Mass. Stat. 1855, chap. 220, cannot on the insolvency of the corporation before the time when the stock was redeemable prove against the insolvent company any claim as a creditor except for accrued 27 L. R. A.

dividends or notes therefrom which he had received. *Allen v. Herrick*, 15 Gray, 274.

The court holds that the agreement to redeem is executory and cannot be regarded as a present existing debt or duty, but that a more decisive objection to allowing the claim under the contract of redemption is that it would violate the intent of the statute to treat it as a debt entitling the holder to share in the assets *pari passu* with other creditors, but that the holders of this special stock were entitled to no rights or immunities over the general stockholders except those specifically enumerated in the act. *Ibid.*

The court allowed holders of special stock which was invalid merely because the requisite three fourths of the stockholders were not shown to have voted for its issue, to rescind their contract and recover back the money paid for the stock, even after they had held the stock for more than two years and until after the corporation became insolvent. *American Tube Works v. Boston Mach. Co.* and *Reed v. Boston Mach. Co. supra*.

The claim that a person who has received special stock and also received dividends thereon should be held estopped to deny that he was a stockholder after the corporation has become insolvent, is denied in the Massachusetts case of *American Tube Works v. Boston Mach. Co.* 120 Mass. 5.

This is contrary to the doctrine which has become fully established in respect to preferred stock, as shown by the cases cited under the heading *Estoppel*. See *supra*.

On the claim that special stock was never lawfully issued and that the holder was therefore entitled to claim a return of his money paid therefor from assets of an insolvent corporation, it was held in *Allen v. Herrick*, 15 Gray, 274, that he had made no election to rescind and had not tendered back the money or notes which he had received under the contract when the first publication of notice of the insolvency proceedings was made, and he could not recover back his money on the ground that the contract had failed.

But commenting on this case in *Reed v. Boston Mach. Co.*, 141 Mass. 454, the court distinguishes it on the ground that the stockholders in the case of *Allen v. Herrick* had received and held notes indorsed by another party for the dividends. The case of *Reed v. Boston Mach. Co., supra*, holds that it is necessary for the holder of special stock to return dividends received thereon in order to rescind the contract and avoid liability as a stockholder, if what he has received is less than what he is entitled to on the rescission.

The same is held in *American Tube Works v. Boston Mach. Co.* 120 Mass. 5.

X. Reduction of shares.

That preferred as well as common shares are subject to reduction for loss of capital is decided

fact also would furnish an argument against regarding the guaranty as an absolute one. We discover nothing in the way of contemporaneous construction at variance with that which we have adopted. No dividend having been declared, it follows that this action, which is a suit at law, cannot be maintained. *Williston v. Michigan, S. & N. I. R. Co. supra.*

The remaining question is whether, upon the facts agreed, if applied to proceedings in equity, the plaintiff could have relief. We assume that the directors and manager could be compelled to make dividends out of net profits to the preferred stockholders if it turned out that they were acting unreasonably in refusing to declare them; but we do not think that in this case the plaintiff would be entitled to relief. The capital is seriously impaired. Though the indebtedness was reduced by the compromise, and has been further reduced by payments since, it still amounts to a large sum, and is payable on demand or on short time. The bonds matured in August, 1890. None of them were paid before maturity, and the concern

could not have paid any of them without seriously crippling it, or destroying its business. It is true that the assets seem to be largely in excess of the indebtedness, and that it has been held that preferred stockholders are not bound to wait for dividends till the impaired capital has been made good and the debts have been paid. *Stevens v. South Devon R. Co. and Belfast & M. L. R. Co. v. Belfast, supra.* But the valuation put upon the assets appears to be to a considerable extent a bookkeeping one; and it is agreed that if the company should be obliged to dispose of them, to pay its debts or to close up its business, they would suffer a very great shrinkage from the valuation put upon them. No dividend has been paid upon the preferred stock, and none upon the common stock since 1882. It is not claimed that there were any net profits prior to January 1, 1888, sufficient to justify a dividend. From January 1, 1886, to July 1, 1890, after paying all expenses and current interest on its debt, and depreciation of property "the business resulted in net gains, in actual cash value, in assets more than in liabilities,

in *Re Great Western S. S. Co.*, 56 L. J. Ch. 3, 35 Week. Rep. 154.

Where both preference and ordinary shares had been issued and paid up in full and some of each class had been given in payment for patents, and of these some of both kinds had been surrendered to the company for the benefit of the company and canceled, in pursuance of an arrangement for abatement of the purchase money on the ground that it was excessive, a reduction of capital by canceling such ordinary and preference shares as had not yet been issued and by accepting and canceling those of both kinds surrendered for cancellation as above stated, was held lawful. *Re Gatling Gun*, 62 L. T. N. S. 812.

Preference shareholders whose shares were given for the purchase price of property, cannot object to a reduction of the shares of the company on account of lost capital, on the ground that it violates their contract, where at the time the shares were taken the company was authorized by law to reduce shares in such cases upon vote of the shareholders, although the preferred shareholders had no right of voting. *Re Barrow Haematite Steel Co.* L. R. 39 Ch. Div. 582, 58 L. J. Ch. 143, 59 L. T. N. S. 500, 37 Week. Rep. 249.

The right to reduce the capital of a company and alter the amount and denomination of its shares by the nominal amount of one half of each share, ordinary and preferential, under a general provision in the articles for the reduction of capital and alteration of shares, is upheld against the objection of the preferred shareholders, who claimed that it was an infringement of their rights, in the case of *Bannatyne v. Direct Spanish Teleg. Co.*, 18 Am. & Eng. Corp. Cas. 368, L. R. 84 Ch. Div. 287, 56 L. J. Ch. 107, 55 L. T. N. S. 715, 35 Week. Rep. 125, although the vice-chancellor, whose opinion was reversed by this decision, had declared that "it would be a wholesale recipe and a mode of cheating preference shareholders for the benefit of ordinary shareholders, whatever the relative amount or value of the shares might be."

The above decision was the denial of an injunction against proceedings for such reduction. Following it the court decided in *Re Direct Spanish Teleg. Co.*, L. R. 84 Ch. Div. 307, 56 L. J. Ch. 363, 55 L. T. N. S. 804, 35 Week. Rep. 200, 18 Am. & Eng. Corp. Cas. 377, that the approval of the court to a scheme for reduction might be withheld if the

scheme would work injustice, and leave the company to prepare a new scheme; but in this case where the company had lost part of its assets, a scheme for reducing its capital by a corresponding amount by writing off £5 per share from the amount paid up on both preference and ordinary shares, the former of which had been fully paid at £10 each, and on the latter of which £9 had been paid, and also reducing the unissued shares one half was approved.

Where some of the rights of preference shareholders were prejudiced by a proposed scheme on arrangement although it appeared that on the whole the scheme was much to their advantage, it was held that they were a class prejudicially affected within the meaning of the Railway Companies Act of 1867. *Re Neath & B. R. Co.* [1897] 1 Ch. 349.

Where no power to issue preference shares was given by the act under which a company was formed except to divide any shares into half-shares, one of which should be called preferred and the other deferred, with a preference in dividends to the former, the holders of the preferred half-shares were held not to form a class of preference shareholders whose separate assent to a scheme of arrangement must be obtained under section 12 of the English Railway Companies Act of 1867, which provides for a scheme of arrangement between a company and its creditors. *Re Brighton & D. R. Co.* L. K. 44 Ch. Div. 23, 62 L. T. N. S. 353.

The reduction of the capital of a company by paying off preference shares pursuant to its articles out of a sinking fund into which a specified portion of the net profits was annually put as provided for in the articles, was held in *Re Piccolo Pier Co.* [1891] 2 Ch. 354, to be a valid carrying out of the contract contained in the memorandum and articles of association, and did not involve a "payment to any shareholder of paid-up capital" within a provision of the English Companies Act of 1877, section four. In this case no question of the rights of creditors was involved, and the question was simply between the company and the preference shareholders. No one opposed the petition of the company. The court says: "Whatever difficulty there may be in this case arises from the extraordinary prosperity of the company," and that "the case is a very peculiar one and not likely to occur again."

sufficient in amount to warrant the payment of dividends on the preferred stock at the rate provided for in the certificates for every year since the time of its issue to the trustees, with interest." But in the year ending July 1, 1894, there were no net profits. During half the time, therefore, from the date of compromise, in July, 1885, to July, 1894, there seem to have been no net profits, showing that the business was somewhat precarious in its nature. The controlling purpose of the directors and manager has been to provide for the payment of the debts, and to put the concern in a position strong enough to secure renewals of such of its debts as could not be paid when due. Their discretion, it is agreed, has been honestly exercised to that end, and they have refused to declare dividends, in part because they believed that it would endanger the ability of the company to pay its debts, and in part because they did not deem it proper to declare dividends on account of the impairment of the capital. We do not think that the directors and manager appear so plainly to have acted

in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity. The directors and manager were bound to have regard to all of the interests intrusted to them. If one class was to be favored above another, the creditors were to be looked after in preference to the stockholders. It was for the benefit of the stockholders, the preferred as well as the common, that the impaired capital should be made good, and that the business, if possible, should be put on a sound and enduring basis. We cannot say that if dividends had been paid, the result might not have been to injure the concern, nor that the conduct of the directors and manager has not been on the whole judicious. *Barnard v. Vermont & M. R. Co.* 7 Allen, 516; *New York, L. E. & W. R. Co. v. Nickols*, 119 U. S. 296, 80 L. ed. 360; *Cook, Stock & Stockholders*, 3d ed. § 271.

The result is that, in the opinion of the majority of the court, the judgment must be affirmed; and it is so ordered.

The right of a company on reduction of capital to leave the preferred shares untouched and make the reduction from ordinary shares is sustained in *Re America Pastoral Co.*, 62 L. T. N. S. 625, and in *Re Agricultural Hotel Co.*, 63 L. T. N. S. 743.

But a proposed reduction of capital which seemed to throw the whole burden of the loss which had been incurred by the company upon the ordinary shareholders in favor of the preference shareholders, who were entitled to be preferred in dividends only, was condemned in *Re Quebrada Railway, Land & Copper Co.*, L. R. 40 Ch. Div. 363, 26 Am. & Eng. Corp. Cas. 880, 60 L. T. N. S. 432, where the resolution producing this effect had been assented to at a meeting at which only a small number of shareholders were represented, and the notice for which, while stating a proposed reduction, had not indicated that any such inequality was proposed.

XI. Miscellaneous matters.

A contract for the purchase of land by a railroad company to be paid for "in 8 per cent preferred stock" does not authorize a decree for payment in stock "guaranteed to pay 8 per cent." *Dickinson v. Chesapeake & O. R. Co.* 7 W. Va. 390.

Money loaned to a corporation, to be repaid in preferred stock to be subsequently issued, may be recovered back where the corporation had at the time of the loan no power to issue such stock, although the power to issue such stock had been granted to the corporation before the trial of the action, since a contract by a corporation to repay a loan in preferred stock which it had no authority to issue is a nullity, and is not renewed by a subsequent act authorizing it to issue preferred stock, but which does not empower it to renew that contract. *Anthony v. Household Mach. Co.* 5 L. R. A. 575, 16 R. I. 671.

Under the New York Act of April 1, 1854, authorizing a railroad corporation to issue preferred stock on payment "in such manner as the board of directors of such company shall direct at the time of subscribing," they may take a note in payment of a subscription. *Magee v. Badger*, 80 Barb. 246.

The privilege to surrender common for preferred stock "at any time," offered for the purpose of obtaining funds by means of a required cash payment on the exchange of 20 per cent, must be exercised within a reasonable time in order to serve the purpose for which it is offered, and cannot be claimed thirty-six years afterwards. *Holland v. Cheshire R. Co.* 151 Mass. 231.

Statutory power to issue preferred stock to increase the capital of a corporation does not include the power to issue any common stock. *Covington & C. Bridge Co. v. Sargent*, 1 Cin. Super. Ct. Rep. 354.

A suit against directors to establish their liability for misrepresentations as to the preferential character of stock sold by them was dismissed in *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 603, 35 L. T. N. S. 822, 26 Week. Rep. 190, on the ground that there was no deception by misrepresentations of fact, but only a common misconception of law.

A claim by holders of preferred stock to 4 per cent interest which had been remitted by mortgage creditors and constituted the usurious excess of interest called for by the mortgage, under a contract by which this 4 per cent was to be paid to such holders of preferred stock as should surrender their certificates for new ones bearing less interest, was held invalid on the ground of usury as well as laches and various other defenses. *Sullivan v. Portland & K. R. Co.* 4 Cliff. 212.

A lease of a railroad for ninety-nine years at a rent which is not sufficient to pay anything except a portion of the dividends on preferred stock if otherwise regular and lawful and made with the approval of the required number of stockholders, cannot be defeated by a holder of common stock on the ground that it practically annihilates his stock. *Middletown v. Boston & N. Y. Air Line R. Co.* 53 Conn. 351.

It is said in *Jones v. Concord & M. Railroad (N. H.)* July 20, 1892, that the natural inference is that new stock issued under general authority to increase stock is common and not preferred where the contrary does not appear.

Failure of a corporation to pay 7 per cent interest on preferred stock issued to the holder under an agreement to pay such interest is not such a breach of contract as justifies a rescission by him, where the corporation has no funds for dividends. *Feld v. Roanoke Investment Co. (Mo.)* June 30, 1894.

For redeemable stock, see cases presented in or referred to from heading *Special stock*. B. A. R.

MARYLAND COURT OF APPEALS.

Solomon HOWSER, *Appt.*,
v.
CUMBERLAND & PENNSYLVANIA R.
CO.

(.....Md.....)

Presumption of negligence arising out of the doctrine of *res ipsa loquitur* applies to the falling of cross-ties from a railroad car injuring a person walking over a foot-path running beside the roadbed, but not upon the right of way.

(*McSherry and Fowler, JJ., dissent.*)

(December 18, 1894.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Washington County, in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. J. W. S. Cochrane and F. F. McComas, for appellant:

The wrong or thing amiss was the negligent manner of loading the car. The consequence of such negligence was the injury which the plaintiff sustained. The wrong and the damage conjoined when the accident happened, and the defendant could not escape the consequences of the first wrong by running the car in any way, good, bad, or indifferent.

Northern Cent. R. Co. v. State, 29 Md. 434, 96 Am. Dec. 545; *Cooley, Torts*, p. 62.

In *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 284, the boiler of an engine exploded in the company's depot and injured Phillips who was not under its control or care. It was "held that the mere fact that the boiler exploded was *prima facie* evidence of negligence, to overcome which it must be shown that the materials used in its construction were of the kind usually employed, and that it had been subjected to and withstood the usual tests, and was used with judgment and skill by persons of experience."

Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Scott v. London & St. K. Docks Co. 3 Hurlst. & C. 600.

The breaking down of a coach whereby a passenger was injured made out a *prima facie* case of negligence.

Christie v. Griggs, 2 Camp. 79.

It is not incumbent on plaintiff after proving an accident which implies negligence to go

NOTE.—In connection with the very interesting case above reported, see, on the subject of the presumption of negligence from occurrence of accidents, the case of *Barnowski v. Helson* (Mich.) 18 L. R. A. 33, and note, treating three divisions of the subject, viz.: Personal injuries, injuries to live stock by railways trains, and railway fires. 27 L. R. A.

further and show what the particular negligence was, when from the circumstances it is not in his power to do so.

Feital v. Middlesex R. Co. 109 Mass. 398, 19 Am. Rep. 720; *Byrne v. Boodle*, 2 Hurlst. & C. 726; *Mulcairns v. Janesville*, 67 Wis. 26; *Cummings v. National Furnace Co.* 60 Wis. 611; *Dougherty v. Missouri R. Co.* 81 Mo. 329, 51 Am. Rep. 239; *Utrich v. McCabe*, 1 Hilt. 252.

Railroads are bound to conduct their business with due regard to the safety of the public like individuals.

Baltimore & O. R. Co. v. State, 83 Md. 554.

It is a sound rule of law not to look out for danger when there is no reason to apprehend any.

Beach, Contrib. Neg. § 88.

Even a pedestrian crossing a highway need not anticipate reckless riding.

Stringer v. Frost, 2 L. R. A. 614, 116 Ind. 477.

Nor that a wagon will overtake and strike him when there is ample room to pass.

Shea v. Reems, 86 La. Ann. 966.

In the exercise of lawful rights, every person has a right to presume that every other will perform his duty and obey the law.

Beach, Contrib. Neg. p. 53, note.

Messrs. Robert H. Gordon and Henry Kyd Douglas for appellee.

Roberts, J., delivered the opinion of the court:

This appeal brings before us for consideration a single question, yet one of interest and some importance, the determination of which is not entirely free of difficulty. In the fall of 1892, while the defendant was passing from the place of his employment to his home he walked over a foot-path on the land of William E. Walsh, in the city of Cumberland, which had been for twenty years used by various persons. This path extended along the roadbed of the appellee but not upon its right of way.

As the plaintiff proceeded on his way to his house, the defendant's train was approaching on the outside track, the one nearest to him. Attached to the train was a gondola car loaded with railroad cross-ties. When the car containing the cross-ties got opposite to where he was walking a part of the ties slipped off of the car, and about a half dozen fell upon him and broke one of his legs in two places and otherwise injured him. In his testimony he says, "he supposed there was a jar on the track." The case was tried before a jury, the court at the instance of the appellee instructing them "that upon the pleadings in the cause and the evidence given to the jury, the plaintiff was not entitled to recovery." If the defendant was entitled to recover, it was only because of the insufficiency of the proof offered by the plaintiff in that connection. We will now proceed to consider the instruction.

While the general rule undoubtedly is, that the burden of proof that the injury resulted from negligence on the part of the de-

fendant is upon the plaintiff, yet in some cases, "the very nature of the accident may of itself, and through the presumption it carries, supply the requisite proof." Whart. Neg. § 421.

Thus when the circumstances are, as in this case, of such a nature that it may be fairly inferred from them that the reasonable probability is, that the accident was occasioned by the failure of the appellee to exercise proper caution, which it readily could and should have done, and in the absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it.

In the case of *Byrne v. Boudle*, 2 Hurlst. & C. 722, the plaintiff was walking in a public street past the defendant's shop, where a barrel of flour fell upon him from a window above the shop and seriously injured him. The court held that these facts constituted sufficient prima facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence. Pollock, C. B., said: "There are many accidents from which no presumption of negligence can arise; but this is not true in all cases. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be prima facie evidence of negligence."

Shortly after this decision, a similar case, that of *Scott v. London & St. K. Docks Co.*, 8 Hurlst. & C. 596, was decided in the exchequer chamber. The plaintiff proved in this case that while in the discharge of his duties as a customs officer, he was passing in front of a warehouse in the dock and was felled to the ground by six bags of sugar falling upon him. The court said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Then followed the leading case of *Kearney v. London, E. & S. C. R. Co.* L. R. 5 Q. B. 411. This case underwent great discussion with a view to the settlement of the true principle governing it. The facts were that the plaintiff was passing on a highway under a railway bridge when a brick fell and injured him on the shoulder. A train had passed over the bridge shortly before the accident. The bridge had been built three years, and was an iron-girder bridge, resting on iron piers on one side and on a perpendicular brick wall with pilasters on the other, and the brick fell from the top of one of the pilasters, where one of the girders rested on it. A motion was made for a non-

suit on the ground that there was no evidence of negligence to leave to the jury. The court of queen's bench, by a divided vote, held that this was a case to which the maxim *res ipsa loquitur* was applicable, or in other words, that there was prima facie evidence of negligence. Kelly, C. B., delivering the opinion on the appeal, said: "We are all agreed that the judgment of the queen's bench must be affirmed. . . . The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury."

"The lord chief justice, in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears, without contradiction, that a brick fell out of the pier of the bridge, without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence that it was loose; for otherwise so slight a vibration could not have struck it out of its place. No doubt it is humanly possible that the percussion of the iron girder, arising from expansion and contraction, might have gradually shaken out the mortar, and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants, from time to time, to inspect the bridge and ascertain that the brick work was in good order, and all the bricks well secured. If there were necessity for other evidence, the case is made still stronger by the evidence of the plaintiff, which was uncontradicted on the part of the defendants, that after the accident, on fitting the brick to its place, several other bricks were found to have fallen out."

And again in the case of *Briggs v. Oliver*, 4 Hurlst. & C. 403, the plaintiff going to a doorway of a house in which the defendant had offices, was pushed out of the way by his servant, who was watching a packing-case belonging to his master, and was leaning against the wall of the house. The plaintiff fell and the packing-case fell on his foot and injured him. There was no evidence as to who placed the packing-case against the wall, or who caused its fall. The court held that there was a prima facie case against the defendant to go to the jury.

We have made full reference to the foregoing cases as showing the views of the English courts upon this question. These and many other English and American cases clearly establish the fact that it is not requisite that the plaintiff's proof, in actions of this kind, should negative all possible circumstances which would excuse the defendant, but it is sufficient if it negatives all probable circumstances which would have this effect. Thomp. Neg. 1229. It is also well settled that the cause of accident must be connected with the defendant either by direct evidence that it is his act, or that it is under his control, before it can be presumed that he has been negligent. *Higgs v. Maynard*, 12 Jur. N. S. 705; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 698; *Smith*

v. *Great Eastern R. Co.* L. R. 2 C. P. 10. When, however, there is no duty upon the plaintiff, as under the facts of this case, or when the duty which he has to perform has been performed by him, it is clear that the negligence of the plaintiff is out of the question; and if the accident is connected with the defendant the question whether the phrase "*res ipsa loquitur*" applies or not becomes a question of common sense. Whittaker's Smith, Neg. 423.

The American cases sustaining the maxim *res ipsa loquitur* are numerous and to the point. In the case of *Cummings v. National Furnace Co.*, 60 Wis. 603, when the defendant company was engaged in unloading iron ore from a vessel by means of a crane to which was attached a bucket, while so engaged the bucket tipped and threw its contents upon a seaman lawfully working upon the deck of the vessel. The court said: The accident itself was of such a character as to raise a presumption of negligence, either in the character of the machinery used, or in the care with which it was hauled; and as the jury found the fault was not with the machinery, it follows that it must have been with the hauling, otherwise there is no rational cause shown for its happening. The leading American case, however, appears to be *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530. The opinion of the court was delivered by Dwight, C., and is a most able and exhaustive examination of the subject.

He cites with approval many of the English and American cases to which reference is made in this opinion. The case was one in which the walls of a building, without any special circumstances of storm and violence, fell into one of the streets of the city of Brooklyn, knocking down the plaintiff, who was on the sidewalk, and seriously injuring her. The court said: "There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling unless it was badly constructed, or in bad repair, as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind, necessarily, seeks for a cause for the fall. That is apparently the bad condition of the structure. This again leads to the inference of negligence, which the defendant should rebut.

To like effect are, *Lyons v. Rosenthal*, 11 Hun, 46; *Edgerton v. New York & H. R. Co.* 89 N. Y. 227; *Kirt v. Milwaukee, L. S. & W. R. Co.* 26 Wis. 489; *Smith v. Boston Gas Light Co.* 129 Mass. 318; *Clare v. National City Bank*, 1 Sweeney, 539; *Brehm v. Great Western R. Co.* 34 Barb. 256; *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800; *Hays v. Gallagher*, 72 Pa. 136; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Dixon v. Plums*, 98 Cal. 384, 20 L. R. A. 698.

We have referred to numerous cases as illustrating the views which we entertain, because the question on this appeal has not heretofore been determined by this court. Cases resting in contract have frequently received our consideration and they are generally free from difficulty, because the mere happening

of the accident will be prima facie evidence of a breach of contract without further proof, while in those not resting in contract, it must not only appear that the accident happened, but the surrounding circumstances must be such as to raise the presumption of a failure of duty on the part of the defendant towards the plaintiff." Article, *Res ipsa loquitur*, Judge Seymour D. Thompson in 10 Cent. L. J. 261. None of the cases herein quoted relate to those resting in contract.

In all cases of the character we have been considering, the most careful scrutiny should be given to the circumstances attending the accident and while an excellent authority has said that after all the question resolves itself into one of common sense, we would add that it should be of a high order. For it is unquestionably true that the authorities are by no means in accord on the question which arises out of the doctrine of *res ipsa loquitur*. The facts of this appeal are very meagre but they by no means lie on the border line, nor even close to it. Here you find the plaintiff traversing a path over which the defendant had no dominion, for the plaintiff was rightfully there.

The defendant moves its cars over its roadway along said path and from a gondola car there slips an half dozen railroad cross-ties, falling upon the plaintiff and seriously injuring him.

The plaintiff was guilty of no negligence in being where he was at the time he was injured, and in so far as the defendant's rights are involved, the principle is the same whether he was on the land of Mr. Walsh or on his own land. The accident happened at the hour of noon, as the plaintiff was on his way to his dinner. There is no contention that it did not happen just as the plaintiff has himself represented. The plaintiff had no control over nor was he in any way connected with the loading or management of the cars or trains upon defendant's road. If the cross-ties had been properly loaded, there existed no reasonable probability of their falling off.

A cross-tie is defined to be a sleeper, connecting and supporting the parallel rails of a railroad. Stand. Dict. 444. Its figure and dimensions are familiar and its flat surfaces and weight illustrate how readily they can be loaded so as to form an almost compact body of wood, if reasonable care be exercised in placing them on the flat bottom of the car, and proper lateral support be given them. If by accident the ties had become displaced, it was a duty incumbent upon the defendant and its servants to have re-adjusted them, in such a manner as to have prevented the happening of an accident. It was the duty of the defendant and its servants to have carefully loaded said cross-ties upon its cars, and it was equally its duty to have exercised reasonable care in seeing that its train was transported in such condition as to avoid all reasonable probability of injury.

If the presumption arising out of the doctrine of *res ipsa loquitur* finds proper application anywhere, we think this is a case in which it should be applied. In conclusion, taking the proof as we find it in the record,

we think the case should have been permitted to go to the jury, with proper instructions from the court.

The judgment must be reversed.

Judgment reversed and new trial awarded.

McSherry, J., dissenting:

I am constrained to dissent in this case, and I will state very briefly my reasons for the opinion I have formed. An accident happened, and the plaintiff was injured. There was no relation of passenger and carrier existing between the plaintiff and the defendant, and there was no proof of any antecedent negligence on the part of the defendant, and no proof as to what caused the cross-ties to fall from the moving cars. Under these circumstances, the court below properly, I think, took the case from the jury; but a majority of this court now reverse that ruling, and holding that there was sufficient evidence for the jury to consider on the question of negligence. The plaintiff was not a passenger. As I understand the repeated rulings of this court, it is the settled law in Maryland that where that relation does not exist no presumption of negligence can ever arise from the mere fact that an injury has been sustained. Something more must be shown. Where the defendant is under no contractual obligation to the plaintiff, the mere occurrence of an accident resulting in injury furnishes no evidence of causative negligence on the part of the defendant. This principle is well illustrated in *Hummack v. White*, 11 C. B. N. S. 588. It is incumbent, therefore, on the plaintiff in such cases, not only to show an injury, but also to show that the defendant had been guilty of some negligence which produced that injury. There must not only be negligence, but between that negligence and the injury complained of there must be the relation of cause and effect. Negligence which produces no injury furnishes no right of action, and an injury not caused by any negligence cannot justify a recovery. Proof, then, of both the injury and the negligence which caused it must be given. They are both indispensable constituents of the plaintiff's case, and proof of the one cannot, in the absence of a contractual duty, establish the existence of the other, unless, in obedience to some unvarying physical law, you can say with unerring certainty that the given effect necessarily proceeded from a particular exclusive cause. If, consistently with known laws, a particular effect could not exist, except as the result of a single cause, then, when the effect does exist, that single cause, and no other, must, in the nature of things, have produced it; and to that extent proof of the effect is proof of its cause, or of what its cause was. But, if the effect could have resulted from any one of several causes, then it is obvious that something more than the effect itself is required to be shown before it can be determined from which one of those several causes the given effect did in fact in the particular instance proceed. More especially is this so if of these several causes some are of such a nature that they impose no obligation on the defendant at all. It

seems to me, then, to follow that where the injury could have happened in consequence of an accident pure and simple, unmixed with negligence, and for which and its consequences the defendant is not responsible; and where it could, under the proven facts, equally have happened as the result of actionable negligence for which the defendant would be responsible; and there is no evidence to show that it did not happen, or could not have happened, by sheer accident, or that it did happen, or could only have happened, as the result of negligence,—the plaintiff, upon whom the burden to show how it did happen always rests, would fail to sustain his case. And he would fail because his proof in the case supposed would be as consistent with the hypothesis that the injury was caused by non-actionable accident as with the opposite theory, that it was caused by actionable negligence.

Now, in the case at bar the only evidence is that as the freight train approached the plaintiff, who was walking towards it just outside of the right of way, he thought he saw a jar on the track, as he expressed it, and the cross-ties fell off from the moving car when it was opposite to him, and struck and injured him. There is no evidence in the record that these ties had been improperly loaded on the car, or to show when, where, or by whom they were loaded, or how far they had been hauled, or to show that the car upon which they had been loaded was out of repair, or that the track was not in proper and safe condition, or that the employés of the defendant were unskillful, careless, or incompetent. The naked fact that the ties fell off while the car was in motion is all the evidence that was adduced. If it had been shown, or could rightly be assumed as a fact established by known and admitted physical laws, that these ties could not have fallen off at that particular place except because they had been negligently loaded, or because of some other negligence on the part of the defendant, I concede there would then have been sufficient evidence before the jury to justify them in concluding that there had been antecedent negligence which, through the falling of the ties, caused the injury; because then the probability of the existence of a non-actionable accident, as the cause of the injury, would necessarily be precluded. But with the numerous probabilities existing that the same result could have happened, though there had been no anterior negligence, the jury, if allowed to consider the case at all, would have been at liberty to speculate between these conflicting probabilities, none of which were excluded by the proven facts, and to base a verdict, at best, upon mere conjecture. The cases relied on by the appellant are distinguishable from the one at bar. Take, for example, the case of *Byrne v. Boadle*, 2 Hurlst. & C. 726. There the barrel rolled out of the warehouse of the defendant, and fell upon a person rightfully passing along the public thoroughfare below, and, though no evidence was offered to show what caused the barrel to roll out, the case was allowed to go to the jury upon the theory, I take it, that, according to the fixed

laws of dynamics, it was physically impossible for the barrel to roll at all without the application of some force which must have been applied on the defendant's premises while those premises were so unguarded as to permit the barrel to roll out of the door. Had the door not been left open when it ought to have been closed, or, at all events, ought to have been protected by a servant or watchman, the barrel could not have rolled out as it did. Allowing the door to remain open or unguarded was an act of negligence. Now, negligence, in the abstract, is a nullity, but in the concrete it is either positive or negative; that is to say, it consists either in the doing of some act which ought not to have been done, or in the omission to do some act that ought to have been done. In both instances it is the breach of a duty that is owed to another. In the barrel case the plain duty which the owner of the warehouse owed to the public, and to every individual who was entitled to use the public street, was to keep the door so closed or guarded that a barrel could not roll out in the way it did roll out, no matter how it received the im-

petus, and the failure to do this was clearly an act of negligent omission, which directly caused the injury. Had the omitted duty been observed, it was physically impossible for the barrel to roll out as it did. But the case at bar is widely different. It does not follow that because the logs fell off the car they were negligently put on,—for, though properly loaded, they may have become displaced, without negligence, by the jarring incident to a moving train; or, by other means, they might have fallen without involving a breach of duty towards any one, and therefore without involving antecedent negligence. To conclude that there was negligence because an injury happened is to assume as proved the very fact to be proved. It seems to me, then, that some evidence tending to show negligence ought to have been adduced, and that the court below was right in withholding the case from the jury upon the failure of the plaintiff to adduce such additional evidence. I am authorized by Judge Fowler to say that he concurs in these views.

CALIFORNIA SUPREME COURT, (In Banc).

PEOPLE of the State of California, *Resp't.*,

v.
William BRAY, *App't.*

(.....Cal.....)

1. The sale or giving of liquors to an Indian of full blood, whether he has adopted the habits of civilization and separated from tribal relations or not, is prohibited by Penal Code, § 397, prohibiting the sale or furnishing of such liquors "to any Indian."
2. A citizen of Indian blood is not deprived of any constitutional privileges and immunities by a statute prohibiting the sale or giving of intoxicating liquors to any Indian.

(December 31, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Sonoma County, convicting him of selling intoxicating liquors to an Indian contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. M. Thompson and Rolfe L. Thompson, for appellant:

Section 397 of the Penal Code cannot possibly contemplate all persons of Indian blood, who now do, or may hereafter, come within the jurisdiction of the California courts.

The Indian in question being a citizen, the law was not violated by furnishing her the liquor.

If the power to pass such a law exists, it

might equally well have forbidden such liquor to be furnished to Irishmen, or Germans, or Americans, or persons of color, or it might have included only one or more of the classes mentioned; and a law which would make such grossly unjust discriminations against the class of citizens mentioned could not remain upon the statutes of the state as legal.

Re Parrott, 1 Fed. Rep. 481; *People v. Antonio*, 27 Cal. 404; *State v. Richter*, 23 Minn. 81.

Laws public in their object must be general in their application; they may extend to all citizens or be confined to particular classes, such as miners, bankers, traders, etc.

Cooley, Const. Lim. 3d ed. 890, 891; *Re Yick Wo*, 68 Cal. 295, 58 Am. Rep. 12; *People v. Henshaw*, 76 Cal. 436.

If a statute purporting to have been enacted to protect public morals or public safety is an invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the constitution.

To this end section 397, if intended to apply to citizens of Indian blood, should be declared repugnant to the constitution and void.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Abel v. Clark*, 84 Cal. 226; *Utsey v. Brott*, 30 S. C. 380; *State v. Goodwill*, 6 L. R. A. 621, 38 W. Va. 179; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Tugman v. Chicago*, 78 Ill. 405; *State v. Berka*, 20 Neb. 875; *People v. Haug*, 68 Mich. 549.

An act which prohibits the employment of Chinese or Mongolians is void.

8 Am. & Eng. Encyclop. Law, pp. 691, 727.

Also which prohibits colored people from serving as jurors.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

And the Kentucky Homestead Law of 1866

NOTE.—For jurisdiction of crimes committed by or against Indians, see note to *State v. Campbell* (Minn.) 21 L. R. A. 169.

For authorities as to equal privileges or immunities, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 572.

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is void so far as it excludes negroes from its benefits.

Custard v. Poston (Ky.) Feb. 14, 1886.

A state law which discriminates in favor of a school for white children is void.

United States v. Buntin, 10 Fed. Rep. 780.

The "queue ordinance" of San Francisco is void, as being directed against Chinese.

Ho Ah Kow v. Nunan, 5 Sawy. 552.

The statute of this state prohibiting aliens from fishing in its water is unconstitutional.

Re Ah Chong, 2 Fed. Rep. 733.

And requiring a bond that Chinese emigrants shall not become a charge upon the state is without legal sanction.

Re Ah Fong, 3 Sawy. 144.

A law which imposes a tax upon Chinese over eighteen years of age for each month of his residence in the state is also unconstitutional.

Lin Sing v. Washburn, 20 Cal. 534.

An ordinance requiring Chinese to remove to a certain part of the city is void.

Re Lee Sing, 43 Fed. Rep. 359.

A law is illegal which forbids the sale of goods on Sunday, but at the same time permits Jews to sell.

Shreveport v. Levy, 28 La. Ann. 671, 31 Am. Rep. 553; 17 Am. & Eng. Encyclop. Law, p. 251.

Mr. W. H. H. Hart, Atty-Gen., for the People.

De Haven, J., delivered the opinion of the court:

The defendant was convicted of the crime of selling intoxicating liquor to an Indian named Mary Smith, in violation of section 397 of the Penal Code, which, as amended in 1893 (Stat. 1893, p. 98), reads as follows: "Every person who sells or furnishes, or causes to be sold or furnished, any intoxicating liquors to any habitual or common drunkard is guilty of a misdemeanor; or who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a felony." It was admitted upon the trial that the defendant furnished intoxicating liquor to the said Mary Smith, named in the information, at the time and place stated therein, and that she "has no other than Indian blood in her veins." It was further shown that her father and mother lived in a house of their own; that they both dressed like white people, and have adopted the habits and customs of civilized life. Her father is a fisherman, and sells his fish in the neighboring city of Santa Rosa. He owns a horse, wagon, household goods, and other property, and their said daughter, Mary, resides with her parents, and none of them have ever lived upon a government reservation, "nor have they ever lived in tribal relations, or under or subject to the control of any chief or like authority." Upon this state of the evidence the defendant requested the court to give the following instructions: "(2) Section numbered 397 of the Penal Code, under which the information in this case was filed, is not violated by a sale of intoxicating liquor to an Indian who at the time of the sale was a citizen of this state." "(4) If you find from the evidence that the Indian in question was born

in this state, and at the time of her birth her parents were living separate and apart from any tribe of Indians, and had no tribal relations, and did not live on any Indian reservation, or other land set apart for such purpose, then I charge you that the Indian in question is a citizen of the United States, and you cannot convict the defendant of the crime charged against him in the information, even if you should also find that he did sell or furnish the said Indian intoxicating liquors at the time alleged." "(12) All citizens of this state are entitled to equal protection under the law in person, property, and privileges; and a law which takes from one person, on account of color or race, any privilege which others are legally permitted and allowed to enjoy, is void as to such person." The court refused to so instruct the jury, and this refusal is assigned as error, and covers all the grounds upon which the defendant claims that the judgment and order appealed from should be reversed; and the argument made in behalf of defendant for such reversal rests upon these three propositions: First, that under the facts shown the person named in the information as the one to whom defendant furnished the intoxicating liquor is a citizen of the United States; second, that section 397 of the Penal Code, in so far as it relates to Indians, applies only to those Indians who are under control of the general government as dependent communities, living in tribal relations, or upon government reservations, and as such deemed wards of the general government; third, that, if said section is not so limited by construction, it is void, because it discriminates between citizens of the United States, denying to the citizen of Indian birth the privilege of buying intoxicating liquors, which is accorded to citizens of the white race, and in making such distinction that it abridges the privileges and immunities of the former.

By an act of congress approved February 8, 1887 (24 Stat. at L. 390), it is provided that "every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." It was undoubtedly competent for congress to thus confer upon Indians the privileges of citizenship (*Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 848), and it may be conceded that the facts of this case show that the said Mary Smith, referred to in the information, is a citizen of the United States, within the meaning of the act of congress from which the foregoing quotation is made, and as such is entitled to the privileges and immunities of such citizens; but we are not able to agree with the further contention of appellant's counsel in their construction of

section 897 of the Penal Code. In our opinion that section forbids the sale or giving of liquors to Indians of full blood, without any reference to the question whether they have or have not adopted the habits of civilization or separated themselves from tribal relations. It was intended to apply to Indians as a class, and was enacted in view of their well-known race peculiarities and their relations to society. There are thousands of California Indians to be found in this state, most of them civilized in a certain degree, perhaps none of them living under any well-defined tribal government. They live generally by themselves, in small villages or communities, and yet are in constant contact with the white race, some of them living in families as servants, and all of them at times engaged in fishing or employed as laborers in the harvest fields or otherwise. The statute applies to this people as a race, and in its enforcement all inquiry as to the habits or the degree of civilization attained by the individual of such race to whom the intoxicating liquor is furnished, or as to whether he is or is not a citizen of the United States under the act of congress before referred to, is irrelevant; and, as thus construed, this section of the Penal Code is not in conflict with any provision of the Constitution of the United States or of this state. It is general and uniform in its operation, because it affects in the same manner all persons belonging to the class to which it refers (*Ex parte Smith*, 88 Cal. 710), and does not deprive any citizen of his privileges and immunities as such. The privileges and immunities which pertain to citizens in the several states are thus defined by Washington, J., in *Corfield v. Coryell*, 4 Wash. C. C. 880, Fed. Cas. No. 8,280: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restrictions as the government may justly prescribe for the general good of the whole, the right of a citizen of one state to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, real and personal, and an exemption from higher taxes or imposi-

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tions than are paid by the other citizens of the states,—may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." It will be seen that in the above extract the learned judge was careful to say that the right to acquire and possess property and to pursue and obtain happiness is not unlimited, but "subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." And it is well settled that in regulating the sale of intoxicating liquors the legislature may, in the exercise of its judgment as to what restrictions upon such sale the general good of the public requires, prescribe the conditions upon which the license to make such sale shall be granted. "Wherever the law allows the sale of liquor under licenses or other restrictions, there are statutes forbidding such sale to certain classes of persons who are peculiarly liable to be injured or demoralized by indulgence in alcoholic beverages; such as minors, persons already intoxicated, and habitual drunkards. The constitutionality of such laws has seldom been questioned, and, indeed, their validity could scarcely be assailed with any show of reason." Black, *Intoxicating Liquors*, § 42. Whatever may be true in respect to particular individuals of that race, it is certainly true that Indians as a class are not refined, cultured,—civilized in the same degree as persons of the white race,—and doubtless, in the judgment of the legislature, they are less subject to moral restraint, and therefore more liable to be dangerous to themselves or others when under the influence of liquor, or less able to resist the desire for such liquors, and for that reason they, as well as the community in which they move, were thought entitled to the protecting influence of this statute. We have no doubt the law under consideration falls within the proper exercise of the police power of the state. It was so stated by Sanderson, J., in *Ex parte Smith*, 88 Cal. 708, and a statute in all respects similar to it was upheld by the supreme court of the territory of Montana as a valid exercise of the police power in the case of *Territory v. Guyot*, 9 Mont. 46, the court there saying: "The act under consideration is clearly within the police power of the territorial government as defined by the courts, and is not inconsistent with the Constitution and laws of the United States." These views dispose of all the questions arising upon this appeal.

Judgment and order affirmed.

We concur: Garoutte, J.; Harrison, J.; McFarland, J.; Van Fleet, J.; Fitzgerald, J.

CONNECTICUT SUPREME COURT OF APPEALS.

Peter RITCHIE

v.

William WALLER, *Appl.*

(63 Conn. 155.)

1. The question is in most cases one of fact whether or not the act of a servant for which it is sought to hold the master responsible was done in the execution of the master's business, within the scope of the servant's employment.

2. If a servant's deviation from the strict course of his employment or duty is slight and not unusual the court may determine as matter of law that he is still executing the master's business, and if the deviation is very marked and unusual, it may likewise determine that he is not executing the master's business within the rule that the master is liable for his negligence.

3. That a servant sent by the master with the latter's team and wagon to a certain place to procure a load deviates from the most direct course home for the purpose of seeing about the repair of his own shoes is not of itself sufficient to show that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team.

4. An objection that defendant was not given time to demur to an amended complaint after the allowance of the amendment is not available on appeal, if it is not fairly included in the assignments of error and it nowhere appears that an offer to demur was made or the right to do so questioned or denied.

(May 22, 1898.)

APPEAL by defendant from a judgment of the Superior Court for Fairfield County in

NOTE.—Master's civil responsibility for the wrongful or negligent act of his servant or agent towards one who has no claim upon the master by reason of a contract inceptant or perfected.

I. LIABILITY FOR ACTS EXPRESSLY DIRECTED TO BE DONE.

II. GROUNDS OF LIABILITY IN CASE THE SERVANT IS NOT OBEYING ORDERS.

III. THE SERVANT MUST HAVE BEEN ACTING IN THE CAPACITY FOR WHICH HE WAS EMPLOYED.

IV. MASTER LIABLE FOR ACTS WITHIN SCOPE OF SERVANT'S EMPLOYMENT.

a. Liability for General Rule.
b. Liability for Negligent Acts.
c. Liability for Fraudulent and Tortious Acts.

d. Limitation of Scope of Employment.
e. Disobedience of Orders.

f. Performance of Unlawful Acts.

g. Acts of Master of Vessel.

h. Willful and Malignant Acts.

V. WHEN THE RESULT OF ABUSE OF AUTHORITY WILL BE SERIOUS OR THE TEMPTATION TO ABUSE IS STRONG.

VI. NEGLIGENCE OR DISOBEDIENCE OF STATUTORY REQUIREMENTS.

VII. QUESTION FOR JURY.

VIII. CONTRIBUTION TO INJURY.

I. LIABILITY FOR ACTS EXPRESSLY DIRECTED TO BE DONE.

Where a servant in doing a wrongful act is executing the direct commands of his master there is no question that the master is responsible for the act. The maxim *qui facit per alium facit per se* then applies. Indeed the fact of liability is so plain that it seems to have been seldom questioned in judicial tribunals and all the modern declarations of the principle, at least, consist simply of *dicta*. The act is so entirely that of the master that trespass will lie against the master for the act of his servant done at his command. *Wilkins v. Gilmore* (1840) 2 Humph. 140.

So trespass is the proper remedy where at the time of the accident the master is sitting by the side of the driver, the act of the driver being then considered as the act of the master. *Chandler v. Broughton* (1882) 1 Crompt. & M. 29, 3 Tyrw. 220; *McLaughlin v. Pryor* (1842) 4 Macon. & G. 58, 4 Scott, N. R. 655, Car. & M. 354.

If the wrong is done at the command of the master. 27 L. R. A.

ter, he is liable for the injury. *Hill v. Caverly* (1884) 7 N. H. 215, 26 Am. Dec. 735.

If the principal procures the agent to do an illegal act the principal will be liable for the consequences whether the agent acted innocently or maliciously in executing his order. *Hynes v. Jungren* (1871) 8 Kan. 391.

A master is liable for an assault by his servant which was authorized by him. *Bell v. Martin* (Tex.) Nov. 30, 1893.

The master is liable for a trespass done by his agent with his knowledge in the course of his business. *Exum v. Brister* (1858) 35 Miss. 391.

The master is always liable for the willful act of the servant when the latter is in his immediate employment unless he forbids the act. *Korah v. Ottawa* (1863) 32 Ill. 121, 33 Am. Dec. 255.

The acquiescence of the master in the use by his employees of an engine in going to and from their meals may render the master liable for injuries caused by the negligent running of the engine. *Reilly v. Hannibal & St. J. R. Co.* (1887) 94 Mo. 600.

But mere receipt by the owner of a wagon of compensation for the act of his servant who has been sent to a neighboring town, in selling some goods for a third person while there contrary to the master's orders, will not make the master responsible for the faithfulness of the servant, and he cannot be held liable in case the servant neglects to turn over part of the money received for the goods. *Hodges v. Holderby* (1857) 49 N. C. 500.

II. GROUNDS OF LIABILITY IN CASE THE SERVANT IS NOT OBEYING ORDERS.

As soon as the servant is not acting in conformity with the master's will the maxim *qui facit per alium facit per se* ceases to be applicable. One person cannot be said to do an act by another which he did not authorize such other to do. And the extent of departure from instructions is immaterial. The slightest departure from instructions as effectually breaks the connection between the master's volition and the completed act as the greatest departure. Yet it has been universally admitted that when a person undertakes to have an act done for his benefit some responsibility rests upon him to make good injuries which result to third persons from such act.

Most of the modern negligence cases, so far as they arise in connection with corporations at least, are based upon this principle, and the law is so well settled that no objection is now made merely

favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. J. J. Rose and G. P. Carroll for appellant.

Messrs. N. W. Bishop and E. O. Hull for appellee.

Torrance, J., delivered the opinion of the court:

This is an action against a master for damage caused by the negligence of his servant. The court below, upon the facts found, decided that the injury occurred solely through the negligence of the servant. One of the claims of the defendant, though it was not pressed on the argument, is that the court, as matter of law, erred in so doing. Upon this point it is sufficient to say that the record does not present any question of law for review. Upon the facts as they appear of

record we must regard the decision of the trial court upon this point as final and conclusive. In the discussion of the case, therefore, we will assume that the negligence of the servant and the damage resulting therefrom have been determined against the defendant, and that the question of the responsibility of the master therefor alone remains to be considered.

The facts bearing upon this question are in substance the following: The defendant is a farmer in Trumbull, and at the time of the injury, in September, 1891, and for some years prior thereto, had been accustomed twice a week to get manure for his farm from a brewery on North Washington avenue, in Bridgeport. This avenue and Main street intersect at a point called "Bull's Head," about a thousand feet south of the brewery. The avenue and Main street are connected by three cross streets, called, respectively, beginning with the one next north of Bull's Head, "Mulloy's Lane," "Grand Street," and

upon the ground that the negligence was that of a servant.

Regarded as the master's act.

Not perceiving a better foundation for such liability it has been placed upon the maxim *qui facit per alium*, etc. It was held that the maxim did not become inoperative when there was only a slight departure and it was left to the courts to say in each case whether or not there was a sufficient departure to make the maxim inapplicable. The result has been a mass of conflicting decisions out of which no rule could be evolved.

In *Rayner v. Mitchell* (1877) L. R. 2 C. P. Div. 357, Coleridge, Ch. J., says: The cases which have arisen upon this subject have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions.

In every case where one person engages another to do work for him his liability for the negligent or wrongful acts of the latter will depend upon two considerations: 1st. The duty or authority apparently or actually imposed upon or committed to the servant. 2d. The master's duty to refrain from injuring third persons by the prosecution of his business. It is not until both these considerations are given their true weight that the law upon this subject can be settled.

The result of leaving out one of these elements is well illustrated by a recent New York decision which has been regarded as an important addition to the law upon the subject.

The court said: "The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto." And after a few intervening sentences it again said: "In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master. *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 120, 21 Am. Rep. 597.

The absurdity of these statements taken together is such that the learned judge who made them never would have done so had he not wished to apparently conform to precedents by which he did not intend to be bound as is apparent from the remainder of the opinion. "It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that

the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another." . . . "If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders." *Ibid.*

That reasoning purports to be based upon the fact that the master authorized or consented to the wrongful act. But the liability cannot be made to rest upon that ground. For not only did the master not consent but the entire necessity for the discussion is caused by the fact that he did not.

It would seem to be much easier and more logical to declare a duty towards third persons directly than to attempt to reach the same result by declaring that the master consented when he did not consent.

"Commercial Street." The brewery is nearly opposite the point where Mulloy's lane enters the avenue. In December, 1890, the defendant hired the servant in question, whose name is Blackwell, as a farm laborer. Soon thereafter the defendant, for the purpose of getting a load of manure, and of showing Blackwell the place to procure it in the future, drove with him from the farm to the brewery, passing down Main street to Grand, through Grand to North Washington avenue, and thence southerly to the brewery. After getting a load they returned through Grand street to Main, and thence northerly home. Neither at that time nor on any subsequent occasion did the defendant give any special directions or instructions as to what particular route Blackwell should follow in going to or returning from the brewery with manure, although he supposed Blackwell took the same route followed on the first occasion above mentioned. In fact, Blackwell went or returned sometimes by way of Mulloy's

lane, and sometimes by way of Grand or Commercial street, and the defendant never at any time made any inquiries as to what route he took. On the day of the injury the defendant told Blackwell to go to the brewery after a load of manure, and to spread it on a designated lot on the farm. These were all the directions given to him. The defendant did not know that he intended to go to any other place. Pursuant thereto, Blackwell, with the wagon and two horses of the defendant, went to the brewery, and procured a load of manure. After so doing, instead of returning to Main street through the lane or Grand or Commercial street, and going thence northerly towards Trumbull, as usual, Blackwell drove southerly down the avenue to Bull's Head, and thence into Main street, and thence northerly in the direction of home till he came to a certain shoemaker's shop on Main street, southerly of Mulloy's lane. There he got off his wagon, leaving his team for about five minutes, and went

Another late New York case furnishes a similar example of indirect reasoning to reach a correct conclusion:

In *Electric Power Co. v. Metropolitan Teleph. & Teleg. Co.* (1894) 75 Hun, 63, in which the employees of one electric company cut from their fixtures certain wires belonging to another company, the court held that by the directions of defendant the wire belonging to plaintiff was out from fixtures and removed therefrom without notice to plaintiff and without affording it a reasonable opportunity of collecting together and reclaiming such property and such wire having been removed by the employees of defendant it was an act so clearly and intimately connected with and related to their employment that though it was not authorized by defendant it is but just that the employer should be held liable. The court says there has been upon this branch of the law a gradual tendency to increase the liability of the master for the acts of the employé done not only within the scope of his employment but also within the scope of the business with which he is intrusted. But in that case the court relies upon authorities which were determining the liability of the master to one towards whom he owed a special contract duty.

Cases in which there was a special duty have had a marked influence in calling the attention of the courts to the more logical rule of decision, that of general duty to society, cases being frequently cited upon both questions indiscriminately. See notes on arrest and assault appended to the cases of *Mulligan v. New York & E. R. Co.* (1892) (N. Y.) 14 L. R. A. 791 and *Davis v. Houghtelin* (1891) (Neb.) 14 L. R. A. 737.

Duty to society.

It is only recently that the liability has been placed upon the true ground. That is the master's duty toward his neighbors. As long ago as 1824 in considering the liability of public officers for the acts of their servants the court in *Hall v. Smith*, 2 Bing. 160, says the maxim "*respondet superior*" is bottomed on this principle; that he who expects to derive advantage from an act which is done by another for him must answer for an injury which a third person may sustain from it.

But while such remarks were sometimes made the general application of the principle has been of very slow growth.

The true basis for the liability is that the principles of modern jurisprudence require that the one who employs another to do an act for his benefit

and who has the choice of the agent must take the risk of injury to third persons by either the manner or mode of performance. *Barton's Hill Coal Co. v. Reid* (1888) 4 Jur. N. S. 767; 8 Macq. H. L. Cas. 206; *Sleath v. Wilson* (1889) 9 Car. & P. 607; *McDonald v. Snelling* (1897) 14 Allen, 290, 32 Am. Dec. 768; *Philadelphia & E. R. Co. v. Derby* (1892) 55 U. S. 14 How. 468, 14 L. ed. 532; *Illinois Cent. R. Co. v. Middleworth* (1893) 46 Ill. 494; *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 298; *Northwestern R. Co. v. Hack* (1872) 68 Ill. 238; *New Orleans, J. & G. N. R. Co. v. Bailey* (1896) 40 Miss. 306; *New Orleans, J. & G. N. R. Co. v. Albritton* (1899) 38 Miss. 242, 75 Am. Dec. 98; *Rounds v. Delaware, L. & W. R. Co.* (1874) 3 Hun, 329; *Redding v. South Carolina R. Co.* (1871) 3 S. C. N. S. 1, 16 Am. Rep. 661; *Schaefer v. Osterbrink* (1896) 97 Wis. 495, 58 Am. Rep. 375; *Ft. Worth & N. O. R. Co. v. Smith* (Tex.) March 21, 1894; *Pittsburgh, C. & St. L. R. Co. v. Shields* (1890) 8 L. R. A. 464, 47 Ohio St. 387; *Nashville & C. R. Co. v. Stearnes* (1871) 9 Heisk. 52, 24 Am. Rep. 303.

He is not required in all cases to insure the conduct of his agent, but if the probable effect of misconduct, either because of the dangerous character of the implements entrusted to the servant or of the exacting nature of his duties, will be serious injury to third persons, he must do so. In other cases his care in selecting his agent must be proportioned to the effect of misconduct and the temptation likely to come to the agent.

To render the master liable, 1st. The servant must have been acting in the capacity for which he was employed. 2d. The master will be liable, (a.) for all acts done within the scope of the servant's employment, (b.) For acts done by the servant in his capacity as servant although he abuses his authority or uses his power for purposes of his own, if the abuse is likely to occur and the probable result of such abuse will be serious injury to third persons. In cases where the result would not be so serious but the temptation to abuse is strong there must be reasonable care in the selection of the servant to avoid liability.

There is such dissimilarity in the elements of the master's duty to the public in the several classes of cases that may arise that one case cannot safely be decided by analogy to another unless all essential elements are the same in each.

Other rules.

Many of the general rules which have been laid down are faulty because they do not cover all the

into the shoemaker's shop. Blackwell's purpose and object in so doing was to see the shoemaker about soling or mending the shoes belonging to and then worn by him. While he was in the shop, the team started at a slow trotting gait up Main street, till it came opposite the plaintiff's market, where the wheels of the defendant's wagon caught in the left rear wheel of the plaintiff's wagon, upsetting the same, and causing the injuries to the plaintiff and his property referred to in the complaint. Blackwell was employed by the month, and the carting of the manure was within the ordinary scope of his employment as a servant of the defendant, and he was in the service of the defendant at the time of the accident.

Just here it may be well to call attention to two points in the finding, and to settle its interpretation with reference to them. After stating that Blackwell drove around to the shoemaker's shop, and there left his team and went into the shop, the court, as we have

seen, adds that "Blackwell's purpose and object in so doing was to see the shoemaker about soling or mending his shoes." Now, whether the phrase "in so doing" refers to the entire conduct of Blackwell from the time he left the brewery till the horses ran away, or only to his act in leaving them and going into the shoemaker's shop, is perhaps not free from doubt. We will assume, however, in accordance with what seems to be the claim of the defendant, that the phrase in question refers to the entire conduct. Again, the finding is that Blackwell "was in the service of the defendant at the time of the accident." This may mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it may mean that in making the detour he was, and continued to be, in the execution of the master's business, within the scope of his employment. We shall, for the purposes of the discussion, assume that the former meaning is the correct one.

possible elements. Thus in *BOWLER v. O'CONNELL*, post, 178, it is said that "an act done by a servant while engaged in his master's work, but not done as a means, or for the purpose of performing that work, is not to be made the act of the master."

That is true but it does not follow that the master may not be liable for the act of the servant in misusing a dangerous machine which has been placed in his keeping as in *TEXAS & P. R. Co. v. SCOVILLE*, post, 179.

In *Springfield Engine & Threshing Co. v. Green* (1887), 25 Ill. App. 106, the court in deciding that agents in that case exceeded their authority in instituting an action against a third person says in regard to acts that would be authorized by implication only, because within the scope of the employment: "The principal may control the agent as to the object, time, means, and manner of performance, or forbid it altogether. This principle of liability furnishes a test by which to determine whether a given wrongful act of the agent is or is not within the scope of his employment. It may often be difficult to decide correctly whether the employer had the legal right, simply by virtue of his relation as principal, to forbid its performance absolutely or in the particular case in question, or to require its performance in a different and proper manner; but if it be clear that he had, the act must have been within the scope of the employment, and if otherwise, it could not have been so."

In *Baker v. Kinsey* (1869) 38 Cal. 631, 99 Am. Dec. 438, it is said that if the servant can justify his act to his master as being within the line of his duty to him, the act is the act of the master and not otherwise.

Under Louisiana code the master is not responsible unless he could have prevented the act which caused the damage and did not do so. *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189.

In *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 645, Biggs, J., says that the best statement of the rule is that given by Wood (Mast. & S. 2d ed. § 309): "The act must have been done while engaged in the prosecution of some business for the master, and that business must have been such as the servant had authority from the master to do; that is, he must have been authorized, either expressly or impliedly, to do the act in some manner, which he has improperly or wrongfully performed, and the fact that he was only authorized to do the act in a certain way does not save the master from liability. If he was authorized to do the act at all, the master is liable for the conse-

quences of his doing it in a different manner, if the mode adopted by him is so far incident to the employment that it comes within its scope, for having given the servant any authority in the premises, he alone must suffer for its abuse.

The liability of the master for the acts of the servant rests now upon the condition whether or not the act of the servant was in the course of his employment. *Farber v. Missouri Pac. R. Co.* (1893) 20 L. R. A. 350, 116 Mo. 81.

None of those statements cover all the elements which have entered into the numerous cases which have been before the courts for decision.

III. THE SERVANT MUST HAVE BEEN ACTING IN THE CAPACITY FOR WHICH HE WAS EMPLOYED.

The act for which the master is liable must be something incident to the employment for which the servant is hired and which it is his duty to perform. *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, 50 L. J. Q. B. 281, 44 L. T. N. S. 153, 29 Week. Rep. 506, 45 J. P. 603.

To render the master liable the act must pertain to the particular duties of the employment. *Keith v. Lynch* (1886) 19 Ill. App. 574.

The rule of *respondent superior* belongs to the relation of superior and subordinate and is applicable to that relation wherever it exists whether between principal and agent or master and servant and to the subjects to which that relation extends, and is co-extensive with it and ceases when the relation itself ceases to exist, and it is founded on the power which the superior has the right to exercise and which for the prevention of injury is bound to exercise over the acts of his subordinates. *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304.

The master cannot be made liable for acts which a servant volunteers to do for him beyond the scope of his employment. *Marion v. Chicago, R. L. & P. R. Co.* (1882) 59 Iowa, 423, 44 Am. Rep. 687.

The liability of the master does not reach wrongs caused by the carelessness of the servant in work not directed by the master, as business of a third person or of the servant himself or of the master which he did not expressly or impliedly direct him to perform. *Witsee v. State Road Bridge Co.* (1889) 63 Mich. 644.

So the master is not liable for the unskillfulness of engineers engaged to run a steamer in attempting at the request of a passenger to run a canal railway at a pleasure resort which was at the time closed, it being no part of the duties of the em-

Whether, then, upon the facts found, the master is responsible for the negligence of the servant, is the important question. The general rule of law applicable in this class of cases is accurately and comprehensively stated in *Stone v. Hills*, 45 Conn. 47, 20 Am. Rep. 635, as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." Of these "conditions" of liability, the one under which the present case seems to fall, if it falls under any of them, is the one for acts done "in the execution of the master's business within the scope of his employ-

ment." This rule or "condition" of liability is in itself simple and intelligible enough, but, in determining whether any particular case falls within it or not, difficult and troublesome questions may arise. "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves." *Rayner v. Mitchell*, L. R. 2 C. P. Div. 357. In reality, however, the difficulty here spoken of arises in ascertaining whether the act was done in the execution of the master's business within the scope of his employment, which, as we shall see, is ordinarily a question of fact, and not in applying the rule when that fact has been ascertained. This fact once determined, the rule can be easily applied, but the rule cannot at all aid in the deter-

ployés of the steamer to run such railway. *Biederman v. Brown* (1893) 49 Ill. App. 483.

If the master of a vessel is not in charge of it he cannot bind the owner by contracts clandestinely made. *Walter v. Brewer* (1814) 11 Mass. 99.

Assisting third person.

So the master is not liable for the acts of his servant done while assisting a third person. *Sawyer v. Martins* (1898) 25 Ill. App. 521.

The owner of a boiler is not liable for the act of its engineer, which results in the explosion of the boiler which is done while he is assisting the employés of the vendor who have been sent to test the boiler and put it into the condition required by the contract of sale. *Olive v. Whitney Marble Co.* (1896) 108 N. Y. 232.

The master is not liable if at the time of the commission of the act the servant was acting under command of a third person. *Murphey v. Caralli* (1894) 3 Hurst. & C. 462, 34 L. Exch. 14, 10 Jur. N. S. 1307, 13 Week. Rep. 165.

A master is not liable for the acts of his servant while he is under control of a third person. *Bourke v. White Moss Colliery Co.* (1877) L. R. 2 C. P. Div. 205, 46 L. J. C. P. 233, 36 L. T. N. S. 49, 25 Week. Rep. 253.

So where a servant was sent to deliver goods at a certain place and directed to go and return by a certain route, and when he reached his destination, the customer wanted him to carry them further, which he did, and while so doing the horses ran away, the court held that the servant had left his master's employment and was under the control of the customer and the master was not liable for the injuries caused by the running horses. *Stone v. Hills* (1877) 45 Conn. 47, 20 Am. Rep. 635.

Instances of servant acting outside of capacity.

A bank is not liable for the loss of money given to its bookkeeper away from the bank and out of bank hours to be by him deposited to the credit of one from whom he received it. *Manhattan B. Co. v. Lydig* (1899) 4 Johns. 377.

A railroad company is not liable for the act of one of its trackmen in advising a boy whom he has taken away from home to attempt to board a moving freight train for the purpose of returning to his home. *Keating v. Michigan Cent. R. Co.* (1893) 97 Mich. 154.

A railroad company is not responsible for the acts of its local agent in preventing the attorneys of one injured on the road from having access to a

witness who is in the employ of the company. *Marsh v. South Carolina R. Co.* (1876) 56 Ga. 274.

The owner of a foundry is not liable for injuries to a boy who falls into hot ashes, given by them to their engineer and removed by him after working hours to a vacant lot in the vicinity, where he intended to apply them to his own use, although they knew of the place where he had stored them and knew they were liable to do injury. *Burke v. Shaw* (1892) 59 Miss. 445, 42 Am. Rep. 370.

A railroad company is not liable for injuries caused by the obstruction of a highway crossing by refuse removed from its cars by a brakeman and placed in the highway for his own use. *Pittsburg, W. & C. R. Co. v. Maurer* (1871) 21 Ohio St. 421.

A servant employed to post bills in a certain town is not acting within the scope his of employment in taking the bills to a town fifteen miles away and leaving them in a heap in the highway, so as to render the master liable for injuries to a horse frightened by them. *Smith v. Spits* (1892) 156 Mass. 319.

A parlor-car company is not liable for injuries to a bystander caused by its porter throwing from the car a bundle containing his personal effects. *Walton v. New York Cent. Sleeping Car Co.* (1895) 139 Mass. 556.

A station agent is not acting within the scope of his employment in placing upon the track torpedoes which have been thrown from the train by conductors and which he has picked up and placed on the track merely to hear them explode, where station agents have no duty to perform with torpedoes and the rules of the company prohibit their use near stations. *Smith v. New York Cent. & H. R. Co.* (1894) 78 Hun. 524.

A railroad company is not liable for the act of its fireman in going into the cabooses, getting torpedoes and placing them on the track for the purpose of making a noise to aid a fourth of July celebration going on near the station. *Chicago, B. & Q. R. Co. v. Epperson* (1897) 26 Ill. App. 79.

As to liability for misuse of torpedoes by persons who have been placed in charge of them, see V.

Where a baggageman on a train went into the express car for the purpose of having some fun with a boy who was there and the boy being frightened jumped off from the moving train and was injured, the court held that the railroad company was not liable, if the baggageman was not about its business when he left his compartment and went into that of the express company. *Louis*

mination of the fact. The rule tells us that the master's liability depends upon whether the acts were done in the execution of his business within the scope of his employment, but it does not help us to determine whether they were or not so done.

In like manner the general rule of construction is that the intent of the parties shall prevail. This tells us what to do when the intent has been ascertained, but affords no aid in a particular case in ascertaining what the intent is. Whether, then, the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases be a question of fact, to be determined as such by the jury or other trier, because no general rule of law has been, or probably can be, laid down, the application of which will determine the matter in all cases. Sometimes, however, this question is determined

by the court as a matter of law. But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law. In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions. Thus, in *Phelon v. Stiles*, 43 Conn. 426, the

ville, N. O. & T. R. Co. v. Douglass (1892) 69 Miss. 723.

A railroad company is not answerable for the act of its baggageman in assisting an employé of a contractor to put tools off from the train, which the contractor is allowed by the railroad company to carry free of charge. *Cunningham v. Grand Trunk R. Co.* (1871) 81 U. C. Q. B. 350.

A baggageman on a train is not serving his master in delivering drills which are carried merely to accommodate persons who have not contracted with the carrier and for which the carrier receives no benefit, and therefore his negligence in throwing the drills from the car by which the person to whom they were sent is injured does not make the carrier liable. *Walker v. Hannibal & St. J. R. Co.* (1894) 24 L. R. A. 363, 121 Mo. 575.

The master is not liable for the negligence of his servants, who have been engaged in moving a house, in erecting steps thereto at the request of the tenant which the master was under no obligation to erect and which the servants undertook to do after they had quit the master's employment at the close of working hours for the day. *Dells v. Stollenwerk* (1890) 78 Wis. 320.

The owner of a livery stable with whom a horse is left to be kept is not liable for the death of his horse by reason of his servant's immoderate driving of it for exercise under instructions from the owner. *Adams v. Cost* (1884) 62 Md. 264, 50 Am. Rep. 211.

It is no part of the ordinary business of a clerk in a store to borrow money and draw notes in the name of the firm for the amount, so that the proprietor is not liable upon a note so drawn by him without showing that he had express authority to draw it. *Kerns v. Piper* (1835) 4 Watts. 222.

The fact that horses are struck and rendered unmanageable so that they cause injury by one who had been employed by the owner, but who at the time was not attending to any business which concerned the owner, is not sufficient to render the owner liable for the damage. *Weldon v. Harlem R. Co.* (1859) 5 Bosw. 576.

A railroad company is not liable for the act of its brakeman on a train which is in charge of a conductor in commanding a boy who is on the train to assist in adjusting boards loaded on some of the cars, in doing which the boy is injured. *Sherman v. Hannibal & St. J. R. Co.* (1880) 72 Mo. 62, 37 Am. Rep. 423.

A toll-bridge company is not liable for the act of the bridge keeper in setting furniture out of the
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house for the purpose of cleaning it, so that it frightens horses passing over the bridge. *Wiltse v. State Road Bridge Co.* (1886) 63 Mich. 644.

A slave owner is not liable for the act of his overseer and slaves in turning a tenant out of a house on the premises and then setting fire to it, if such act is done without his knowledge or authority. *Boulard v. Calhoun* (1858) 18 La. Ann. 445.

A railroad company is not liable for the act of its servants in pursuing, capturing, and taking to a place of examination, a man seen running from where obstructions had been placed on the track. *Porter v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 358.

A master is not liable for the death of a horse which he has instructed his servant to turn out of a certain pasture if after it is turned out the servant while boys are trying to drive the horse along the road strikes it with a whip causing it to injure itself so that it dies. *Yates v. Squires* (1865) 19 Iowa, 20, 37 Am. Dec. 418.

It is not within the authority of the conductor of a railroad train to pursue a boy into his father's house, and with a pistol in his hand force the boy to go away with him on the train, and the railroad company is not liable for such acts. *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268.

A carrier is not liable for the value of a package entrusted to his servant to be carried by the latter for a consideration paid to him for his own benefit, and lost in transit. *Butler v. Basing* (1827) 2 Car. & P. 618.

The master is not liable for an injury to a small child which the employé has invited to ride upon a hand-car, while after quitting work for the day they are taking passengers to a house, along the track, for their own purposes and contrary to the rules of the company. *Houston C. A. & N. R. Co. v. BOLLING*, post, 190.

A railroad company is not liable for the negligence of the master of its round-house while he is running an engine on the main track for the purpose of going for a doctor to attend a sick neighbor. *Cousins v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 572.

In the latter case the custody of the engine having been entrusted to the master of the round-house it would seem that the company should be responsible for the manner in which he executed his trust.

Servant acting under special orders.

Where a master having a servant at work by the

deviation by the servant from the strict course of his duty was so slight that this court, as matter of law, held the master liable, while in *Stone v. Hills*, 45 Conn. 44, 39 Am. Rep. 635, the deviation was so marked and unusual that it refused to hold the master responsible. On the other hand, where a servant, contrary to his duty, and solely for a purpose of his own, drove his master's horse and cart a quarter of a mile out of the way, the question whether in and while so doing he was in the execution of his master's business, within the scope of his employment, was left to the jury as a question of fact. *Whitman v. Pearson*, L. R. 8 C. P. 422. "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome." Pollock, Torts, *71. In the following cases, among many others, this question was decided as one of fact: *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528; *Redding v. South Carolina R. Co.* 3 S. C. N. S. 1, 16

Am. Rep. 681; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Cornick v. Digby*, 9 Ir. C. L. Rep. 557; *Burns v. Poulson*, L. R. 8 C. P. 568.

In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. "Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master 'is no longer answerable for the servant's conduct.'" Pollock, Torts, *76. In the case of *Joel v. Morison*, 6 Car. & P. 501, the jury were told

day, burned over some land and then told the servant to harrow in another field and left, but the servant instead of so doing attempted to burn some brush in such field first and by so doing set fire to adjoining property, the court held the master not liable, stating that when the servant works under special orders of the master, the master is responsible only for his skill and care in executing those orders. *Wilson v. Peverly* (1828) 3 N. H. 548.

A master who sends his servant to haul goods of a certain person with instructions not to take the goods of any one else is not responsible for the goods of a third person taken by the servant and embezzled by him during the journey. *Satterlee v. Groat* (1828) 1 Wend. 272.

IV. MASTER LIABLE FOR ACTS WITHIN SCOPE OF SERVANT'S EMPLOYMENT.

a. Liability the general rule.

There is perhaps no rule of law more firmly settled than that a master is ordinarily liable to answer in a civil suit for tortious acts of his servant, if the act be done in the course of his employment in the master's service. *Ayorrig v. New York & E. R. Co.* (1864) 30 N. J. L. 460.

The principal is liable for the act of his agent. *Arthur v. Balch* (1851) 22 N. H. 157; *Brown v. Lent* (1848) 20 Vt. 529; *Hill v. Morey* (1854) 26 Vt. 178.

The master is liable for the acts of his servant. *Charlock v. Freal* (1891) 126 N. Y. 357; *Suydam v. Moore* (1860) 8 Barb. 368; *Morgan v. Bowman* (1856) 23 Mo. 538; *Dillon v. Hunt* (1884) 83 Mo. 160.

The master is liable for injuries caused by the act of his servant in throwing snow and ice from the roof into the street below when he has sent him to clean off the roof. *Althof v. Wolf* (1866) 2 Hilt. 344.

The master is liable for the act of his general collecting agent in collecting money on false bills. *Adams v. Cole* (1861) 1 Daly. 147.

The master is liable for the act of his servant in drawing in a gang-plank so as to throw a person trying to cross it into the water. *Baldwin v. New York & H. Nav. Co.* (1872) 4 Daly. 814.

The master who sends his servant to cut trees on his own land but who fails to point out his division line is responsible if the servant ignorantly or wantonly cuts trees belonging to an adjoining owner. *Carman v. New York* (1862) 14 Abb. Pr. 301.

Where a farm hand took a bag containing barley supposing it to be oats to feed his team and

finding his mistake put an iron bolt into the bag to carry it home and returned the bag with its contents to the place where he found it, the master who subsequently used the bag to take some grain to mill without knowing that the bolt was in the bag, was held liable for injuries to the mill machinery caused by the bolt getting into it. *Tuel v. Weston* (1874) 47 Vt. 684.

If a servant kindles a fire in the way of husbandry and proper for his employment though he had no express command of his master, yet his master should be liable to an action for damages done to another by the fire. *Turberville v. Stampe* (1666) 1 Ld. Raym. 264, 1 Salk. 12.

As to liability for fires generally, see *note* to *Brown v. Brooks* (1866) (Wis.) 21 L. R. A. 255.

b. Liability for negligent acts.

In *Barton's Hill Coal Co. v. Reid* (1868) 4 Jur. N. S. 707, 8 Macq. H. L. Cas. 208, the court in considering the question of the liability of a master to one servant for the negligence of a co-servant said: "In general it is sufficient to hold (the master) liable to show that the person whose negligence caused the injury was at the time when it was occasioned acting not on his own account but in the course of his employment as a servant in the business of a master and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim '*respondet superior*' prevails and the master is responsible. Thus if a servant in driving his master's carriage along the highway carelessly runs over a bystander, or if a game keeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold and so hurts a passer-by, in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master. . . . The law does not permit him to escape liability because the act complained of was not committed with his own hands. He is considered and reasonably considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders. . . . A person sustaining injury . . . has a right to say: 'If you choose to do or cause to be done any of these acts it is to you and not to your servants I must look for redress if mischief happens to me as their consequence.' A large portion of the ordi-

that if the servant, with his master's horse and cart, made a detour in order to call upon a friend, or if, when driving on his master's business, he went out of his way against his master's implied commands, the master remains liable for the servant's negligence while *extra viam*; but that "if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." If the servant, in going *extra viam*, is really engaged in the execution of the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own. Thus, in *Putton v. Rea*, 2 C. B. N. S. 606, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor he negligently drove against a horse and killed it, and the master was held responsible. In *Sleath v. Wilson*, 9 Car. & P. 607, the master was held liable for the negligent act of his servant, who, after hav-

ing set his master down, drove around to deliver a parcel of his own, and did not drive directly where he had been ordered to go. See the case, also, of *Cormick v. Digby*, *supra*, upon this point. In *Storey v. Ashton*, L. R. 4 Q. B. 476, *Chief Justice Cockburn* says: "I think that if a driver, while acting in his master's business, were to make a slight deviation to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation. . . . I am far from saying if the servant, when going on his master's business, took a somewhat longer road, that owing to the deviation he would cease to be in the employment of the master, so as to divest the latter of all responsibility. In such cases it is a question of degree as to how far the deviation could be considered as a separate journey." In *Whitman v. Pearson*, *supra*, the servant, with the horse and cart of the master, contrary to express orders,

nary acts of life are attended with some risks to third parties and no one has a right to involve others in risks without their own consent, this consideration is alone sufficient to justify the wisdom of the rule which makes the principal by whom or by whose orders these risks are incurred responsible to third persons for any ill consequences resulting from want of any due skill or caution."

The master is liable for the negligence of the servant within the scope of his employment. *Montgomery & E. R. Co. v. Chambers* (1885) 79 Ala. 838; *Louisville Gas Co. v. Gutenkuntz* (1884) 82 Ky. 433; *Harlow v. Humiston* (1828) 6 Cow. 189; *Gleason v. Amsdell* (1880) 9 Daly, 393; *Oil-Creek & A. R. R. Co. v. Kelghron* (1873) 74 Pa. 316.

The master is liable for the negligence of his servants as for his own. *Burton v. Philadelphia, W. & B. R. Co.* (1845) 4 Harr. (Del.) 252.

The master is liable for the negligent act of his servant in leaving water running in the master's apartments, by reason of which injury is done to property of a third person, situated lower down in the same building. *Gass v. Coblenz* (1869) 43 Mo. 377.

The occupant of the upper portion of a building will be liable for damages caused to lower occupants by the negligence of his servants in leaving water running in his apartments which floods the lower floors. *Simonton v. Loring* (1878) 68 Me. 164, 28 Am. Rep. 29.

The landlord of a building is liable to his tenant for injury by water permitted to overflow from a wash basin by the negligence of the janitor of the building. *Pike v. Brittan* (1886) 71 Cal. 159, 60 Am. Rep. 527.

A coal merchant is liable for the act of his servant in leaving open a coal chute, through which he was delivering coal, so that a person fell into it and was injured. *Whitley v. Pepper* (1877) L. R. 2 Q. B. Div. 276, 46 L. J. Q. B. 493, 36 L. T. N. S. 588, 25 Week. Rep. 607.

A railroad company is liable for the negligent use by the engineer of the whistle so as to frighten horses on a highway. *Philadelphia, W. & B. R. Co. v. Brannen* (1886) (Pa.) 2 Cent. Rep. 38, 33 Alb. L. J. 216; *Philadelphia, W. & B. R. Co. v. Stinger* (1875) 73 Pa. 219; *Pennsylvania Co. v. Barnett* (1868) 59 Pa. 269.

The railroad company may be liable for the heedless or careless act of its servants in letting off steam from an engine or in blowing a whistle. *Culp v. Atchison & N. R. Co.* (1877) 17 Kan. 476.

A corn factor is liable for injuries caused by a truck negligently left in the road by an inebriated

man employed to take some corn out of the shop to a customer by the factor's sister who was left in charge of the shop during the factor's absence. *Wanstall v. Pooley* (1841) 6 Clark & F. 910, note.

Where a master commands a thing to be done and injury results from the want of care of the servant whilst performing the order, the master is liable in trespass. And he is responsible for consequential damages where by the negligence and carelessness of the servant in doing the business of his employer another receives injury for which the servant would himself be liable in trespass. *Douglas v. Stephens* (1853) 13 Mo. 362.

The master is liable for the act of his servant in carelessly throwing a keg out of a window so as to injure a person in a passageway below. *Corrigan v. Union Sugar Refinery* (1868) 98 Mass. 577, 96 Am. Dec. 685.

A railroad company is liable for the negligence of its servant in running over cattle on the track. *Cincinnati & Z. R. Co. v. Smith* (1871) 22 Ohio St. 227, 10 Am. Rep. 729.

The owner of a raft running in a river is liable for the injuries caused by the negligence of his servant in charge of it. *Shaw v. Reed* (1845) 9 Watts & S. 72.

Where a servant was directed to cut timber in a certain direction and the true line was not pointed out to him and he negligently cut over the line, the principal was held responsible in trespass. *Luttrell v. Hazen* (1855) 3 Sneed, 20.

The master is liable for the negligent chastisement of a slave which results in his death. *Echols v. Dodd* (1857) 20 Tex. 190.

A railroad company is liable for the negligence of its porter in handling baggage so that it falls upon and injures a bystander. *Tebbutt v. Bristol & E. R. Co.* (1870) L. R. 6 Q. B. 73, 40 L. J. Q. B. 73, 29 L. T. N. S. 772, 19 Week. Rep. 383.

Where a sailor negligently unlashed a skid from the rigging where it had been placed by a stevedore for use in loading the vessel for the purpose of tarring the rigging against which it rested by reason of which it fell and injured a third person, the ship owner was held liable for the injury. *The Polaria* (1885) 25 Fed. Rep. 735.

A railroad company is liable for injury caused by the negligence of its conductor in ordering his train to run out on the main line at a time when another train is due, of which fact he had knowledge, but had for the moment forgotten it. *Terre Haute & I. R. Co. v. Chicago, P. & St. L. R. Co.* (1893) 53 Ill. App. 41.

went a quarter of a mile out of his way purely for a purpose of his own, and the master was held responsible. In *Mitchell v. Crassweller*, 13 C. B. 237, Maule, J., said: "The master is liable even though the servant, in the performance of his duty, is guilty of a deviation, or a failure to perform it in the strictest and most convenient manner." In some of its aspects the case of *Quinn v. Power*, 37 N. Y. 585, 41 Am. Rep. 392, is somewhat similar to the case at bar. There a boatman at a certain town on the Hudson river applied to the pilot in charge of a ferry boat, asking to be put on board of a canal boat then in midstream. The pilot, without compensation, and apparently out of mere "good nature," agreed to do so. Similar acts had occasionally been done before, but without the knowledge or express authority of the master. To reach the canal boat the pilot diverged from his regular course, and while so out of his course, through the negligence of those in charge of

the ferry boat, a collision with a canal boat occurred. In behalf of the master it was urged that his servants, when the collision occurred, were not acting in his business or within the scope of their employment, but in the execution of an independent purpose of their own, not connected with the master's business; but upon this point the court said:

"We do not concur in this view of the transaction. At most, it appears to us a case where the servant, while acting in the master's business and within the scope of his employment, deviated from the line of his duty to his master, and disobeyed his instructions. When this ferry boat left the dock at Athens it started for its terminus at Hudson. It took freight and passengers to transfer across the river. Servants and boat, as the latter moved out into the river, were doing the master's business, and acting in the line of duty and of employment. There was a usual track or route by which the boat crossed. It may even have been selected and

The negligence of an engineer in permitting sparks to escape from his engine to the injury of property in the vicinity is imputable to the master. *Haywood v. Hedrick* (1833) 94 Ind. 340.

The owner of a farm is liable for the act of one whom he employs to work it in setting fire to stumps at an improper time so that it spreads to adjoining land and injures property there. *O'Connell v. Strong* (1837) Dud. L. 265.

A gas company is liable for the negligent act of its agent in causing an explosion while attempting to locate a leak in a private house which he had been sent to find. *Lannen v. Albany Gas-Light Co.* (1871) 44 N. Y. 459; (1885) 46 Barb. 264.

The negligence of a flagman stationed at a railroad crossing to give notice of the approach of trains, in failing to do so, is imputable to the company. *Dolan v. Delaware & H. Canal Co.* (1877) 71 N. Y. 285.

A telegraph operator who is given a key to a switch and charged with the duty of operating it for certain trains will render his master liable for injuries caused by his mistake in sending a wrong train on to the switch. *Tierney v. Syracuse, R. & N. Y. R. Co.* (1896) 82 N. Y. Supp. 627.

In that case the court says if he exceeded his instructions to the injury of a third person the defendant who furnished him the means and opportunity to cause the injury should bear the loss rather than an innocent party.

If a servant does without special orders an act of such a nature that he is justified in doing it as between himself and his master without an express order, the master is liable for damages sustained by an individual in consequence of the act being done in an unskillful manner. *Gilmartin v. New York* (1899) 55 Barb. 239.

A street-railway company is liable for the act of its driver in starting up the horses when a boy who had come on the car at the driver's request to furnish him with a drink of water is attempting to get off, in consequence of which the boy is injured. *Day v. Brooklyn City R. Co.* (1877) 12 Hun, 426, affirmed (1879) in 76 N. Y. 593.

A railroad company is liable for the negligence of its servant in catching the hand of a car inspector between two cars which they are attempting to couple while he is engaged in fixing one of the couplings so as to make it fit to perform its work. *Rhodes v. New York Cent. & H. R. Co.* (1894) 59 N. Y. S. R. 593.

A railroad company is liable for the negligence of its servants in permitting a steer which had been

killed on its track to be placed near the traveled part of a highway so as to frighten passing horses. *Baxter v. Chicago, R. L. & P. R. Co.* (1893) 87 Iowa, 483.

A master is liable for the negligent setting of fire by his servant in preparing ground for cultivation. *Ellegard v. Ackland* (1890) 43 Minn. 382.

A master is liable for the negligent act of his servant in exploding fireworks which the master has contracted to do in aid of a celebration. *Colvin v. Peabody* (1891) 155 Mass. 104.

The owners of a street railroad company are liable for the negligent acts of their employees in driving a car against a pipe near the opening of a sewer excavation, the result of which is to throw the pipe into the excavation and injure a man working there. *Schmidt v. Steinway & H. P. R. Co.* (1899) 55 Hun, 496.

A railroad company is liable for the act of its employee, who being engaged in fixing a cattle-guard at a railroad crossing leave some of the weather-beaten timbers lying at the side of the highway in such a manner as to be likely to frighten passing horses. *Tinker v. New York, O. & W. R. Co.* (1896) 71 Hun, 432.

The master is liable for the negligent act of his servant in delivering goods to a customer which results in breaking a window. *Ridge v. Railroad Transfer Co.* (1894) 56 Mo. App. 133.

A railroad company is liable for the injuries caused by its conductor, leaving his train standing without an attendant. *Rauch v. Lloyd* (1858) 31 Pa. 358, 72 Am. Dec. 747.

The master is liable for the carelessness and negligence of his servant in driving trespassing cattle out of his field, although it is not shown that the particular act was commended by him. *Smith v. Causey* (1856) 28 Ala. 655, 65 Am. Dec. 372.

Negligent driving of horse.

The owner is liable for his servant's negligence in driving his horse. *Metcalf v. Baker* (1874) 57 N. Y. 632; *Wright v. Crompton* (1876) 53 Ind. 337; *Moebus v. Herrmann* (1888) 103 N. Y. 349; *Coulter v. American Merchants Union Exp. Co.* (1871) 5 Lans. 87; *Moriarty v. Zepp* (1891) 42 N. Y. S. R. 824; *Huff v. Ford* (1878) 126 Mass. 24, 30 Am. Rep. 645; *Harpell v. Curtis* (1850) 1 E.D. Smith, 78; *McCahill v. Kipp* (1854) 2 E. D. Smith, 413; *Kimball v. Cushman* (1869) 103 Mass. 194, 4 Am. Rep. 523; *Springett v. Ball* (1865) 4 Fost. & F. 472; *Phelps v. Wait* (1864) 30 N. Y. 78.

The master is liable for the agent's negligent

dictated by the owner. In deviating from it the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route, or pursued another, or even a forbidden, track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. When they took this passenger to the tow, and in so doing deviated from the usual route, and stopped the boat midriver for that reason, they were still engaged in the master's business of transporting freight and

passengers across the river. They were doing it in a mode and manner perhaps not authorized, and possibly in some sense to effect a purpose of their own, but none the less acting within the scope of their employment, and engaged in the master's business." Some of the above remarks are quite applicable to the case at bar. In making the detour, Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited, even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also.

Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time be-

care of a team on account of which it ran away causing injury. *Norris v. Kohler* (1890) 41 N. Y. 42.

The owners of a stage-coach are liable for injuries caused by the negligent driving of their driver. *Johnson v. Small* (1844) 5 B. Mon. 2; *Hart v. New Orleans & C. R. Co.* (1841) 1 Rob. (La.) 173, 36 Am. Dec. 689.

The master is liable for the reckless driving of his servant. *Metcalf v. Baker* (1871) 2 Jones & S. 10.

A sewing-machine company is liable for the negligent act of its agent engaged in traveling about with a horse and wagon for the sale of machines in driving upon and injuring a person on the highway. *Singer Mfg. Co. v. Bahn* (1890) 123 U. S. 518, 33 L. ed. 440, affirming *Bahn v. Singer Mfg. Co.* (1885) 26 Fed. Rep. 912.

A traveling salesman who hires a horse to visit customers will render his employers liable for his negligent management of it, although at the time of hiring it he does not disclose the fact that he was merely an agent. *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 65.

If the master permits his servant to use his horse and carriage in collecting rents for the master he will be liable for his negligent use of it. *Lovington v. Bauchens* (1889) 34 Ill. App. 544.

In *Michael v. Alestree* (1877) 2 Lev. 172, the master was held liable for injuries inflicted by the servant in taking horses into a much-used place to break them, on the ground that it would be intended that the master sent the servant there to train the horses.

Where defendant and his groom in riding along a highway on horse-back, passed the plaintiff who was on foot driving a three-horse team, and at the moment of passing the groom touched his horse with his spur, causing it to kick and injure plaintiff, the master was held liable. *North v. Smith* (1881) 10 C. B. N. S. 572, 4 L. T. N. S. 407.

If the servant is upon his master's business when he injures a third person by driving against him, the master is liable although the horses belong to the servant and the servant is at the same time attending to business of his own. *Patten v. Rea* (1857) 2 C. B. N. S. 606, 26 L. J. C. B. 226, 40 Eng. L. & Eq. 329, 8 Jur. N. S. 892.

The fact that defendant's driver is at the time of the accident demeaning himself improperly is not sufficient to defeat the action if the injury was caused by his carelessness. *Barlow v. Emmert* (1872) 10 Kan. 368.

If the servant in charge of the team commits the reins to another by whose careless driving the injury is done, the master is still liable. *Booth v. Mister* (1836) 7 Car. & P. 64.

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Negligent ejection from train.

A railroad company is liable for the act of its brakeman in compelling a boy to jump from a train which is moving at a dangerous rate of speed. *Kansas City, Ft. S. & G. R. Co. v. Kelly* (1887) 38 Kan. 655, 59 Am. Rep. 601.

A railroad company is liable for injuries resulting from the reckless manner in which servants remove a trespasser from a moving engine. *Carter v. Louisville, N. A. & C. R. Co.* (1884) 98 Ind. 522, 49 Am. Rep. 730.

A railroad company is liable for injuries resulting from its conductor compelling a boy to get off from a moving train. *Benton v. Chicago, R. I. & P. R. Co.* (1881) 56 Iowa, 496.

A railroad company is liable for the act of its conductor in pushing a drunken man off from a platform of a moving car. *Louisville, N. A. & C. R. Co. v. Dunkin* (1883) 92 Ind. 601.

A railroad company is liable for the act of its engineer in compelling a boy to get off from the engine while it is in motion although the boy was on the engine at his invitation which was without the scope of his authority to give. *Chicago, M. & St. P. R. Co. v. West* (1888) 125 Ill. 320, Affg. 24 Ill. App. 44.

A railroad company is liable for the negligent act of its watchman in removing a boy from a moving train. *Brill v. Eddy* (1893) 115 Mo. 590.

A trespasser cannot be ejected from a train without a reasonable regard for his safety. *Arnold v. Pennsylvania R. Co. (Pa.)* Feb. 7, 1887.

A railroad company is liable for the act of its driver in pushing a trespassing boy off from the car under the wheel of a passing truck, thereby injuring him. *Amato v. Sixth Ave. R. Co.* (1894) 59 N. Y. S. R. 674.

A street-car company is liable for the act of its driver in compelling a boy whom he has allowed to ride on the platform a short distance, to leave the car when it is going at a rate making it dangerous for him to do so. *Lovett v. Salem & S. D. R. Co.* (1895) 9 Allen, 557.

A railroad company is liable for the negligence of its conductor in putting a person off from the cars. *Meyer v. Pacific Railroad* (1867) 40 Mo. 156.

The disposition to shield the master and to hold him responsible only for acts properly done by the servant is very prominent in a New York decision in which it was held that a brakeman with authority to remove trespassers from a train is not acting within the scope of his authority, so, as to render the master liable in compelling a boy to leave the train while it is in motion so that the proceeding is dangerous. *Hughes v. New York & N. H. R. Co.* (1873) 4 Jones & S. 222.

ing, totally departed from the master's business, and set out upon a separate journey and business of his own. If the rule of law were that any deviation by the servant "to carry some business of his own into effect" was of itself such a departure, the above question would be one of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to

be decided by the trier. As such, we think the court below decided it. It is true that upon our interpretation of the finding the court below has not found formally and in terms that Blackwell, during the time of the detour, was in the execution of his master's business, and perhaps such interpretation does that court an injustice; but, however this may be, the court, in deciding as it did, necessarily found that Blackwell continued in the execution of the master's business all the time, and this is enough without so finding in terms. This court will not review such a finding upon the errors assigned. If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view, then, there is no error.

The remaining question relates to the al-

Permitting children to be in danger.

Where a child went into a shed where machinery was operated by horse power and sat upon the seat to drive the horse, and the servant whose duty it was to start the machinery knowing that he was there started the machinery and then left after which the child in attempting to get down was caught in the machinery and injured, the court held the master liable, saying: "We need not consider whether the act of the agent in granting permission to the deceased to ride on the horse-power was in the course of his employment or not; for whether the deceased was within the building and upon the machinery with or without the express or implied consent of defendants, its agent then present and engaged in and about its business, knew the situation of the deceased lad; and his negligent act in starting the horse and leaving the boy in a perilous position was in the course of his employment and is clearly imputable to the defendant. *Gunderson v. Northwestern Elev. R. Co.* 47 Minn. 161.

The master is responsible for the act of his servant in charge of a pump-house containing exposed machinery in negligently permitting a youth of immature judgment and discretion to be in the house about the machinery in consequence of which he is injured. *White v. San Antonio Water Works Co. (Tex.)* Jan. 16, 1896.

A steamboat company is liable for the act of those in charge of a boat in inviting a child on board where it is likely to be injured by dangerous machinery or places, if it is in fact so injured. *Cook v. Houston Direct Nav. Co. (1890)* 76 Tex. 363.

A street-car company is liable for the negligence of its driver in permitting little children to ride on the platform of a moving car. *Pittsburg, A. & M. Pass. R. Co. v. Caldwell (1873)* 74 Pa. 421.

A street railroad company is liable for the negligence of its driver in permitting a child to ride on the front platform of a car by reason of which it fell off and was injured although it was riding free by permission of the driver. *Brennan v. Fairhaven & W. R. Co. (1877)* 45 Conn. 284, 29 Am. Rep. 679.

But in other cases it has been held that—

To charge a railroad company with a duty towards a child who has been invited into a place of danger by one of its servants, it must be shown that the servant had the authority to give the invitation, so as to bind the company. *Mexican Nat. R. Co. v. Crum (1894)* 6 Tex. Civ. App. 702.

It is not within the scope of the authority of the engineer of a freight train to permit boys to ride on the train so as to make the company liable in case there was injury thereby. *Chicago, B. & Q. R. Co. v. Casey (1881)* 9 Ill. App. 632.

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A railroad company is not liable for the negligence of its servants engaged in moving cars, in inviting children to get upon them for the purpose of having a free ride. *Snyder v. Hannibal & St. J. R. Co. (1875)* 60 Mo. 413.

The company is not liable for the negligent act of its conductor in letting a boy come on board a train for the purpose of selling papers. *Duff v. Allegheny Valley R. Co. (1879)* 91 Pa. 453, 36 Am. Rep. 675.

Permitting slave to escape.

The owner of a stage-coach is liable for the negligence of its agent in permitting a slave to be taken away on the coach. *Lowe v. Stockton (1835)* 4 Cranch, C. C. 537.

The owner of a stage-coach is liable for the negligent act of his servant in permitting a slave to ride on the coach, whereby the slave is lost to its owner. *Harris v. Mabry (1840)* 23 N. C. 240.

The owner of a steamboat is liable for the act of the captain in neglecting to make search for a slave which he is informed is on board, so as to prevent its escape from its master. *Pennsylvania, D. & M. Steam Nav. Co. v. Hungerford (1884)* 6 Gill & J. 321.

If the captain of a vessel negligently permits slaves to be transported out of the state in it, the owner will be liable, but if he willfully and knowingly permits them to go out on his boat, the owner will not be liable. *Price v. Thornton (1846)* 10 Mo. 130.

Neglect to perform a duty resting on the master.

The master is not discharged from debts, which he gives his servant money to pay, if the servant keeps the money. *Wayland's Case*, 3 Salk. 234.

The master cannot escape liability for the negligence of his servant whom he has employed to remedy a defective vault, which results in the work being improperly done. *Martin v. Richards (1882)* 155 Mass. 381.

In a case where defendant's servants had contrary to his order left some timber, which he had directed them to move, in the street in front of his premises, so that it caused injury for which suit was brought, the court said: "The present case does not seem to call for the application of the rule under which a master is held responsible for the tortious acts of his servant done in violation of orders but rather for the consideration of the question whether or not a person who has ordered a certain thing to be done, the doing of which imposes on him the duty of seeing that something further is done, can escape responsibility for the non-performance of that duty by showing that he ordered his servant to perform it and his servant

lowance of the amendment. The complaint alleged that the damage was done by the defendant, while the proof was that it was done by his servant. After the plaintiff rested, the defendant moved for a nonsuit on the ground of this variance, and the court permitted the plaintiff to amend his complaint in this respect. According to the record, the only objection made by the defendant was a general one to the allowance of the amendment, and the error assigned upon this point seems to relate wholly to the allowance of the amendment. Under the statute (sec. 1023) the court clearly had the discretionary power to allow the amendment, and the power, for aught that we can see, was very properly exercised. *Santo v. Maynard*,

57 Conn. 157. The real grievance of the defendant, however, upon this part of the case, as stated upon his brief, seems to be that he was not allowed time to demur to the amended complaint. Now, if we admit for argument's sake that the amended complaint was demurrable, there are two sufficient answers to this claim of the defendant. The first is that it is not fairly included in the assignments of error, and the second is that it nowhere appears that the defendant asked or offered to demur, or that his right to do so was questioned or denied by the court below.

There is no error in the judgment appealed from.

The other Judges concur.

neglected to do so. The removal of the timber from the street was a duty resting upon defendant personally which was negligently performed. The case comes within the familiar rule, that if one does or authorizes the doing of an act which causes a public nuisance, he becomes answerable in damages to those who suffer special injuries thereby." *Driscoll v. Carlin* (1887) 50 N. J. L. 23.

c. Liability for fraudulent and tortious acts.

The servant is liable for the torts of the servant committed in the course of service. *Denver South Park & P. R. Co. v. Conway* (1884) 8 Colo. 1, 54 Am. Rep. 537.

A railroad company is liable for the wrongful act of its agent who through bribery or from motives of partiality or oppression gives unlawful preference to one shipper over another to the injury of the latter. *Galena & C. U. R. Co. v. Rae* (1857) 18 Ill. 488, 68 Am. Dec. 574.

A principal who is agent of forwarding merchants and entrusts his agent with the management of the business is responsible if his agent falsely represents to the merchants that certain advances have been made on shipments and draws to cover the amount and after the draft is honored misappropriates the proceeds. *Swire v. Francis* (1877) L. R. 3 App. Cas. 106, 47 L. J. P. C. 18.

A railroad company may be liable for the act of its watchman at a foot-bridge over its track who by frightening boys away from the bridge with a stick causes one of the boys to attempt to cross the tracks on a level, by reason of which he is injured. *Clarke v. Midland R. Co.* (1880) 43 L. T. N. S. 831.

If a master sends his servant to draw his lumber from a saw mill with directions to take the advice of the sawer as to its identity, he is liable to a third person in trespass if the servant either by mistake or misdirection of the sawer takes away lumber of such third person. *May v. Bliss* (1850) 22 Vt. 477.

Where the agent of an attorney, not knowing that the debt had been paid, entered up judgment and levied an execution to collect the debt, the court held that the creditor who had employed the attorney to collect the debt, and the attorney who had set his agent in motion, were liable for the trespass. *Bates v. Pilling* (1826) 6 Barn. & C. 38, 9 Dowl. & R. 44.

A railroad company is liable for the wrongful act of its baggage-man in refusing to return trunks which he refused to check without the payment of extra fare and which the owner has decided not to send under those conditions, although he has sent them on board the train, and delay will ensue if he attempts to recall them. *McCormick v. Pennsylvania Cent. R. Co.* (1872) 49 N. Y. 303.

The owner of a boat which is accustomed to ply for hire, who employs a boatman to have charge of it is liable for the act of the latter in carrying a passenger over a course which conflicts with the

ferry route of a third person if the fare is turned over to him although he did not authorize or know of the intention of the servant to carry the passenger. *Huzzey v. Field* (1835) 2 Crompt. M. & R. 432, 1 Gale, 166, 5 Tyrw. 855.

False bills of lading.

In accordance with the early doctrine that the master's liability must be limited as far as possible it was held that—

A master of a vessel signing a bill of lading for goods that had never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who makes advances upon the faith of the bill. *Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. 93, 15 Jur. 236.

The master of a vessel cannot charge the owners by signing bills of lading for greater amounts of goods than is put on board. *Hubbersty v. Ward* (1853) 8 Exch. 330, 22 L. J. Exch. 113.

The owner of a vessel is not liable for a greater amount than is actually received on board. *McLean v. Fleming* (1871) L. R. 2 H. L. Sc. 123, 25 L. T. N. S. 817.

The owner of a vessel is not liable upon a bill of lading signed by the ship's agent for a larger amount of goods than was shipped. *Jessel v. Bath* (1837) L. R. 2 Exch. 207, 36 L. J. Exch. 149, 15 Week. Rep. 1041.

Bills of lading are not conclusive upon the ship owner. *Berkley v. Watling* (1837) 7 Ad. & El. 38.

It is not within the scope of the authority of the master to sign a bill of lading for goods not received. *Sears v. Wingate* (1861) 8 Allen, 108; *Ryder v. Hall* (1863) 7 Allen, 455.

The owner is not liable on a fraudulent bill of lading. *Louisiana National Bank v. Lavielle* (1873) 52 Mo. 380.

The master's bill of lading is not binding on the owner. *Brown v. Powell Duffryn Steam Coal Co.* (1875) L. R. 10 C. P. 562.

In *The Freeman v. Buckingham* (1855) 50 U. S. 16 How. 182, 15 L. ed. 841, the court held that the vessel being under the control of a special owner, the master was not the agent of the general owner so as to bind him by fraudulent bills of lading. But that case recognizes the doctrine of the English cases that he would not be bound by the fraud of the master in case he was not in fact his agent. The point decided in the *Freeman Case* was also decided in *The Loon* (1870) 7 Blatchf. 244, and in the subsequent case of *Pollard v. Vinton* (1881) 105 U. S. 7, 26 L. ed. 998, the question was distinctly raised and the authority of English cases recognized and followed.

And the effect of those decisions has been felt in the decisions upon the question of liability upon modern bills of lading.

Of course as between the original parties the

MASSACHUSETTS SUPREME JUDICIAL COURT.

Patrick Henry BOWLER
v.
Daniel O'CONNELL et al.

(.....Mass.....)

The scope of employment of a servant leading a colt from a water tub to a yard near by does not extend to an invitation to ride, given by him to a boy who is injured in attempting to accept it.

(October 24, 1894.)

EXCEPTIONS by defendants to rulings of the Superior Court for Hampden County,

bill of lading is merely a receipt which may be explained by parol. *The Lady Franklin* (1899) 75 U. S. 8 Wall. 325, 19 L. ed. 455.

So there is no estoppel as between the parties. *Dean v. King* (1871) 22 Ohio St. 118; *Kirkman v. Bowman* (1844) 8 Rob. (La.) 246; *Fearn v. Richardson* (1857) 12 La. Ann. 752; *Fellows v. The R. W. Powell* (1861) 16 La. Ann. 315, 79 Am. Dec. 581.

And it has been held that a railroad company is not liable for the act of its station agent in issuing bills of lading for goods which have not been received although advances have been made on the faith of it. *Baltimore & O. R. Co. v. Wilkens* (1876) 44 Md. 11, 22 Am. Rep. 23. In that case the one issuing the bill was also the consignor.

A station agent of a railroad company does not act within his authority in issuing fraudulent bills of lading, so as to charge his principal with the loss to a third person caused by advancing money on such bills. *Erb v. Great Western R. Co.* (1877) 42 U. C. Q. B. 80; *Oliver v. Great Western R. Co.* (1877) 23 U. C. C. P. 143.

And the *Erb Case* was affirmed in 5 Can. Sup. Ct. 179. But in that case it appeared that the agent who issued the bill of lading was also interested as consignor.

And there had been a decision bearing somewhat in the opposite direction, in *McLean v. Buffalo & L. E. R. Co.* 23 U. C. Q. B. 448, 24 U. C. Q. B. 271.

A wharfinger is not liable for the act of his servant in giving a receipt for grain which has never been delivered at the wharf upon the faith of which the consignee advances money to the holder of the receipt. *Coleman v. Riches* (1855) 18 C. B. 104, 3 C. L. Rep. 795, 24 L. J. C. P. 125, 1 Jur. N. S. 595.

But those decisions have not proved entirely satisfactory and one court at least has seen fit to revise the reasoning by which it holds the bill of lading inconclusive.

The consignee cannot verify the signature of the carrier's agent but he is legally bound to know the signature of his regular correspondent and when he receives a bill of lading he honors the bill of exchange drawn against the shipment or makes the required advance not on any proof which the bill of lading affords him of its genuineness or of the authority of the person by whom it purports to have been signed, but upon the confidence which he reposes in the good faith of his correspondent, who must have perfect information as to its genuineness and the authority of the person by whom it is signed. *Hunt v. Mississippi Cent. R. Co.* (1877) 20 La. Ann. 446.

There may be enough elements in the case so that it is not really a question of master and servant. However, it has been decided that—

A railroad company cannot contradict a bill of 37 L. R. A.

made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from negligence of defendants' servant, for which they were responsible. *Sustained.*

The evidence of the plaintiff tended to show that defendants owned a barn in which numerous horses were kept. That plaintiff, a lad near six years of age, went to the barn with one of the defendant's sons; that another son, Frank by name, started to lead a colt from the barn to the yard in which defendants' house stands, and that about that time the plaintiff started to return to his home,

lading furnished by its agent after a third person has advanced money on the faith of it, although the property represented by it has not been received. *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.* (1878) 20 Kan. 519.

A railroad company whose agent issues bills of lading for property which has not been received will not be permitted to set up that fact against one who has made advances on the faith of them. *Armour v. Michikan Cent. R. Co.* (1875) 65 N. Y. 111, 23 Am. Rep. 603.

A railroad company cannot deny the validity of a receipt for goods given by its shipping clerk after a third person had advanced money on it, although the goods had never been received for shipment. *Brooke v. New York, L. E. & W. R. Co.* (1885) 108 Pa. 529, 56 Am. Rep. 235.

A railroad company whose agent has negligently executed two delivery orders for the same property will not be permitted to dispute the fact that there were two lots as against one who has made advances upon both. *Coventry v. Great Eastern R. Co.* (1883) L. R. 11 Q. B. Div. 776, 52 L. J. Q. B. 694.

A railroad company is bound by a fraudulent bill of lading on which advances have been made. *Sioux City & P. R. Co. v. First Nat. Bank of Fremont* (1880) 10 Neb. 556, 35 Am. Rep. 486.

A railroad company is estopped to deny the assertion contained in the bill of lading. *Brooke v. New York, L. E. & W. R. Co.* (1885) 108 Pa. 529, 56 Am. Rep. 235.

In *Stone v. Wabash, St. L. & P. R. Co.* (1881) 9 Ill. App. 43, where a bill of lading was issued to a person who did not own the property before it was received for shipment, and a third person advanced money on the faith of it, after which the true owner delivered the property for shipment and before it had reached the consignee brought replevin to recover possession of it, the court said the proceeds of the property can be applied to the payment of the draft and in this manner the wrong done to the one who cashed it can be repaired while the loss can properly be made to fall upon the railroad company whose agent seems to have been the only party through whose fault the fraud was permitted to be perpetrated.

In *Dickson v. Seelye* (1861) 12 Barb. 102, the master who signed the bill was himself the owner of the vessel.

The owner of a vessel who is in charge himself or by a super-cargo is not bound upon contracts clandestinely made with the master. *Walter v. Brewer* (1814) 11 Mass. 99.

Distrain for rent.

A landlord who authorizes a broker to distrain for rent due is liable for the act of the broker in

when Frank called out to him asking if he would like a ride on the colt, and upon his replying in the affirmative, Frank said, "Come along and I will give you a ride," and that he ran towards the colt and upon reaching it the colt kicked, striking him and inflicting the injuries complained of.

Further facts appear in the opinion.

Messrs. T. B. O'Donnell and George D. Robinson, for defendants:

If plaintiff went into the defendants' yard without any proper person looking out for him and while following the colt he was hurt, there was contributory negligence as to him sufficient to defeat in law his action.

The custodian of the plaintiff for the time being either let him go into danger, or voluntarily exposed him, or left him without any care at all.

Wright v. Malden & M. R. Co. 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Lovett v. Salem & S. D. R. Co.* 9 Allen, 557; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104

Mass. 52; *Gibbons v. Williams*, 135 Mass. 833; *O'Connor v. Boston & L. R. Corp.* 125 Mass. 352; *Messenger v. Dennis*, 137 Mass. 197, 50 Am. Rep. 295; *Grant v. Fitchburg*, 160 Mass. 16; *McGeary v. Eastern R. Co.* 135 Mass. 363; *Collins v. South Boston R. Co.* 143 Mass. 301, 58 Am. Rep. 675; *Marsland v. Murray*, 148 Mass. 91; *Slattery v. O'Connell*, 10 L. R. A. 653, 153 Mass. 94; *Brown v. Sherer*, 155 Mass. 83; *Creed v. Kendall*, 156 Mass. 291.

The question arises wholly under the law of master and servant.

Yates v. Squires, 19 Iowa, 26, 87 Am. Dec. 418.

The court erred in instructing the jury that it was competent for the jury to find the action of said Frank to be negligent, and such negligence to be within the scope of his employment.

Hove v. Newmarch, 12 Allen, 49; *Heenrich v. Pullman Palace Car Co.* 20 Fed. Rep. 100.

The mere fact that a tortious act is com-

making an excessive or unlawful levy. *Gauntlett v. King* (1857) 3 C. B. N. 8. 59.

A landlord is liable for irregularities of a broker in proceedings to sell goods which he has rightly distrained on the leased property. *Haseler v. Le-moyne* (1856) 23 L. J. C. P. 108.

But a landlord is not liable for the acts of bailiffs in distraining goods for rent upon property of a person other than the tenant unless he expressly authorizes it or adopts the benefit. *Lewis v. Read* (1845) 13 Mees. & W. 384, 14 L. J. Exch. 205.

d. Limitation of scope of employment.

There was a strong tendency among the early cases to limit the liability of the master to cases in which the act was expressly commanded by him. This was accomplished by holding that in the language of the Delaware court: "A master is liable only for such acts of his servant as are done within the scope of his authority." *Higgins v. Chesapeake & D. Canal Co.* (1842) 3 Harr. (Del.) 411.

And then to confine the scope of authority within the narrowest limits. In the language of one of the earliest cases: "If I command my servant to do what is lawful and he misbehaves himself, or do more, I shall not answer for my servant but my servant for himself, for that it was his own act, otherwise it were in the power of every servant to subject his master to what action or penalties he pleased." *Kingston v. Booth* (1688) Skin. 223.

That reasoning receives little recognition at the present day. The master is and should be regarded as the responsible person when he is seeking to avoid the necessity of doing a particular thing himself, by taking advantage of another's services. It is entirely for the master's benefit that the servant is employed and third persons have the right to hold him responsible. Of course, he is not liable for acts done outside of the particular service for which he substituted the agent in his place.

And if the consequence of misconduct will be serious the master has the alternative of doing the work himself or of employing a responsible servant who can answer over to him for his misconduct. Most of the cases arise out of the employment of persons wholly unfit for the duties that are placed upon them.

In *Middleton v. Fowler* (1899) 18 Lk. 232, in which the owner of a stage-coach was held not liable for the loss of a trunk by the carelessness of the servant L. R. A.

ant because the master did not undertake to carry trunks, *Lord Holt* said, no master is chargeable with the acts of his servant, but when he acts in execution of authority given by his master, and then the act of the servant is the act of the master.

As shown in the authorities cited *supra*, this doctrine was short lived, but it had its effect in giving a bent to a line of decisions upon the subject, which it has been difficult to overcome, and the long line of cases has been the fruitful source of an unsettled discussion as to what is within the scope of authority rather than what was the master's duty to society in view of the character of the work which he wished to do by a servant.

General agents.

Proprietors of gas works are liable for the acts of their superintendent in casting refuse into a river in such a way as to constitute a nuisance, although they do not know that he is doing so and the plan pursued by him is a departure from the original plan adopted by them. *Rex v. Medley* (1834) 6 Car. & P. 232.

Where under the advice of the manager of a bank, money was placed in his hands for investment as the representative of the bank, and he absconded with it, the court held the bank liable on the ground that the manager of the bank is a person appointed to conduct the entire business, and if business is transacted with him as the representative of the bank, the bank is held liable. *Thompson v. Bell* (1854) 10 Exch. 10, 2 C. L. Rep. 1212, 23 L. J. Exch. 321.

But a general agent having charge of a mill with authority to keep it in repair, lease it and collect rent, will not render the owner liable for making excavations in the bed of the stream whereby water is wrongfully diverted from the wheel of another mill. *Stickney v. Munroe* (1837) 44 Me. 195.

So the managers of a sewage farm are not liable for the acts of their manager which constituted a trespass on adjoining property done while he was deepening a brook for the purpose of getting better drainage upon the farm. *Bollingbroke v. Swindon New Town Local Board of Health* (1874) 43 L. J. C. P. 237, L. R. 9 C. P. 575, 30 L. T. N. S. 722, 23 Week. Rep. 47.

More excess of authority.

In *Lucas v. Mason* (1875) L. R. 10 Exch. 251, 44 L. J. Exch. 145, 33 L. T. N. S. 13, 23 Week. Rep. 324, the court in deciding that the chairman of a public meeting was not liable for the acts of officers in

mitted by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable.

Snyder v. Hannibal & St. J. R. Co. 60 Mo. 418; *Cooley*, Torts, 2d ed. pp. 626 *et seq.*; *Buswell*, Personal Injury, pp. 44 *et seq.* and *notes*; *Roberts & Wallace*, Liability of Employers, 84, 85; *Shearm. & Redf. Neg.* §§ 62-64, and *notes*; *Whart. Neg.* § 164; *Pollock*, Torts, p. 74; *Bishop*, Non-Cont. L. § 619; *Addison*, Torts, p. 106; 2 *Thomp. Neg.* p. 885; *Bigelow's Lead. Cas. Torts*, p. 85, and *notes*; 2 *Kent, Com.* p. 280; *Wood, Mast. & S.* §§ 281 *et seq.*, and *notes*.

Frank's invitation was not in the line of his employment; it did not pertain to his duties, but was wholly outside of them.

Walton v. New York Cent. Sleeping Car Co. 189 Mass. 556; *Smith v. Spits*, 156 Mass. 819; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Yates v. Squires*, 19 Iowa, 26, 87 Am. Dec. 418; *Meehan v. Morewood*, 53 Hun, 566; *Farber v.*

Missouri Pac. R. Co. 82 Mo. App. 378; *Davis v. Houghtelin*, 14 L. R. A. 737, 88 Neb. 582.

If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively the master is not responsible.

Golden v. Newbrand, 52 Iowa, 59, 85 Am. Rep. 257; *Keith v. Lynch*, 19 Ill. App. 574; *Clerk & Lindsell*, Torts, p. 54.

When the servant does something he is not employed to do at all the master is not responsible.

Chicago City R. Co. v. Mogk, 44 Ill. App. 17; *AraSmith v. Temple*, 11 Ill. App. 89; *Innes*, Torts, pp. 58-62, citing *Lamb v. Palk*, 9 Car. & P. 629; *Stephenson v. Southern Pacific Co.* 15 L. R. A. 475, 98 Cal. 558; *Sleath v. Wilson*, 9 Car. & P. 607; *Woodman v. Joiner*, 10 Jur. N. S. 852; *Campbell v. Providence*, 9 R. I. 262; *Wilson v. Peverly*, 2 N. H. 548.

As to invitation to children to ride or expose themselves to danger, when master not

assaulting a person whom they thought to be disturbing the peace, *sa*^d that where the relation of master and servant exists, the former is liable for the tortious acts of the latter, wherever they are such as come within the scope of the servant's general duty, although in doing the particular act complained of, he may exceed his authority, providing that what he does is in the honest belief that he is executing his master's orders.

Effect of holding agent out as having authority.

Where a certificate of deposit was given to an express agent to be forwarded for renewal, and he collected the amount and failed to return it, the express company was held liable on the ground that the agent was employed in this character of business and so "was held out as a person authorized and fully to be trusted therein." *Dougherty v. Wells* (1872) 7 Nev. 382.

Illustrations of scope of employment.

In *Foster v. Essex Bank* (1881) 17 Mass. 479, 9 Am. Dec. 163, the court in deciding that a bank is not liable for the loss of a special deposit by the fraud or theft of its cashier, says: "No one will suppose if my servant commits a fraud relative to a subject that does not concern his duty toward me, that I should be civilly answerable for such fraud. If I send him to market and he steps into a shop and steals or upon false pretences cheats the shopkeeper of his goods, I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire." "There can be liability only when the servant is, when committing the fraud, acting in the business of his master. If the servant steps out of his employment to do a wrong towards another, the master is no more answerable than any stranger. The cases of innkeepers, common carriers, and perhaps ship masters when goods are embezzled, are exceptions to the general rule founded on public policy."

Where a lighterman sent with plaintiff's boat to a certain wharf to be unloaded, moved a boat which he found moored there and fastened it where it was injured by the changing tide, the owner of the boat was held liable because the servant was acting within the course of his employment. *Page v. Defries*, 7 Best & S. 137.

The act of a fireman in throwing a burning stick of wood from the engine into dry grass at the side of the track causing fire and injury, is within the scope of his employment where it appears that firemen frequently throw out wood which is found 37 L. R. A.

to be too large for the fire box of the engine. *Spaulding v. Chicago & N. W. R. Co.* (1878) 38 Wis. 582.

Where a railroad company carried some plants and the station master at the point of destination permitted them to be set in the ground for a short time until the consignee should be ready for them, and when he called for them, he refused to permit them to be taken, the court held that he was acting within the scope of his authority and that the railroad company was liable for the conversion. *Giles v. Taff Vale R. Co.* (1868) 2 El. & Bl. 822.

A bank is responsible for the act of its cashier in paying money to one who believes it to be in payment of a debt, whereas the cashier makes it a loan by requiring signature to a check which the receiver takes to be a receipt for the money. *Foster v. Green* (1863) 31 L. J. Exch. 168.

A clerk in the cloak-room of a railroad station who takes parcels to the trains for passengers when there is no other porter there, is acting within the scope of his employment, in returning from the train, so as to render the company liable for his negligence in running against a third person causing injury. *Milner v. Great Northern R. Co.* (1884) 50 L. T. N. S. 367.

One paying money to a clerk for the master may hold the master responsible in case the proper credit is not given. *Cary v. Webster* (1722) 1 Strange, 480.

An action lies against a goldsmith in case his apprentice takes the stones out of a piece of jewelry shown him to ascertain the value of it and refuses to return them. *Armory v. Delamirie* (1722) 1 Strange, 506.

An action will lie against the master in case of the refusal of his servant to return gold given him in the course of his business to assay. *Mead v. Hammond* (1722) 1 Strange, 506.

The master is liable if a section foreman in returning home from work with his crew, to avoid an obstruction on the road, transfers his car to the track of another company and inflicts injury on an employé of the latter while running the car on its track. *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 103 Ind. 390, 33 Am. Rep. 675.

A master who instructs his servant to go to a certain place and kill a beef is liable, if the servant goes to the place and in good faith kills an animal belonging to a third person. *Maier v. Randolph* (1886) 33 Kan. 240.

Where a servant was instructed to drive some cattle back to cars from which they had escaped

liable, see *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Gulf, C. & S. F. R. Co. v. Duckins*, 77 Tex. 228; *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

Defendants were under no obligation to take care of him, though they could not maliciously or recklessly hurt him. If he put himself into danger without their knowledge or fault, he must bear his injury alone.

Daniels v. New York & N. E. R. Co. 13 L. R. A. 248, 154 Mass. 349; *Sullivan v. Boston & A. R. Co.* 156 Mass. 378; *McGuinness v. Butler*, 159 Mass. 233; *Gay v. Essex Electric Street R. Co.* 21 L. R. A. 448, 159 Mass. 238; *Mergenthaler v. Kirby* (Md.) March 14, 1894.

Mr. William H. Brooks for plaintiff.

Allen, J., delivered the opinion of the court:

In determining the legal question which

and he without leave took the horse of a third person to assist him in the work and the horse was injured, the master was held liable for the injury. *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421.

A servant engaged to deliver flour and feed, who to facilitate his delivery, so that he could get through sooner, to do some work for himself, leaves some bags by the side of the road while he delivers others, is acting within the scope of his employment, so as to render his master liable for injuries caused by the frightening of horses caused by the bags. *Phelon v. Stiles* (1878) 43 Conn. 426.

A servant employed to peddle goods for his master who injures a third person while driving to the store to get goods is within the scope of his employment, so as to render the master liable for the injury. *Shea v. Reems* (1884) 36 La. Ann. 966.

A servant employed to do general farm work is acting within the scope of his employment in driving cows out of the corn so that the master will be liable in case he hits one of them with a stone and kills it. *Evans v. Davidson* (1879) 53 Md. 245, 38 Am. Rep. 400.

A saloon keeper is liable for the act of his bartender in ejecting an intoxicated person from the saloon in a reckless and negligent manner. *Brazil v. Peterson* (1890) 44 Minn. 212.

The owner of a public carriage in charge of a servant whose duty is to carry passengers for hire is liable for a negligent injury by the servant to one whom he has invited to ride free. *Siegrist v. Arnot* (1881) 10 Mo. App. 201.

A street-railway company is liable for injuries caused by its driver's negligence to a child, which he has invited to ride without payment of anything for the privilege. *Wilton v. Middlesex R. Co.* (1871) 107 Mass. 108, 9 Am. Rep. 11.

Where the agent of a corporation in executing an order of the corporation to remove a boy from its premises, did it with such violence and in such a careless and wanton manner as to inflict an unjustifiable personal injury upon the boy ordered to be taken and removed, the company may be held liable. *Hewett v. Swift* (1882) 3 Allen, 420.

A servant sent to get certain cattle from a pasture is acting within the scope of his employment in searching for them in the vicinity, if he does not find them in the pasture so that he will render the master liable in case he takes cattle of a third person by mistake from an adjoining lot. *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680.

A master is liable for hay taken to feed a team

is presented, we must assume that the jury adopted the plaintiff's view as to the circumstances attending the accident, and the testimony in contradiction thereof may be disregarded. With reference to this aspect of the case, the defendants asked an instruction to the jury that they were not responsible for the acts of Frank O'Connell, in his invitation to the plaintiff to take a ride upon the colt. The jury, however, were instructed that if Frank O'Connell was the servant of the defendants in leading the colt from the stable to the defendants' yard, and while so leading the colt the plaintiff was invited by Frank to ride, and was injured as he was going forward to accept the invitation, it would be competent for the jury to find that such invitation was within the scope of the employment of Frank; and, again, that if while Frank was leading the colt along or across the sidewalk, or in the yard of the defendants, as the servant of the defendants, and while so leading the colt, in

which he has intrusted to his servant without making any provisions for its sustenance. *Potulni v. Saunders* (1897) 37 Minn. 517.

Where the general manager of defendant, a horse dealer, had a horse and gig of his own which he sometimes used about the master's business, and negligently injured a third person while driving his horse to collect a debt due the master, and afterwards to see his own doctor, it was held that at the time of the accident he was engaged in the master's business so as to render him liable for the injury. *Patten v. Rea* (1867) 40 Eng. L. & Eq. 329, 3 C. B. N. S. 606, 28 L. J. C. P. 235, 3 Jur. N. S. 862.

Where a servant of a railroad company whose duty was to remedy anything which he saw amiss at any time about the track, after the regular working hours, for a purpose of his own took down some bars leading on to the track which he left down and plaintiff's horses went through them and were killed, the company was held liable on the ground that his duty required him to replace the bars no matter how they got down and his failure to do so was negligence for which the company was responsible. *Chapman v. New York Cent. R. Co.* (1865) 33 N. Y. 369, 38 Am. Dec. 392 (1860) 31 Barb. 309.

A line-man of a telegraph company having authority to remove trees which he regards as dangerous to the line will render the company liable for a trespass in cutting trees on the property of third persons which he regards as dangerous. *Western U. Teleg. Co. v. Satterfield* (1899) 34 Ill. App. 386.

A servant authorized to test a boiler to a pressure of 150 pounds has not so far departed from his authority when he tests it to 200 pounds, that his master will not be liable for the injuries caused by an explosion before the 200-pound mark is passed. *Ochsenbein v. Shapley* (1881) 35 N. Y. 214.

The owner of a ferry-boat is liable for the result of a collision caused by the effort of those in charge of the boat to put a boatman on a boat in the middle of the river although the employees had no general power further than to carry passengers and freight across the river from shore to shore. *Quinn v. Power* (1832) 87 N. Y. 535, 41 Am. Rep. 392, reversing (1879) 17 Hun, 102.

It is within the scope of the service of a farm hand employed by the month, who is directed to summer-fallow a piece of ground, to cut and remove the brush therefrom, and the master will be liable for injuries caused by fire set by him to the brush. *Simons v. Monier* (1859) 29 Barb. 419.

A servant who is sent to get bags of paper shav-

the line of his duty, he, with his own accord, and without the knowledge or authority of, or direction from, the defendants, invited the plaintiff to ride upon the horse, and while the plaintiff was attempting to go forward to accept the invitation of Frank he was injured, it was competent for the jury to find the action of Frank to be negligent, and such negligence to be within the scope of his employment.

The correctness of these instructions is to be determined with reference to the testimony in the case. The colt, it would seem, was about two years and nine months old. It was not harnessed into a wagon, but the boy Frank, who must be assumed to have been in the defendants' employment, was leading it from the watering tub to its stall, or to some other place. The defendants were contractors and excavators, and owned many teams. There was nothing to show that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to

ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this: Was the invitation given in the course of doing their work, and for the purpose of accomplishing it? Was this act done for the purpose or as a means of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendant's business. *Snyder v. Hannibal & St. & J. R. Co.* 60 Mo. 413, 419; *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 798; *Davis v. Houghtelin*, 33 Neb. 582, 14 L. R. A. 737. An act done by a servant while engaged in his master's work, but not

ings from a building, who undertakes to guard the entrance to the building while the bags are thrown through a hatch from an upper story, is acting within the scope of his employment, so that his neglect to warn one about to enter the building will render his master liable if injury is caused by such neglect. *Post v. Stockwell* (1887) 44 Hun, 28.

A master is liable for the act of his servant in placing dynamite given him to blast with, in a blacksmith shop, to preserve it from the rain. *Birmingham Water Works Co. v. Hubbard* (1888) 85 Ala. 179.

A fireman left to "watch" a standing engine is acting within the scope of his employment in letting off steam so as to charge the master with liability in case injury is done by his doing it so negligently as to frighten horses standing near. *Andrews v. Mason City & Ft. D. R. Co.* (1890) 77 Iowa, 669.

A master may be liable for the act of his servant sent to haul certain supplies in taking a part of a wagon, the property of a third person, to enable him to reach his destination, upon the breaking of the wagon which he is using. *Walker v. Johnson* (1881) 23 Minn. 147.

In removing to a place of safety a person who has been injured by collision with a train, the employees of a railroad company are acting within the scope of their employment, and if they negligently place him without assistance in a shed and look him in erroneously believing him to be dead, in consequence of which he dies, the company will be liable. *Northern Cent. R. Co. v. State* (1893) 29 Md. 420, 36 Am. Dec. 545.

The principal is answerable for the acts of the agent with general authority to collect accounts in foreclosing a mortgage and taking possession of property in violation of the rights of a third person. *Byrne v. Hatcher* (1895) 75 Ga. 220.

Where the conductor of a freight train left it standing in such a way as to obstruct access to a station and upon a person's approaching it to go to the station directed him to pass under the train in attempting to do which the person was injured by the starting of the train, the court held the company liable, saying that while it was true that he was acting outside of the scope of his authority in directing one to pass under the train yet he had wrongfully obstructed the passway to the depot. It was his duty to have opened his train and failing to do so, he undertook to perform his duty in another mode by directing deceased to pass under the end of the car. But even if not so endeavor-

ing, he was engaged in the performance of his duty to the company and was in this matter not so acting as though engaged in his own private affairs. Although injury resulted from an act he was not required by the company to perform it was connected with the business of the company and in the performance of which he was engaged. *Chicago, B. & Q. R. Co. v. Sykes* (1890) 96 Ill. 175.

Acts held not to be within scope of employment.

A tenant is not liable for the burning of the leased house by reason of his servant's using some furze and straw to burn out the soot from the chimney, if it was no part of the servant's duty to clean the chimney, which services were usually done by a carpenter and mason. *McKenzie v. Mo-Leod* (1834) 10 Bing. 385, 4 Moore & S. 249.

A master is not liable for injuries caused by a servant whom he has sent on an errand without providing him with a horse, by riding against a third person with a horse which he has procured on his own responsibility to carry him on his journey. *Goodman v. Kennell* (1827) 3 Car. & P. 167, 1 Moore & P. 241.

A solicitor will not be liable for the act of his clerk in leaving the water running in a lavatory in the solicitor's private apartments, where the clerk has no right to be, but where he has gone for purposes of his own. *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, 50 L. J. Q. B. 231, 44 L. T. N. S. 153, 29 Week. Rep. 506, 45 J. P. 603.

The scope of employment of a servant leading a colt from a water tub to a yard near by does not extend to an invitation to ride given by him to a boy who is injured in attempting to accept it. *BOWLER v. O'CONNELL*, ante, 163.

In an action of trespass for making roads across plaintiff's land, in making charcoal on defendant's land, and transporting it to his furnace, the court says to render the master liable for a trespass committed by the servant, it is necessary to show that the acts were done while the servant was acting under the authority of the master, and since it was not shown that the master knew of or assented to the making of the roads, he was not liable. *Church v. Mansfield* (1850) 20 Conn. 234.

A street-car company is not liable for the act of its driver in striking with his whip at a boy which results in the boy's becoming entangled in the whip and thrown under the car. *Ryan v. Hudson River R. Co.* (1871) 1 Jones & S. 159.

A street-car driver is not within the line of his employment in striking with the lines at a boy near

done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt. *Hove v. Neumarch*, 12 Allen, 49; *Hawks v. Charlemont*, 107 Mass. 414; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 883; *Levi v. Brooks*, 121 Mass. 501; *George v. Gobeys*, 128 Mass. 290, 35 Am. Rep. 376; *Wallace v. Merrimack River Nav. & Exp. Co.* 134 Mass. 95, 45 Am. Rep. 801; *Walkon v. New York Cent. Sleeping Car Co.* 139 Mass. 556; *Young v. South Boston Ice Co.* 150 Mass. 527; *Mitchell v. Oranveller*, 18 C. B. 237; *Croft v. Alison*, 4 Barn. & Ald. 590; *Limpus v. London General Omnibus Co.* 1 Hurlst. &

C. 526; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 265; *Storey v. Ashton*, L. R. 4 Q. B. 476; *British Mut. Bkg. Co. v. Charwood Forest R. Co.* L. R. 18 Q. B. Div. 714.

There may be cases where injuries result from accepting unauthorized invitations to ride which do not fall within the above rule, and are to be distinguished. Such cases may be found in the books, and need not be considered here, the circumstances being different. Under the circumstances disclosed in the present case, it was not competent for the jury to find that the invitation given to the plaintiff to ride was within the scope of Frank's employment, and for this reason there must be a new trial.

Exceptions sustained.

the car, so as to render the company liable for injuries inflicted by such act. *Chicago City R. Co. v. Mogk* (1882) 44 Ill. App. 17.

Where the delivery clerk on a wharf whose business was to take receipts for goods that were taken away for the purpose of getting a view of another part of the wharf, from where he was standing because some goods had been stolen on the previous day and he wished to watch the action of certain persons who were there, pushed over a bale of cotton which had been left standing, thereby inflicting injury on a third person, it was held that he was not acting within the scope of his authority so as to render the master liable. *Courtney v. Baker* (1874) 5 Jones & S. 255.

But that case was reversed on appeal on the ground that it is difficult to say that a delivery clerk, whose function was to see that the proper goods were delivered to the proper parties, was traveling outside of the scope of his duty in observing whether or not the goods were being stolen when he suspected that they were. But that at all events since the clerk was testifying in the interests of his employer, the jury were not bound to believe his testimony as to the motive that led him to throw down the bale of cotton. *Courtney v. Baker* (1875) 60 N. Y. 1.

A fireman has no authority to request a boy to assist him in filling the tank of the engine with water so that he will render the company liable for injury to the boy while attempting to comply with the request. *Flower v. Pennsylvania R. Co.* (1871) 60 Pa. 210, 8 Am. Rep. 351.

A railroad company is not liable for the acts of its conductor in forcing a boy by means of threats to go between and uncouple cars for the purpose of aiding the conductor in his work, since the conductor's act is a willful, malicious trespass outside and beyond the scope of his authority and his line of duty. *New Orleans, J. & G. N. R. Co. v. Harrison* (1873) 48 Miss. 112, 12 Am. Rep. 356.

A railroad company is not liable for the act of its engineer in running his engine which belonged to a construction train out on the main track at night for the purpose of carrying a coffin for the accommodation of a third person when in running the engine at that time he is acting against express orders of the company. *New York, T. & M. R. Co. v. Sutherland* (1886) 3 Willson Civ. Cas. (Tex.) § 140, p. 177.

In an action for damages for shooting through a tin ventilator the court said the defendant was not responsible for the act unless what he said and did justified an understanding by the agent that he wished it done or induced the act. *Rich v. Jakway* (1854) 18 Barb. 357.

One who employs a detective to find property of his judgment debtor on which execution can be

levied is not liable for the act of the detective in causing the arrest of the debtor on the charge of illegally selling lottery tickets if the creditor did not know of or authorize the arrest. *Riboux v. Mayer Bros.* (1877) 29 La. Ann. 823.

The superintendent of a mill has no implied authority to institute suits to recover property wrongfully taken from the mill, and the owners will not be liable for his act in instituting such suit which results in the arrest of a person into whose hands the property is traced. *Pinkerton v. Gilbert* (1887) 22 Ill. App. 563.

Where laborers engaged in erecting a telephone line were instructed to cut poles only on the right of way which was clearly defined, but they negligently or willfully cut them from the adjoining land, the master was held not liable, the court saying: "These laborers were the mere sentient tools of the company authorized by the character of their employment to exercise no discretion or judgment, but were simply charged with the performance of the physical labor necessary to the execution of the instructions of their superior." *Fairchild v. New Orleans & N. E. R. Co.* (1883) 60 Miss. 381, 45 Am. Rep. 437.

Where in order to drive some of the crew of a boat away from where part of the cargo consisting of whiskey was stowed, the mate threw a pine knot and hit one of the men injuring him, the owner of the boat was held not liable, because it was no part of the mate's duty to guard the whiskey or to throw pine knots from the boiler deck to the main deck. *Dyer v. Hieley* (1876) 23 La. Ann. 6.

Where the servant was sent to drive cattle out of a field and after getting them out he proceeded to drive them along a lane, the court held that when they were over the borders of the field, the scope of the employment ceased, and that the master was not liable for injuries inflicted afterwards. *Oxford v. Peter* (1862) 23 Ill. 434.

Where a servant was sent to remove a vessel from a wharf into the stream and after placing and mooring it there, he took the vessel's boat to return to the shore and abandoned it so that it floated away and was lost to the owner, the court held that when he had finished mooring the vessel his employment ceased and the acts done afterwards did not render his master liable. *Brown v. Purviance* (1828) 2 Harr. & G. 316.

One who hires a shed for the purpose of having a sign board made in it is not liable to the owner in case the shed is burned by the carpenter employed to make the sign-board, who in attempting to light his pipe drops fire among the shavings, since lighting the pipe is no part of the duty for which the carpenter is hired. *Williams v. Jones* (1865) 3 Hurlst. & C. 602, 11 Jur. N. S. 542, 12 L. T. N. S. 309, 13

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TEXAS & PACIFIC R. CO., *Plf. in Err.*,

P. A. SCOVILLE.

(83 Fed. Rep. 730.)

The engineer and fireman in charge of a railroad locomotive are acting within the scope of their employment in blowing the whistle wantonly and maliciously to frighten a horse which a person is driving near the track, so as to render the company liable for injuries to the driver.

(May 23, 1894.)

ERROR to the Circuit Court of the United States for the Eastern District of Texas, to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Mr. T. J. Freeman for plaintiff in error.

Messrs. C. C. Leverett and R. C. De Graffenried for defendant in error.

McCormick, Circuit Judge, delivered the following opinion:

P. A. Scoville, the defendant in error,

Week. Rep. 1033, affg. S. C. sub nom. Woodman v. Joiner, 10 Jur. N. S. 862, 11 L. T. N. S. 109, 33 L. J. Exch. 297, 3 Hurlst. & C. 264.

In some of the latter cases the scope of the servant's employment seems to be unduly limited. The hirer of a shed certainly has some duty to care for it, and if he places a servant in charge of it that duty rests upon the servant for a neglect of which the hirer will be liable. So it seems strange that a servant sent to do an act in the middle of a river should be compelled to abandon his service in midstream with no means of returning to land.

Servant in charge of horse.

It would seem that the same rule should apply to this subject as to any other case of entrusting a servant with a dangerous agency. And such seems to have been the opinion of some of the judges.

If a servant having in charge his master's horse and proceeding on his master's business, goes out of his way for a purpose of his own even against the master's implied command, the master will be liable. *Joel v. Morison* (1834) 6 Car. & P. 501.

One who entrusts a horse and wagon to another generally to get such business as he can, is liable for the negligence of the servant at a time when after delivering a trunk he attempts to bring home a load of poles for himself on the return journey. *Mulvihill v. Bates* (1884) 31 Minn. 364, 47 Am. Rep. 733.

Where the statutes make the proprietor and driver of a cab sustain to each other the relation of master and servant, the master is liable for injuries caused by the reckless driving of the driver in returning to the stables, although after he has set down his last passenger, he goes a quarter of a mile out of his way, to get some snuff at a tobacconist, since the cab is entrusted to the driver to use entirely at his discretion, provided he uses it properly and returns it to the stables when the day's work is over. *Venables v. Smith* (1877) L. R. 2 Q. B. Div. 273, 45 L. J. Q. B. 470, 36 L. T. N. S. 509, 25 Week. Rep. 584.

Whoever drives a horse in a thoroughfare owes the duty of due care to the community or to all persons whom his negligence may expose to injury, nor is it open to question that the master in such case is responsible for the misconduct of his servant. *McDonald v. Snelling* (1867) 14 Allen, 290, 42 Am. Dec. 768.

Whenever the master has entrusted the servant with the control of his carriage it is no answer to an action for injuries caused by the servant's carelessness, that the servant acted improperly in the management of it, or that he went out of the prescribed course for purposes of his own. The master in such case will be liable on the ground that he put it into the servant's power to mismanage the carriage by entrusting him with it. *Sleath v. Wil-* 37 L. R. A.

son (1890) 9 Car. & P. 607, sub nom. Heath v. Wilson, 2 Mood. & R. 181; *Rayner v. Mitchell* (1877) L. R. 3 C. P. Div. 367, 25 Week. Rep. 633.

But in a subsequent case where one who had been sent to deliver goods on the return persuaded the driver to drive to his house, and while on the way damage was done, the chief justice says: "I cannot adopt the proposition in *Sleath v. Wilson*, that wherever the master has entrusted the servant with the control of the carriage it is no answer that the servant had acted improperly in the management of it. I think that a servant can only be said to be acting in the employment of his master so long as he is doing some act with his master's assent. I think that if the driver while acting in his master's business were to make a slight deviation in order to carry some business of his own into effect in such a case the master might be liable, and that the question would be as regards the extent of the deviation. But this is not the present case; here the man starts upon an entirely independent journey which has nothing to do with that which he undertook on behalf of his master." *Storey v. Ashton* (1890) 33 L. J. Q. B. 223, L. R. 4 Q. B. 476, 17 Week. Rep. 727. In that case the accident took place two miles out of the way which the master's journey required the servant to take.

No rule can be satisfactory in which the master's liability is made to depend on the extent of the deviation. There is no solid foundation upon which it can be placed. With regard to a thing so capable of doing injury if improperly managed as a horse and wagon the master's liability should depend upon the power entrusted to the servant. If he is entrusted with the care of the horse generally the master should be responsible for his misuse of the trust no matter under what circumstances it arises. If the servant is entrusted with the horse for a particular journey or during a certain portion of the day the master should be responsible for the use made of it until it is returned to the master unless in the exceptional cases where the servant has abandoned the intention of returning it. Any other principle of decision can but lead to conflicting cases, as will appear from the cases collected, *infra*.

Horse taken without master's knowledge or assent.

Of course if the master's horse is taken by the servant for purposes of his own, the master is not liable for injuries caused by it on the journey. *Maddox v. Brown* (1890) 71 Me. 432, 36 Am. Rep. 336.

So a farmer is not liable for the negligence of a servant who has taken one of his horses to go to a railroad station to meet a friend in leaving the horse unsecurely hitched by reason of which it ran away causing injury. *Way v. Powers* (1884) 37 Vt. 135.

brought this action against the Texas & Pacific Railway Company, the plaintiff in error, to recover damages for injuries he claimed to have received from the willful and wanton misconduct of its servants while engaged in its business. The part of his pleading pertinent to the questions raised on this writ of error is as follows:

"Plaintiff, for cause of action, alleges that on the 2d day of May, 1891, he was riding on horseback (returning home from Longview, Texas) along a public road running parallel with said railway of defendant company (said road on which plaintiff was so riding on horseback being about twenty-five yards south of said railway), and that defendant company, its agents and employes, knew or could have known of the existence of said public road, and its proximity to said defendant company's railway, the same having been used by the traveling public for the period of fifteen years for travel, and in full view of said railway company's agents and

employes; that immediately south of the road on which plaintiff was riding was a fence; that while plaintiff was passing along said road, as above set forth and described, the place on said road on which he was riding as above indicated being about one fourth of a mile from said town of Longview Junction, a point on said railway, a train of cars in charge of, and under the control of, the agents and employes of defendant company, while coming east from said Longview Junction, while nearing the plaintiff, and when directly opposite the plaintiff, the agents and employes of the defendant company, with the intention to frighten plaintiff's horse, commenced, and continued until some distance beyond plaintiff, to blow the whistle of the engine of said train of cars in a manner more calculated to frighten and render unmanageable horses and other domesticated animals; that the manner of blowing said whistle at the time and the place above mentioned was not called for nor demanded by

A farmer is not liable for the negligence of his servant in the care of a horse which he has borrowed to take himself and some other persons to a fair in an adjoining village. *Bard v. Yohn* (1856) 26 Pa. 482.

The owner of a hack is not liable for the violation of a city ordinance by his day driver who has taken the hack for his own use in the night-time. *Campbell v. Providence* (1899) 9 R. I. 232.

If the servant takes his master's horse for purposes of his own not being at the time on the master's business, the master is not liable for injuries caused by his careless driving, nor is the master liable if the servant lends the horse to another without authority, by whom the injuries are caused. *Joel v. Morison* (1834) 6 Car. & P. 501.

5 *Mews' Digest*, p. 264, states that where a servant borrowed his master's horse to go on an errand of his own and promised to do an errand for the master also, to which the master assented, and drove so negligently that he inflicted an injury on plaintiff, the court refused to hold, as matter of law, that the master was responsible. *Cornick v. Digby*, 9 Ir. C. L. Rep. 557.

Where a servant whose duty was to deliver beer and bring back empty kegs took the horse and cart for purposes of his own and after accomplishing his object, picked up two empty kegs from a customer which he took back with him, the court held that he had not returned to his employment so as to render his master liable for injuries caused by his negligent driving. *Rayner v. Mitchell* (1877) L. R. 3 Q. B. Div. 337, 26 Week. Rep. 633.

Horse placed in servant's charge.

Where an employe engaged to drive a horse in prosecution of work upon an excavation, took it to his home when he went for dinner and left it standing in front of his house, when it ran away inflicting damage, the court held that the servant was employed to take care of the horse and was engaged in taking care of it when the mischief arose, and that the master might properly be found liable. *Whitman v. Pearson* (1888) 37 L. J. C. P. 156, L. R. 3 C. P. 422, 18 L. T. N. S. 290, 16 Week. Rep. 649.

Where after being directed to take a team to the stable, the driver at the request of another employe of the master went about a mile out of his way to deliver a trunk for such other servant, during which drive an injury was caused by his negligent driving, the master was held not liable. *Cavanagh v. Dinsmore* (1878) 12 Hun. 465.

Where after a cartman came in from his day's work he procured the keys of the stable at the shop and started to put the horses up, but, instead of going directly to the stable, drove in another direction to take a friend home, and while so doing caused an injury, the master was held not liable on the ground that the servant was at the time not in his employ. The judge says that if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words he must be in the employ of his master at the time of committing the grievance. *Mitchell v. Craseweller* (1853) 13 C. B. 237, 23 L. J. C. P. 100, 17 Jur. 716.

Where a coachman upon finding the road obstructed with a van to which horses were attached, standing across the road, from which cases were being unloaded into adjacent premises, got off from the box and turned the horses off from the street so as to give him room to pass, by which a case was made to fall off from the van upon a gig standing near, breaking it, the court held that the coachman in moving the horses was not acting within the scope of his employment so as to charge his master with responsibility for his act. *Lamb v. Palk* (1840) 9 Car. & P. 629.

The master is not liable for an injury caused by his coachman who has taken the horse and carriage to do an errand of his own. *Sheridan v. Charlack* (1879) 4 Daly. 338.

A driver of an ice wagon does not necessarily leave his master's employment by needlessly driving the wagon over on the wrong side of the road against a carriage which is standing there, although there was room for him to have passed in safety had he remained on the proper side of the road. *Young v. South Boston Ice Co.* (1890) 150 Mass. 527.

In *Vernon v. Cornwell* (Mich.) Feb. 12, 1905, in which plaintiff was injured by a collision on the highway with a team under the charge of defendant's servant, the contention was that the servant was not acting within the scope of his employment, and the court charged that if the jury should find that the collision was caused by the wrongful act of the teamster, which act was beyond the scope of the defendant's business (the act charged was voluntarily running horses), and that such act was wantonly done, the verdict must be for defendant. The verdict was for plaintiff so that the correctness of these instructions was not necessarily passed upon by the supreme court, but the judgment was affirmed.

any event or circumstances within the range of defendant company's legitimate business; that when the agents or employes of defendant company began to near, and until they were beyond, plaintiff's horse, they began to give, and continued to give, keen and frightful sounds, in quick and rapid succession, by means of the whistle, the immediate effect of which was to frighten the plaintiff's horse, which he was then and there riding, causing his horse to leap and jump with him in the most violent manner; that, by reason of such violent capering and jumping of his horse, he, the plaintiff, was placed in great danger of being killed and greatly injured, and seriously and permanently injured. Plaintiff states that the agents and employes of the defendant company saw the effect of said frightful noise on plaintiff's horse when the whistling commenced, and while the same was going on, and might have ceased making the same, and thereby prevented the

said injuries, or greatly lessened the same, but for no legitimate purpose, willfully, knowingly, negligently, wantonly, and intentionally, and only for the purpose of gratifying a base curiosity and malignant spirit, they commenced and continued blowing said whistle in the most frightful manner of which they were capable."

The answer of the railway company is not brought up in the transcript, but it appears from the judgment of the circuit court that a general demurrer to the plaintiff's petition was overruled. Four errors are assigned, but each involves substantially the same question, which the counsel for the railway company, in his printed brief, propounds as follows:

"Is a master responsible for the willful, wanton, and malicious acts of his servants, not done for the master's benefit, and not within the scope of the employment of the servant, and not done by the authority or

In an action to recover for injuries to a child caused by the rapid starting of a delivery wagon upon which it had climbed while it was standing in front of a house, it appeared that the driver had left the wagon to pay a personal visit to the house, and the court said if the injury was the consequence of leaving the wagon unattended, the act of so leaving it was performed while the wagon was diverted from the business of defendant and used to promote the pleasure of the driver. If we assume, that, notwithstanding his departure from his route, injuries inflicted by him while driving, resulting from his manner of driving, would have charged the defendant as being within the scope of the employment of the driver or his discretion as to the route, no such presumption can be made as to the act of abandoning temporarily the services of the defendant and leaving his property without care. *Chicago Consol. Bottling Co. v. McGinnis* (1896) 51 Ill. App. 323.

Burden of proof.

That the servant had departed from the course of his employment is a matter of defense, the burden of proof of which is on defendant. *Cleveland v. Newsom* (1890) 45 Mich. 62.

a. Disobedience of orders.

That the servant disobeys the master's instructions is immaterial. *Gregory v. Ohio River R. Co.* (1893) 37 W. Va. 606; *Consolidated Ice Mach. Co. v. Keifer* (1890) 10 L. R. A. 606, 124 Ill. 451; *Johnson v. Central Vermont R. Co.* (1884) 56 Vt. 707; *Mound City Paint & Color Co. v. Conlon* (1897) 92 Mo. 221; *Moir v. Hopkins* (1886) 16 Ill. 515, 63 Am. Dec. 512.

The fact that the servant disobeyed the master's instructions will not relieve the latter from responsibility. *Mound City Paint & Color Co. v. Conlon* (1897) *supra*.

Ignorance on the part of the master is no excuse. *Noble v. Cunningham* (1874) 74 Ill. 51.

A master is liable for the infringement by his servant of a patent in the course of his business, although the infringement is contrary to his express orders. *Betts v. De Vitre* (1868) L. R. 3 Ch. 441, 37 L. J. Ch. 325, 18 L. T. N. S. 165, 16 Week. Rep. 529.

The test of the master's responsibility for the act of his servant is not whether the act was done according to the instructions of the master to the servant but whether it was done in the prosecution of the business that the servant was employed by the master to do. *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421.

A master will be liable for the act of a servant 37 L. R. A.

whom he has sent to drive cattle out of a lot in running and worrying them with dogs although he instructs the servant before he goes not to do so. *Schmidt v. Adams* (1885) 18 Mo. App. 432.

Where the clerk of the keeper of a gun store at the request of a customer and for the purpose of effecting a sale loaded a gun in the store, against the commands of his employer, and the gun was discharged and injured a third person, the master was held liable. *Garretsen v. Duenckel* (1872) 50 Mo. 104, 11 Am. Rep. 405.

Where a servant in charge of defendant's truck was instructed to leave it in a certain yard at night, but instead of doing so left it in the street, by reason of which an injury was done to a third person, the owner was held liable. The court says: "The servant was rightfully in possession of the truck and being thus rightfully in possession and about his master's business, the master must be responsible for his neglect in improperly leaving the truck in the street. *Powell v. Deveney* (1849) 3 Cush. 304.

An agent may render his principal liable in firing a signal gun although he acts contrary to his instructions, if at the time he is engaged in the execution of the master's business. *Oliver v. North Pacific Transp. Co.* (1869) 3 Or. 84.

The owner of a lumber yard is liable for injuries caused by its superintendent piling lumber in the street for his own convenience contrary to the employer's instructions. *Cosgrove v. Ogden* (1872) 49 N. Y. 255, 10 Am. Rep. 361.

In *Philadelphia & R. R. Co. v. Derby* (1862) 55 U. S. 14 How. 468, 14 L. ed. 502, a case in which the injury occurred to a passenger on the road, the court held the railroad company liable for the acts of its servants although they were acting in disobedience of orders. The court says: "Although among the numerous cases upon this subject some may be found . . . in which the court have made some distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master, yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondet superior* would in a measure nullify it. . . . The entrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the 'causa causans' of the mischief; while the proximate cause, or the *causa negligens* which produces it, may truly

under the order of the master, but committed willfully, maliciously, and exclusively for the servant's private ends or malice?"

The counsel formulates his answer to his question thus:

"A master is not liable for the willful, wanton, malicious, and deliberate wrongs committed by the servant, not done on the master's account or to further his interest, but done willfully, maliciously, and exclusively for the servant's private ends or malice."

It will be observed that both the question and its answer, as propounded by counsel, are somewhat broader in their terms than the question strictly raised by the general demurrer to the pleading of the plaintiff. The question stated by counsel has exercised judicial inquiry and deliberation from the earliest times. In the often-quoted case of *McManus v. Crickett*, 1 East, 106, decided in the first year of this century, Lord Kenyon said:

be said, in most cases, to be the disobedience of orders by the servant so entrusted. If such disobedience could be set up by a railroad company as a defense when charged with negligence, the remedy of the injured party would in most cases be illusive. . . . Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety."

But there is an English case which appears to be in conflict with the principle of the decisions elsewhere.

Where a railroad constable whose instructions were to use his power to arrest with extreme caution, and not to arrest any one after a fight is over, began a fight with some persons who had been turned out of the railroad station and after it was over he directed the arrest of a person who was walking away from the station, the court held that the company was not liable because the action of its servant was beyond the scope of his authority and in contravention of his instructions. *Walker v. South Eastern R. Co.* (1870) 23 L. T. N. S. 14, 18 Week. Rep. 1032, L. R. 5 C. P. 640, 39 L. J. C. P. 346.

f. Performance of unlawful acts.

There has in some cases been a disposition to hold that the master was not responsible for unlawful acts done by the servant. But this distinction does not seem to be based on sound principle.

Thus where the servant had authority to distrain cattle found damage feasant, and finding a horse running at large in the highway drove it into his master's close and then distrained it, the master was held not liable on the ground that the act being unlawful in itself, the master was not liable unless he expressly authorized it; and a distinction is made between acts unlawfully and those negligently done. *Lyons v. Martin* (1898) 8 Ad. & El. 612, 8 Nev. & P. 504.

In order to charge the master, the act must be one which it would be unlawful for the master himself to have done. So where the master was wrongfully holding public land and the servant attempted to maintain the possession by force of arms and in so doing shot and killed a third person, it was held that the master could not be held civilly liable for the act. *Sagers v. Nuckolls* (1898) 3 Colo. App. 96.

A curious application of this rule was made in Missouri.

In *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 411, the owner of an inland vessel was held not liable for the act of its mate in assaulting 27 L. R. A.

"It is a question of very general concern, and has been often canvassed, but I hope at last it will be at rest. . . . When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such acts."

In the familiar case of *Wright v. Wilcox*, 19 Wend. 343, 33 Am. Dec. 507, Judge Cowen says:

"The line where the master's liability shall terminate must be placed somewhere, and the acquiescence of Westminster Hall for many years on the rule we have cited, as laid down by Lord Kenyon, is an evidence of the common law not to be resisted, especially as it will not be found, I imagine, to conflict with any general principle of that law."

In *Isaacs v. Third Ave. R. Co.* 47 N. Y.

a sailor for the purpose of compelling him to work on the ground that no express authority had been given and that since the owner would have had no authority himself to have assaulted the sailor for such purpose no authority in the mate could be implied.

But within a year the same court decided that a master is liable for the act of his servant in burning rubbish in the street although it is unlawful if he has given him authority to dispose of the rubbish in some way. The court says: "The test is not in the lawfulness or unlawfulness of the means adopted by the servant to accomplish the master's business, but it is whether or not such means are so far incident to the employment as to come within its scope." *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643.

The court in the second case was right and it is difficult to understand what principle of distinction could be made which would justify different decisions in the two cases.

An attorney is personally liable for the costs in case a summons is set aside, because his clerk fraudulently simulated the court's seal upon it, although he was ignorant of the fraud. *Dunkley v. Farris* (1861) 11 C. B. 457.

A servant engaged in running logs in a navigable river will render the master liable for the obstruction of navigation with them although such obstruction is unlawful. *Enos v. Hamilton* (1869) 24 Wis. 653.

g. Acts of master of vessel.

For liability of the owner of a vessel upon fraudulent bills of lading issued by the master, see *supra*: *Faise bills of lading*, under IV. c.

The master of a vessel appears to occupy a somewhat anomalous position. Under the common law the question of the master's liability is made to depend upon the general principles governing master and servant cases. But other judges have applied the principles of the maritime law to the settlement of controversies arising over his acts.

Collision cases.

Some of the cases have decided the question of the liability of the owner for collisions upon principles governing master and servant cases.

The master of a vessel is acting within the scope of his employment in rendering salvage services so as to render the owner liable for his negligence in performing such services, whereby another vessel is sunk. *The Thetis* (1866) L. R. 2 Adm. 265, 35 L. J. Adm. 42.

123, 7 Am. Rep. 418, *Judge Allen*, in referring to the case of *Hibbard v. New York & E. R. Co.*, 15 N. Y. 453, says:

"Some of the expressions in the opinions of the judges . . . are open to criticism, as not in harmony with the later authorities, and would not probably be regarded as sound, although they are supported by the earlier cases and by the elementary authorities:" citing *McManus v. Crickett* and the authorities therein cited, and *Wright v. Wilcox*.

In *Howe v. Newmarch*, 12 Allen, 49, it was held that if the act was done by the servant in the execution of the authority given him by his master, and for the purpose of performing what the master had directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner.

In *Wallace v. Merrimack River Nav. & Exp.*

Co., 134 Mass. 95, 45 Am. Rep. 301, it is said:

"The instruction given treats the defendant as exonerated from responsibility if the act done by its servant was wanton and malicious, and disregards the inquiry whether he was acting under the general authority of the defendant, as master, and for the purpose of doing its work. There are respectable authorities, certainly, such as *Richmond Turnp. Co. v. Vanderbilt*, 1 Hill, 480, and *Wright v. Wilcox*, 19 Wend. 343, 33 Am. Dec. 507, which hold that where the acts of a servant are willful the master is not responsible, even if they are done in the performance of his business, because such willful acts are held to be a departure from the master's business."

The court then cites *Howe v. Newmarch*, *supra*, as holding that the act being willful or malicious is not sufficient to effect a departure from the master's business, and says

The owner of a vessel is responsible for the acts of the master in navigating the vessel. *Chamberlain v. Ward* (1850) 32 U. S. 21 How. 548, 16 L. ed. 211.

The owner of a vessel is responsible not only for injuries resulting from the negligence of those in charge of it, but also from their ignorance of the established sailing rules. *St. John v. Paine* (1850) 51 U. S. 10 How. 557, 13 L. ed. 537.

The owner is liable for the negligence of the commander of the vessel. *Stone v. Ketland* (1804) 1 Wash. C. C. 143.

But it now seems to be the rule that the liability of the vessel for torts in navigation is based upon the maritime law and not upon the common-law rule in regard to master and servant. *The China* (1869) 74 U. S. 7 Wall. 53, 19 L. ed. 67.

The owner of a vessel is liable for the torts of its master under a general principle of the maritime law and not by virtue of any special contract. *Dean v. Angus* (1785) Bee, 375.

So the owner of a vessel is liable for the willful and malicious act of its master in steering against a vessel to its injury. *Ralston v. The State Rights* (1836) *Crabbe*, 23; *Duggins v. Watson* (1854) 15 Ark. 113, 60 Am. Dec. 560.

So the willful and malicious acts of those in charge of a steamboat in running it against a pleasure yacht will prevent the fact that the yacht was sailing on the Lord's Day, contrary to the provisions of the statute, being used as a defense to an action against the owners of the steamboat for the injuries inflicted on the yacht. *Wallace v. Merrimack River Nav. & Exp. Co.* (1888) 134 Mass. 95, 45 Am. Rep. 301.

But in other cases it has been held that—

The owner of a steamboat is not liable for the willful act of its master in running it against and injuring another boat (*Richmond Turnp. Co. v. Vanderbilt* (1841) 1 Hill, 480), even though the act is authorized by the general agent of defendant. *Vanderbilt v. Richmond Turnp. Co.* (1849) 2 N. Y. 479, 51 Am. Dec. 315.

The owners of a steamboat are not liable for the damage resulting from collision caused by the willful act of their servants and agent in charge of the boat. *Cox v. Keahey* (1860) 36 Ala. 340, 76 Am. Dec. 323.

Acts towards cargo.

The shipowner is liable for the conversion by the master of goods shipped on board, if the freight is to be paid to him, but in case the master is to have the freight, the case may be different. *Boucher v. Lawson* (1734-35) Cas. t. Hardw. 35, 194. 37 L. R. A.

The owner of a ship is liable for the act of the master in willfully carrying goods beyond the point of destination. *Ellis v. Turner* (1800) 8 T. R. 531.

If acting according to his best judgment the master, because of the bad condition of the ship, sells the cargo at a point short of destination, the owner is liable for the conversion. *Ewbank v. Nutting* (1849) 7 C. B. 797.

Acts towards crew.

The owner of a vessel is liable for injuries to a seaman through the negligence of the master of the vessel. *Thompson v. Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 734.

The vessel is liable for the negligence of the master in failing to keep the rigging safe for the purpose to which it is to be put, by reason of which a seaman is injured. *The A. Heaton* (1890) 43 Fed. Rep. 594.

But in England it is held that the captain and crew of a ship are fellow servants, so that the owner is not liable to a sailor for injuries resulting from the negligence of the captain. *Hedley v. Pinkney & Sons S. S. Co. Limited* [1892] 1 Q. B. 53.

The owners of a vessel are liable for an assault by its master upon a seaman in attempting to compel him to obey orders, but not for an assault committed by the master in attempting to punish the seaman after the transaction is over for an alleged disobedience of orders. *Spencer v. Kelley* (1887) 33 Fed. Rep. 833.

A willful and unjustifiable attack with kicks and blows by the captain of a vessel upon a seaman, merely because he said he was sick when ordered to go on deck, is not within the scope of the captain's employment or authority and will not render the owners of the vessel liable for the injury thereby caused. *Gabrielson v. Waydell* (1892) 17 L. R. A. 223, 135 N. Y. L. In that case three of the seven judges dissented upon the ground that the act was the negligence of the master in performing the stipulations of the contract of employment and also in performing a duty imposed upon him by law, and for this the owners of the ship have bound themselves to be responsible. If they entrust the discharge of their obligations to another they guarantee his fidelity and his default becomes their default under the well-settled rules of law establishing the liability of persons for the acts or omissions of their agents.

Other cases.

In a United States court it was held that the

that case has been since repeatedly recognized, and seems to express the true rule to which it relates.

In *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, it is said: "It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises, not so much from a difference of opinion as to the rule of law on the subject, as from its application to the facts of a given case."

Strong as was Lord Kenyon's hope that he had put the question at rest, and reluctant as have been Westminster Hall and the courts of last resort in this country to pass the line he set to terminate the master's liability, an examination of the cases shows that the most enlightened and conservative courts no longer hold that a willful and malicious purpose is prima facie a departure from the master's business. It will be conceded that, as to passengers on railroads, the line drawn by Lord Kenyon does not now receive the sanc-

tion of the courts. It is sometimes contended that this departure results from the contract between the passenger and the carrier, and the reasoning to support the decisions declining to follow the earlier cases often gives emphasis to this feature. No such feature, however, is present in the case of *Wallace v. Merrimack River Nav. & Exp. Co.*, nor in *Hove v. Neumarch*; and while perhaps most of the cases have presented that feature, and counsel and judges have become so familiar with it that it readily occurs to the minds of both, and often finds expression, it will be found that the cases are few where, in recent years, recovery has been denied strictly on the ground that, as to persons not passengers, public carriers are not liable for the willful or malicious acts of their servants in the use of the instruments of carriage committed to their control in the conduct of such carriage or business. There are some such cases. The most recent of such that I have examined, and one bearing close analogy to

owner of a vessel fitted out as a privateer is not liable for any piratical acts done by the officers, although he may be liable for unlawful acts committed upon vessels properly taken as prize. *Dias v. The Owners of Privateer Revenge* (1814) 3 Wash. C. C. 282.

But in a later case in the United States Supreme Court it was held that the owners of a privateer are liable for the acts of its crew in plundering and robbing a neutral vessel to the extent of actual damages, but cannot be made liable for vindictive damages. *The Amiable Nancy* (1818) 16 U. S. 3 Wheat. 557, 4 L. ed. 458.

The owner of a ferry boat is not liable for damages done by the captain of the boat in leaving the slip without orders and pursuing a burning barge and towing it so that it comes in contact with a yacht, so that it sets fire to it causing injury. *Ay-crigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460.

As to liability for permitting slave to escape, see IV., b, *Permitting slave to escape*.

b. Willful and malicious acts.

In accord with the idea entertained in the early decisions that the master's liability depended on authority given the court in *McManus v. Crickett* (1800) 1 East, 106, advanced the dictum that the master could not be liable for a willful or malicious act of his servant because as soon as the act became willful or malicious the servant was no longer within the scope of his employment. The court said: "The servant by willfully driving a chariot against the plaintiff's carriage without authority of the master gained a special property for the time and as to that purpose the chariot was the servant's."

That reasoning is not in line with the principle of the modern decisions, and it has to a great extent been departed from, but it made a deep impression upon subsequent decisions and many cases have been made to turn upon the presence or absence of malice.

In commenting on the case of *McManus v. Crickett*, Judge Redfield in his work on Railways, 5th ed. page 534, says: "The reasoning (by which the master is held liable) certainly applies with the same force to that class of cases where the act of the servant is both direct and willful, as where it is only negligent. The master is not liable in either case, perhaps, so much for having impliedly authorized the act, as for having employed an unfaithful servant, who did the injury in the course of his employment. And whether done negligently or will-

fully, seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servant's employment . . . It is very obvious the proper distinction, in regard to the master's liability, cannot be made to depend upon the question of the intention of the servant. The master has nothing to do, either way, with the purpose and intention of his servants. It is with their acts that he is to be affected, and if these come within the range of their employment, the master is liable, whether the act be a misfeasance, or a nonfeasance, an omission or commission, carelessly or purposely done."

Judge Reeve says: "In many cases of injury by negligence there is no other implied contract than that general one with all mankind that they shall not suffer from the neglect of those whom the master employs; and this general implied contract may exist, in case of torts by violence, that his servants in pursuit of his business shall commit no tort." Reeve, Dom. Rel. 8d ed. 519.

I can see no more reason why the master shall be liable for damages occurring by negligence of the servant than for his violence whilst pursuing his business. Reeve, Dom. Rel. 8d ed. 520.

The development of the law upon this branch of the subject and the caution with which the courts advance is very interesting.

Acts done by servant outside of his capacity as servant.

There can be no question that the master will not be liable for acts which the servant does out of pure malice or wantonness not purporting to act as servant and having no relation to his employment.

The principal is responsible, not because the servant is acting in his name or under color of his employment, but because the servant was actually engaged in and about his business and carrying out his purposes. It matters not in such cases whether or not the injury with which it is sought to charge him is the result of negligence, unskillfulness, or wrongful conduct, for he must choose good agents for the conduct of his business. But if his business is done or is taking care of itself and his servant not being engaged in it, nor concerned about it but impelled by motives which are wholly personal to himself and simply to satisfy his own feelings of resentment whether provoked or unprovoked, commits an assault upon another when that is and can have no tendency to promote any purpose in which the principal is interested and to

the case we have at bar, is *Stephenson v. Southern Pac. Co.* 93 Cal. 558, 15 L. R. A. 475.

In the case of *Philadelphia & R. R. Co., v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502, it is said:

"Although, among the numerous cases on this subject, some may be found in which the courts have made some nice distinctions, which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master, yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondet superior* would in a measure nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline,

and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence,—the *causa causans* of the mischief,—while the proximate cause, or the *ipsoa negligentia*, which produces it, may truly be said in most cases to be the disobedience of orders by the servants so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced."

Only negligent misconduct was involved in the case just cited; hence, the language of the court is limited to negligence. The party injured was traveling by railroad; and it may be insisted that only such travelers,

promote which the servant was employed, then the wrong is merely the personal wrong of the servant for which he and he alone is responsible. *Haehl v. Wabash R. Co.* (1893) 119 Mo. 325.

Thus the master will not be liable for the act of a brakeman who when standing on the platform of a car kicks a person standing on the ground, and who has made no attempt to board the train. *Molloy v. New York Cent. & H. R. R. Co.* (1882) 10 Daly, 453.

So a railroad company is not liable for the act of its conductor in knowingly and willfully taking and transporting upon the cars, against his will, one whom he had no right to receive upon the cars for transportation. As where the conductor assists a third person in kidnapping a person. *Jackson v. St. Louis, L. M. & S. R. Co.* (1885) 37 Mo. 422, 56 Am. Rep. 460.

So if a servant sets fire to a prairie through motives of malice or wantonness, the principal will not be liable for that will be an abandonment of the business of the agent. *Johnson v. Barber* (1849) 10 Ill. 426, 50 Am. Dec. 416; *Armstrong v. Cooley* (1849) 10 Ill. 512.

As to willful acts done in the presence of the master, see *supra*, I.

As to liability for aiding escape of slave, see IV., b, *Permitting escape of slave*.

Decisions following McManus v. Crichett.

There are many decisions which turn upon the question of willfulness or malice alone, holding that when those elements appear the servant is no longer within his employment.

The master is not liable for the malicious acts of his servant. *Repaber v. Watson* (1851) 17 Pa. 335.

The master is not liable for a willful trespass of the servant. *Wesson v. Seaboard & R. R. Co.* (1857) 49 N. C. 379.

A master is not liable for injuries designedly or intentionally inflicted by his servant. *Snodgrass v. Bradley* (1852) 2 Grant, Cas. 43.

The principal is not in general responsible for the criminal conduct of his agent. *Mitchell v. Mims* (1852) 8 Tex. 6.

A person allowed to ride free on a train, by employees of the company, cannot hold the company liable for injuries received by his being pushed from the train by the employees in attempting to rob him. *Alabama & V. R. Co. v. McAfee* (1893) 71 Miss. 70.

As to willful acts of master of vessel see IV., g.

A laborer on a building who negligently or want-

only pushes a brick from the top of a completed wall, which he had no business to touch although it is done before he has left the place where he has been at work is not acting within the scope of his employment, so as to make the master liable. *Mayer v. Thompson-Hutchinson Bldg. Co. (Ala.)* (1894) L. R. A.

A master who sends his servant to turn a trespassing horse out of his field cannot be made liable for the wanton act of the servant in throwing a stone at the horse which breaks its leg. *Cantrell v. Colwell* (1859) 8 Head, 471.

Where servants, in removing stones from the bed of a stream, contrary to the master's orders trespassed on the land of an adjoining owner and removed stones from his land it was held that the master was liable for their act, if they negligently disregarded his commands, but not if they willfully did so. *Southwick v. Estes* (1851) 7 Cush. 385.

The master is not liable for the willful act of his servant in setting the master's dog on cattle of another person. *Steele v. Smith* (1854) 3 E. D. Smith, 321.

Servants engaged in clearing a field of ground under orders to set no fire in the absence of the master will not make the master liable for injuries caused by their willfully setting fire in his absence which causes injury to a third person. *Andrews v. Green* (1882) 62 N. H. 436.

If the declaration is against the master for the act of his agent, the act must not be charged to have been willfully done, but the charge must be negligence. *Brashear v. Kennedy* (1849) 10 B. Mon. 23.

A city marshal who employs an agent to carry into effect an ordinance relating to the killing of unmuzzled dogs is not liable for the willful act of the agent in killing a dog not within the terms of the ordinance. *Pritchard v. Keefer* (1870) 50 Ill. 117.

In *Tuller v. Voght* (1851) 13 Ill. 277, the court after stating that the master cannot be made liable in trespass for the willful acts of his servants, states that he is undoubtedly responsible for injuries resulting from the negligence, carelessness, or unskillfulness of the servant, but that he is only liable in a special action on the case. And that in such action the declaration avers that the injury resulted from the carelessness or unskillfulness of the agent.

A master is not liable for the willful acts of his servant when contrary to his orders in interfering with a business rival, as where the servants of the

and by the railroad sought to be charged, were in contemplation of the court. The whole text of the opinion shows that its logic has a larger scope. The injury was not caused by the negligence or other misconduct of the servants engaged in carrying this traveler. His right to recover damages was expressly held to be independent of any contract for carriage. One who has such a contract may found, in part at least, his right to recover on the contract to carry safely. But the maxim of *respondet superior* is wholly irrespective of any contract, expressed or implied, or any other relation, between the injured party and the master.

In the case of *Culp v. Atchison & N. R. Co.*, 17 Kan. 475, it appears that the plaintiff was traveling in his private wagon, drawn by his own team of horses, on the public highway, near a station on the defendant's road, at the time when a train of its cars was standing there on its track; that the servants of the company, carelessly, un-

necessarily, and with gross negligence, caused the steam whistle to be blown with great violence, at which the plaintiff's team took fright, ran, and the plaintiff was injured. A demurrer to the petition was sustained by the trial judge, which on appeal was held to be error. In delivering the opinion of the court, Judge Brewer said:

"These acts [sounding the whistle, and causing steam to escape, etc.], which at times are legal and necessary, may be done without any necessity therefor, out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong. . . . In this case, while the defendant might, under some circumstances, lawfully, and without subjecting itself to responsibility for injuries resulting therefrom, cause the whistle to be blown. . . . yet the same act, done without any necessity therefor,—done negligently and heedlessly,—might render the defendant responsible for all injuries caused thereby. [Citing] *Toledo, W. & W.*

proprietors of an omnibus line attempted to break up the business of a rival by surrounding the omnibus of the rival so that passengers could not get into it. *Green v. Macnamara* (1859) 1 L. T. N. S. 9.

The master of a vessel is not liable in trespass for the act of one of the crew in willfully cutting the sail of another vessel for the purpose of separating the two when they had become entangled. *Bowcher v. Noidstrom* (1899) 1 Taunt. 568.

Where a driver of an omnibus struck with his whip at the servant of a tramway company, who had ascended the steps of the omnibus to get its number because it was obstructing the way, the court held that if the act was for the purpose of preventing an action against the owner, the owner was liable, but if it was to prevent an action against the servant himself, there was no liability. *Ward v. General Omnibus Co.* (1873) 43 L. J. Q. P. 255, 28 L. T. N. S. 850.

To make the master liable for consequential damages resulting from the trespass of the servant it must appear that the servant was in the course of his employment and that by an injudicious, negligent, or unskillful act done in furtherance of the business, the injury resulted to the plaintiff. But if the servant willfully and to effect some design of his own does an injury to another, the master will not be liable. The business of life requires the employment of servants or agents, and to hold that masters are liable for their willful and wanton acts, would be placing every employer entirely at the mercy of those whom he might engage in his service. Such a principle would greatly impede if not wholly prevent commercial intercourse between man and man. *Douglas v. Stephens* (1853) 13 Mo. 362.

A bottler who has undertaken to wash and return whatever bottles of a rival come into his possession is not liable for the act of one of his servants whom he has set to washing bottles in wantonly breaking all bottles of the rival which he finds. *Deith v. Ottenville* (1884) 14 Lea. 191. In that case the court says, the master ought not to be held responsible for such wrongful conduct of the servant as he had never directed him to do nor could be supposed to have authorized or expected the servant to do. A liability so extensive would make the master a guarantor of the servant's good conduct and would impose responsibility which prudent men would hesitate to assume.

The reasoning of the last two cases has met with some favor, but it would seem that it has no place in any system of law. If a trustworthy servant

cannot be found it is far better that the master's business should go undone than that an entire community should be placed in peril for the master's benefit. In most instances the master is entirely to blame, because of carelessness or penuriousness, for having an untrustworthy servant, and he should answer for his fault if not for his servant's.

Railroad cases.

The principle of making the master guarantee the conduct of servants in whose hands dangerous machines are placed, which is developed *infra*, V., found an early application in railroad cases although it was not at first clearly stated.

Some courts still adhere to the old rule even in these cases. Thus it has been held that—

A railroad company is not liable for the willful act of its engineer in running over cattle on the track. *Danner v. South Carolina R. Co.* (1851) 4 Rich. L. 329; *DeCamp v. Mississippi & M. R. Co.* (1831) 12 Iowa, 248; *Cooke v. Illinois Cent. R. Co.* (1870) 30 Iowa, 202.

Moving a railroad engine simply to frighten passengers in a street-car at a crossing is not within the scope of the employment of the engineer so as to make the company liable for the injuries received by a passenger in the street-car by jumping therefrom on account of fright. *Stephenson v. Southern Pac. R. Co.* (1892) 15 L. R. A. 475, 98 Cal. 558.

Where plaintiff's team was run over by defendant's train and case was brought to recover their value, the court said if the injury was caused by the mere willful act of the company's servants and not in execution or furtherance of the business in which they were employed, the company is not liable in this form of action. Case cannot be maintained against a company for injuries willfully and intentionally committed by its servants and not produced in the course of their employment in doing the business for which they were employed. *Illinois Cent. R. Co. v. Downey* (1897) 18 Ill. 252.

Now under the Iowa code railroad companies are liable for the willful acts of their servants connected with the use and operation of the road on or about which they are employed. *Marion v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 569.

But in other jurisdictions it is held that—

The rule with respect to railroads has been modified so that if the servant, while acting within the scope of his employment, does an act injurious to another, either through neglect, wantonness, or intention, then for such abuse of authority the

R. Co. v. Harmon, 47 Ill. 298. '*Sic utere tuo ut alienum non laedas*' regulates the conduct and determines the liability of corporations, as of individuals."

In the case cited by Judge Brewer the trial court had charged the jury:

"If defendants' engineer, with intent to frighten plaintiff's horses, unnecessarily and wantonly let off steam or blew a whistle, so that plaintiff's horses ran off and injured him, defendants are guilty. Malice in the engineer need not be proved positively, but may be inferred."

—And refused the defendant's request to charge:

"If the injury was caused by the willful and malicious act of the agent of the defendants, the defendant is not liable."

There was a verdict and judgment for plaintiff, which was affirmed on appeal. In a well-considered opinion, replete with sound reasoning, that court, in conclusion, uses this language:

master is responsible to the person injured. *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 263.

In *Illinois Cent. R. Co. v. Middlesworth* (1888) 48 Ill. 494, the court in holding a railroad company liable for the act of its engineer in running upon and killing some stock upon the track said: "It is not infrequent that . . . they (engineers) rush their machines into a crowd of animals with no other thought than to see how many they can kill, like a sportsman shooting into a flock of quails, and boast of their skill afterwards. . . . A spirit of recklessness seems to have been engendered among them. . . . It may be said these companies must take men as they find them and none are perfect; yet there is a vast difference in the qualities of men engaged in the same pursuit and all proper means should be used to provide the best. There is always a choice and it ought to be incumbent on railroad companies to make the best choice without regard to compensation of men to whom the public are obliged to entrust their property, lives, and all that is dear to them.

Railroads may and ought to be liable for malicious mischief or willful injuries in running upon and injuring persons or stock trespassing upon the road. *Chicago & M. R. Co. v. Patchin* (1854) 16 Ill. 208, 61 Am. Dec. 65.

A railroad company is liable for the act of its engineer in willfully running the engine against a person walking on the track. *Terre Haute & I. R. Co. v. Graham* (1874) 46 Ind. 239; *Indianapolis & V. R. Co. v. McClaren* (1878) 63 Ind. 563.

The company is liable for the willful killing of a mule by running a train over it. *Banister v. Pennsylvania Co.* (1884) 98 Ind. 220.

A railroad company is responsible for the willful act of its engineer in running upon stock on the track. *Vicksburg & J. R. Co. v. Patton* (1856) 81 Miss. 198, 65 Am. Dec. 552.

A railroad company is liable for the act of its engineer in putting on steam and increasing the speed of his train when he sees a horse on the track in front of his engine, whereby the horse is killed. *Pritchard v. LaCrosse & M. R. Co.* (1858) 7 Wis. 232.

In *Detroit, E. R. & I. R. Co. v. Barton* (1878) 61 Ind. 233, a recovery was sustained upon a complaint which charged the willful and malicious killing of plaintiff's cow by defendant's servants.

Under the Georgia code a railroad company is liable for the killing of a customer who has gone to its office for the transaction of business by a clerk who has a homicidal mania. *Christian v. Columbus & R. R. Co.* (1867) 79 Ga. 460.

37 L. R. A.

"When employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskillful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he willfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages."

In the case brought to us by this writ of error the engineer and fireman in charge of the locomotive engine were driving it on the tracks of the company, pulling a regular train of cars, running on schedule time, charged to sound the whistle frequently, with blasts differing in time and tone, according to the signal to be given or the purpose served. If injury had resulted from failure to sound it at the required times and in the required way, the company might have been held liable. If unnecessarily and negligently sounded,—as, for instance, when the train was standing where it should be,

Use of whistle.

In an action to recover for the death of a horse frightened by a whistle blown by defendant's engineer, one of the judges said, if while in defendant's employ and in the exercise of the duty for which he was employed, the engineer maliciously, willfully, and wantonly performed those duties, either with an intention to injure plaintiff or with a reckless disregard of the safety of plaintiff's property, the employer is liable. *Cobb v. Columbia & G. R. Co.* (1892) 37 S. C. 194.

Where an injury was caused by the willful act of an engineer in blowing a whistle to frighten a horse the company was held liable, the court saying, the master is liable for the act of his servant within the general scope of his employment, although the special act be done at a time and in a manner contrary to an express order of the master. *Philadelphia, W. & B. R. Co. v. Brannen* (1866) 17 W. N. C. 227.

The willful sounding of a steam whistle by the engineer for the purpose of frightening a horse may render the company liable. *Hillman v. Indianapolis, C. & L. R. Co.* (1881) 76 Ind. 176, 40 Am. Rep. 230; *Nashville & C. R. Co. v. Starnee* (1871) 9 Heisk. 52, 24 Am. Rep. 297.

If the engineer uses the engine which has been placed under his charge for the purpose of inflicting wanton injury on another, as by making steam escape so as to frighten horses on a highway, the company will be liable. *Toledo, W. & W. R. Co. v. Harmon* (1883) 47 Ill. 238; *Chicago, B. & Q. R. Co. v. Dickson* (1871) 63 Ill. 151, 14 Am. Rep. 114.

On the other hand, in *Hahn v. Southern Pac. R. Co.* (1871) 51 Cal. 606, the court says if the opening of cocks, which caused the frightening of the horses, for which the action was brought, was a willful and malicious trespass on the part of the engineer a grave doubt would be suggested as to whether the verdict in favor of plaintiff should be permitted to stand.

Willfulness within and without the scope of employment.

A large line of cases has abandoned the ground that willfulness or malice alone is the dividing line, and have advanced to the position that willfulness will not relieve the master if it was manifested for the purpose of effecting the master's business. Of this class are assaults on passengers in attempting to eject them from the cars. See *note to Davis v. Houghtellin* (1891) (Neb.) 14 L. R. A. 737. Those cases are, however, controlled by the master's con-

and was not about to start, or the time had not arrived for giving the signal to start,—and an injury had resulted from such act or omission, for such negligence the company would be liable. As was aptly said by the supreme court of Illinois, the result to the party injured is the same whether it is the effect of negligence, or from wanton and willful purpose. The malice pleaded in this case is only that which the law implies from an act of wanton cruelty. We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of a locomotive engine in charge of the proper servants of the company, while engaged in pulling its regular trains, moving at schedule rate, on schedule time, under direct, constant telegraphic orders. If it is contended that in this act the servants were not in the master's service, because not employed to blow the whistle wantonly and maliciously to frighten travelers or their horses, that con-

tention is fully answered by the supreme court of Illinois,—that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability from all affirmative acts of these servants violating the rights of others. *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298; *Chicago, B. & Q. R. Co. v. Dickson*, 68 Ill. 151, 14 Am. Rep. 114. It is conceded that, in case of passengers receiving injury from the action of the servants of the railroad company, no such distinction between negligent and wanton and malicious conduct obtains. It is contended that in such cases the corporation is held because of its contract to carry safely. That is one reason, and a cogent one, for holding the company in such cases, but it is only one of the grounds for so holding. If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and,

traight with the passenger and depend upon different principles from those which control here.

Ejecting trespassers.

But in cases where the employé is attempting to eject a trespasser the principle directly applies.

Where a child was injured by jumping off from a car in obedience to the command of the driver, defendants requested the court to charge that the owners of the car were not liable for the injury, if it was caused willfully by the acts of their servant. The court refused to give this instruction and the appellate court affirmed the judgment, but there is no discussion of this branch of the case. *Bay Shore R. Co. v. Harris* (1890) 67 Ala. 6.

The fact that the conductor acts wantonly and maliciously in putting a trespassing boy off from a moving train will not relieve the master from responsibility if it was part of the conductor's duty to remove trespassers from the train. The court says the relation (of master and servant) being established all else is mode and manner and as to that the master is responsible. *Kline v. Central Pac. R. Co.* (1899) 87 Cal. 400, 99 Am. Dec. 232.

A railroad company which instructs its conductor not to allow persons to ride on freight cars is responsible for the act of one of its conductors in improperly putting a person off from a freight car while the train was in motion. The court says that the rule of law is that where a master employs a servant to do an act which involves the use of force against the person or property of another, and the servant in the course of his employment uses force in a manner or to an extent unlawful and unjustifiable, the master is liable. *Holmes v. Wakefield* (1866) 12 Allen, 690, 90 Am. Dec. 171.

A railroad company is liable for the act of its servant in using unnecessary force in ejecting a trespasser from a moving train either from misjudgment, negligence, or violence of temper. *Harlinger v. New York Cent. & H. R. R. Co.* (1882) 15 N. Y. Week. Dig. 382.

The tortious act of a brakeman in driving a trespasser from a moving train will be assumed to have been within his authority. *Farber v. Missouri Pac. R. Co.* (1893) 20 L. R. A. 350, 116 Mo. 81.

The master is liable for unnecessary violence in the expulsion of a trespasser by a servant acting within the scope of his authority. *Gulf, C. & S. F. R. Co. v. Kirkbride* (1891) 79 Tex. 459.

A railroad company is liable for wrongful force in expelling a trespasser from a train. *Clark v. New York, L. E. & W. R. Co.* (1886) 40 Hun, 605.

If persons employed by a conductor to expel a

trespasser from a train strike him unjustifiably in expelling him, the company is liable although the blow was struck against the conductor's orders. *Coleman v. New York & N. H. R. Co.* (1870) 109 Mass. 160.

The master is liable for the malicious act of an employé in forcing a trespasser off from a moving train causing injury to him in case the servant is acting within the scope of his employment. *Bees v. Chesapeake & O. R. Co.* (1891) 85 W. Va. 492.

A railroad company is liable for an unjustifiable assault by a brakeman on a trespasser to compel him to leave the train. *Alabama Great Southern R. Co. v. Frazier* (1890) 93 Ala. 45.

In *Sanford v. Eighth Ave. R. Co.* (1861) 23 N. Y. 344, 80 Am. Dec. 233, where a conductor ejected a person from a car for refusing to pay fare, the court said the company was liable for an attempted expulsion at a wrong time, but it was insisted that since in the expulsion the conductor used unnecessary force and wantonly injured the deceased the company was not liable for the excess, but the court refused to allow that contention on the ground that the assault itself was unjustifiable and the company being liable for that as principal it was also answerable for any excess and aggravation which attended the wrong.

In *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293, a case in which the question of liability for ejection of a passenger was involved, the court said: "It is sufficient to make the master responsible *civiliter* if the wrongful act of the servant was committed in the business of the master although the servant in doing it departed from the instructions of the master. The rule is founded upon public policy and convenience. Every principal is bound to use due care in the conduct of his business. If the business is conducted by an agent or servant the obligation is not changed. The omission of such care by the latter is the omission of the master. . . . If he employs incompetent or unworthy agents it is his fault; and whether the injury of third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondet superior* applies provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him."

In *In Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 274, 7 Am. Rep. 448, where there was a mistaken ejection of a passenger, the court held that where the company has the right to authorize the use of force and their agents acting in the pursuit of his

whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of carriers' agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and, by the utmost care and diligence, protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of any one in the lawful enjoyment of the state's peace. To say the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it and motive for blowing it, in the indulgence of

their love of mischief or other evil motive, they separate themselves, in and by that act, and for that instant, from the company's service, is to refine beyond the line of safety and of sound reason. Public policy and safety require that the use of the steam whistle by those servants who are in charge of the locomotive, and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of those servants, so far as to charge the company with liability therefor. The rule propounded by the plaintiff in error, so far as it is sound, does not reach the case. In my opinion the judgment of the Circuit Court should be affirmed.

Pardee, Circuit Judge, being recused, this case was heard by Judges McCormick and Locke, who differing in opinion as to the law of the case, the judgment of the circuit court is affirmed by a divided court.

duty to them and under authority which they have given exceeds through zeal or impetuosity of temper the degree of force necessary and proper to accomplish the purpose, and injury or damage ensue, the master is responsible.

A street-railway company is liable for the act of its driver in forcibly throwing from the platform of the car a person who when the car is obstructing a crossing is attempting to pass over the platform for the purpose of avoiding the obstruction. *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480. In that case the court says if the act was a mistake committed in the course of the servant's employment, the company is liable and also if it was an abuse of authority conferred upon him, the same rule is applicable.

In an action by a newsboy to recover damages caused by being driven off from a street-car by the conductor, the defense was that the act was the malicious personal act of the conductor. The court said if the conductor in the discharge of his duty as manager of the car undertook to put the boy off, the law required him to act in a prudent manner and exercise due care for the safety of the boy, and if he failed to do so and in consequence the boy was injured, the master is liable. *North Chicago City R. Co. v. Gastka* (1889) 4 L. R. A. 481, 123 Ill. 618.

A railroad company is liable for the act of one employed to clean the cars and remove trespassers from them in breaking the hold of a boy upon the rail of the car while it is in motion, thereby injuring him. *Northwestern R. Co. v. Hack* (1872) 66 Ill. 238. In that case the court says it is true that the act of itself was not in the line of duty of any employé of the company, but the question is whether or not the act was done whilst in the discharge of his duty, not in the precise manner in which it was done, but was it his duty to require persons to leave the cars and prevent their remaining thereon.

A railroad company is liable for the excessive force with which a trespasser is ejected from its station. *Johnson v. Chicago, R. I. & P. R. Co.* (1889) 58 Iowa, 848.

A master who puts a servant in a place of trust or responsibility or commits to him the management of his business or the care of his property is justly held responsible when the servant through a lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. 27 L. R. A.

Cohen v. Dry Dock, R. B. & R. R. Co. (1877) 69 N. Y. 170.

If the removal of trespassers is not within the duties generally pertaining to the position filled by the servant the master will not be liable for his act because he is not acting in his capacity as servant.

Unless it is shown to be within the authority of a brakeman to remove trespassers from the cars the company is not liable for his willful act in kicking a boy from the train. *Texas & P. R. Co. v. Mother* (1896) 5 Tex. Civ. App. 87.

If a brakeman has no authority to remove trespassers from a train, the railroad company is not liable for his act, compelling a boy to leave a train while in motion, by reason of which the boy is injured. *Farber v. Missouri Pac. R. Co.* (1888) 82 Mo. App. 381.

To hold the master liable for the ejection of a trespasser from a moving train, the one who did it must be shown to have been acting within the scope of his employment. *Bess v. Chesapeake & O. R. Co.* (1891) 86 W. Va. 492.

A trespasser who seeks to hold a railroad company liable for wrongful expulsion from a train by a brakeman must show that the acts of the brakeman were within the scope of his authority. *Texas & P. R. Co. v. Mother* (1896) *supra*; *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 620; *Texas & P. R. Co. v. Black* (Tex.) June 18, 1894.

In *Planx v. Boston & A. R. Co.* (1882) 17 L. R. A. 337, 157 Mass. 377, the court in holding that a trespasser on a train suing for injuries caused by the fault of the brakeman in compelling him to get off when the train was in motion was precluded from recovery because of contributory negligence, says that we prefer to assume without deciding that it was a question of fact whether or not the brakeman, from his general employment, had authority to represent the company in ordering a trespasser to leave the train. "If he had the defendant is liable for his negligence or misconduct in regard to the time or manner of doing it."

So where a brakeman has no authority to remove trespassers a railroad company is not liable for the act of a brakeman on a freight train in throwing coal at boys trespassing on the train by reason of which one of them is caused to fall under the cars and receive an injury. *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418.

But where he has a railroad company is liable for the injuries caused by the act of its brakeman in driving a trespassing boy from the train by throwing coal at him, by reason of which he falls under

ARKANSAS SUPREME COURT.

HOUSTON, CENTRAL ARKANSAS &
NORTHERN R. CO., *Appl.*,

v.

Falls BOLLING, by Next Friend.

(.....Ark.....)

A railroad company is not liable for an injury to a child riding on a hand-car on invitation of its employes contrary to the rules and not in accordance with any custom acquiesced in by the officers of the company.

(July 14, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court for Drew County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. *Reversed.*

the car and loses a leg. *Lang v. New York, L. E. & W. R. Co.* (1889) 51 Hun, 603.

Other cases.

The master is liable for the tortious act of his servant engaged in his employment, though done willfully without orders, or even against orders. So the owner of a steamboat is liable for the acts of its officers in tortiously colliding with and sinking another boat. *Duggins v. Watson* (1854) 15 Ark. 118, 60 Am. Dec. 560.

A collecting agent of a credit company who goes to a house to make a collection, and failing to get the money assaults the occupant in attempting to take away the property for which the credit was given is acting within the scope of his employment so as to render his employer liable for his act, although he may never have been instructed to take such action, and although his act may have become willful before his purpose is accomplished. *O'Connell v. Samuel* (1894) 81 Hun, 867.

In holding the master liable for an attempt by his servant to bribe a witness the court said: "In this case the clerk had consigned to him the general and special duty of looking for and arranging the evidence in cases where the company was sued by persons injured. . . . His legal authority of course but extended to lawful acts. So it is true of all agencies as they are not appointed for the purpose of committing wrongs or the performance of illegal acts except in rare cases. . . . In this state . . . it has been repeatedly held that when acting in the scope of his duty acts of the servant not merely careless or negligent, but willful or malicious acts are embraced. . . . He was engaged in the performance of a duty for the company. He did the act as part of that duty although unauthorized. We are therefore of the opinion that he performed the illegal and unauthorized act while acting in and as a part of his employment, and we must hold the company responsible for his act." *Chicago City R. Co. v. McMahon* (1882) 108 Ill. 485, 42 Am. Rep. 29.

A willful act which will exempt a master from liability for the tort of his servant must be done outside of his duty and his master's business. *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597.

In *Gleadeil v. Thomson* (1874) 56 N. Y. 194, the carrier had placed the cargo on the wharf, where it was likely to be injured by rain. The owner went to the wharf with tarpaulins for the purpose of covering it, but the servants of the carrier took

Statement by **Hughes, J.:**

The appellee, a boy about four years old, while riding on a hand-car of appellant, had his hand crushed in the cogs by which it was operated, and for the injury recovered damages in this action in the sum of \$5,000, to reverse the judgment for which the appeal in this case was taken. The facts in the case are substantially as follows: Parkdale is the center of a section of defendant's railway in Ashley county, Ark. The section was about six miles long, and Parkdale was situated about the center. At Parkdale was located the railway company's section house, at which the laborers and foreman resided. On March 29, 1892, one Bolling was foreman of that section (No. 6), and had charge of all the work thereon. He lived at the section house at Parkdale, with his wife and child, Falls Bolling, who was at that time about

one of them away to cover the hatch of the vessel by reason of which the cargo was injured. The court held that although the act of the servants was wrongful and was not authorized by the master, yet he was liable for the injury. But in that case the fact of the carrier's duty to protect the cargo until delivered entered into the decision to some extent.

By the Georgia code, the master is liable for all torts of the servant in the prosecution and within the scope of his business, whether the same are done by negligence or are voluntary. *Lindsay v. Central R. & Bkg. Co.* (1872) 46 Ga. 447.

The owner of a race-horse is liable for the act of his jockey in willfully and intentionally fouling and injuring another horse in the race. *McKay v. Irvine* (1882) 11 Blas. 168.

The question is not whether the servant was negligent or willful but whether the act was done in the course of the servant's employment. The argument that when the servant acts willfully he *ipso facto* leaves the employment of the master for the moment or so long as his passion rages, is a specious fallacy. *Eckert v. St. Louis Transfer Co.* (1876) 2 Mo. App. 93.

The master is liable for the willful acts done in the course of the employment. *Garretsen v. Duernckel* (1872) 60 Mo. 104, 11 Am. Rep. 406.

The principal is civilly responsible in damages for the acts of his agent, whether negligently or willfully done in his employment, to the same extent as if the principal himself were the actual wrongdoer. *New Orleans, J. & G. N. R. Co. v. Bailey* (1866) 40 Miss. 386. In that case the court says: "If it be positively certain that somebody must suffer from the wrongful acts or neglect of those employes, as is urged, and that without the positive fault of their principal, upon whom should the calamity fall—upon him who trusted the wrongdoer for his own gain or upon the stranger? If idle capital in search of splendid investments must do its work by agents who 'it is positively certain' will prove negligent or abuse their trust, upon what principle of legal right or ethical rule can it demand of the public to bear the wrongs and injuries it originates?"

In *New Orleans, J. & G. N. R. Co. v. Allbritton* (1859) 33 Miss. 242, 75 Am. Dec. 98, with reference to railroad companies it is stated that the foundation of the rule upon this subject is that the agent is but an instrument. That one having authority over the actions of another—who, for his own benefit, places him in a condition to injure others by the

four years old, and who is the real plaintiff in this suit. On March 29, 1892, Section Foreman Bolling was very ill, and one Mike O'Connor, one of the regular section hands, was presumably acting as temporary foreman. The duties of these section hands were to keep the track of their section in repair, and do all things necessary to that end. Their working hours were from 7 o'clock A. M. to 6 o'clock P. M. each day, and, except in an emergency, the foreman and laborers were not required to be on the track outside of these hours. In order to enable this section crew to do its work, all the tools necessary were furnished them by the railway company, and among these tools was a hand-car. This hand-car was furnished them for the express purpose of transporting the section laborers, with the tools, implements, and materials, to and from the several places on the line of road within the section, wherever needed, and for no other purpose. Indeed, the rules and regulations of the defendant rail-

way company forbade the section foreman or any one of the section men allowing any one to ride on the hand-car except the laborers on the section. They were forbidden to use the hand-car except in their work, and the proofs show that the hand-car was never intended for, nor was it ever used for, the transportation of passengers. On the contrary, the use of the hand-car was, for this purpose, positively and affirmatively prohibited. The section foreman and his men had absolutely nothing to do with the transportation of passengers. On the contrary, they were forbidden to do such work, or to carry passengers on the hand-car or in any manner. The proof was clear and undisputed that Section Foreman Bolling had knowledge of these rules, and that he had repeatedly imparted his knowledge to O'Connor and his crew. On March 29, 1892, the section hands came in early from work,—between 5 and 6 o'clock—at the express orders of Bolling, for the purpose of taking two ladies on the hand-

exercise of the power conferred,—should be responsible for the abuse of that power by his agent, as if it were the act of himself, whether such abuse be the result of negligence or willfulness.

Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end which result in injury to another, the master is answerable for the consequence, regardless of the motives which induced the adoption of the means; even though the means employed were outside of his authority and against the express orders of the master. *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 300, 53 Am. Rep. 675.

The master is liable for a willful act done in the scope of the employment and bona fide for the furtherance of the master's business. *Aramsmith v. Temple* (1882) 11 Ill. App. 39.

The master is liable for willful acts done in the scope of the servant's business. *Lee v. Nelms* (1876) 57 Ga. 258.

Under the Georgia code making a railroad company liable for damages done by the running of its trains without reasonable care and for injuries done by the carelessness or improper conduct of the company or its agent, the company is liable for injuries caused by the improper use of the whistle, although the engineer acted from personal malice and revenge toward the injured person. *Georgia R. Co. v. Newsome* (1878) 60 Ga. 462.

Distinction between malice and willfulness.

After it became settled that mere willfulness would not take the servant out of his employment, a further distinction was made upon malice, and it was held that as soon as malice intervened the servant was no longer within his employment.

A railroad company is liable for the act of its brakeman in kicking a trespassing boy from the platform of a moving car, unless the brakeman was merely using his authority as a cover for accomplishing an independent and wrongful purpose of his own. *Hoffman v. New York Cent. & E. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 387.

If the servant under guise and cover of executing his master's orders and executing the authority conferred upon him, willfully and designedly for the purpose of accomplishing his own independent malicious or wicked purposes does an injury then the master is not liable. *Cohen v. Dry Dock, E. R. & B. R. Co.* (1877) 60 N. Y. 170.

Where an action was brought for driving de-

pendant's sheep on plaintiff's land it was found that the sheep were in charge of the herdsman who acted willfully in the matter, and the court said: "It was his duty to keep the sheep off from plaintiff's land and whether he negligently or willfully violated it, cannot shield defendant from liability for the damages done plaintiff so long as the act was within the course of the herder's employment. . . . I distinguish between the willful doing an act in such case and doing it maliciously. The former may imply that it was done through stubbornness and obstinacy, but not necessarily for an ulterior purpose, while the latter implies that it was done with an intent to injure. It was the duty of defendant to keep his sheep off from plaintiff's land. . . . If he employed ineffectual means he should be responsible unless he were prevented by means over which he had no control. *French v. Crosswell* (1886) 18 Or. 418.

A railroad company is liable for the act of its conductor in putting a trespasser off from the train in a careless, negligent, or reckless manner, but not for a willful, wanton, or malicious trespass on his part in so doing. *Pennsylvania Co. v. Toomey* (1879) 91 Pa. 255.

The owner of a street-car is not liable for the act of its driver in needlessly striking a boy with an iron bar for the purpose of driving him off from the car, because such act is not within the scope of his employment, but it may be liable in case the driver then negligently drives over the boy's foot causing injury. *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119.

A railroad company is liable for the act of a brakeman having authority to eject trespassers from the train in kicking a boy off for refusal to pay fare if his act was to subserve the interests of the company and not to accomplish his own ends. The court says: "Undoubtedly where the object of the servant—the end sought to be reached by him—is the intentional or malicious infliction of an injury upon the person of the trespasser, the company is not liable for the deed and the existence of malicious or intentional and willful design is a question of fact to be determined from all the circumstances of the case. If the end sought by the employé was the infliction of injury,—if the purpose he had in view when he kicked the plaintiff from the train was to injure him,—then the company is not liable because the act would be malicious and willful. But if the end sought was the ejection of the intruder,—if his purpose was devoid of evil design and merely to protect the interests

car up to Mr. Kinnebrew's residence, which was about a quarter of a mile beyond the end of the section, and off of section 6. Kinnebrew was very ill. His wife desired Mrs. Meyer to come and sit up with her. Mrs. Meyer had asked Mrs. Maxwell to go with her, and Mrs. Maxwell had consented. So, in order to get to Kinnebrew's, these ladies asked either Mr. Bolling or his wife or both to let the section men carry them up to that point on the hand-car. Mr. Bolling consented, and ordered the men to come in early from work, and carry the ladies to Kinnebrew's. One of the section men testified: "We were employed on that section (No. 6), and it was the duty of the hands on that section to see every part of the road on that section every day. When we got ready to start over the north end of the section, on said March 29, 1892, Falls Bolling, a child about four years old, began to cry, and wanted to go with us," etc. At 5:20 P. M. the section men quit work, and came into the section

house. On their arrival, Mrs. Bolling, who knew the purpose for which they had come in so early, sent word to the ladies that the men had come, and would take them at once. In the meantime Falls Bolling, the child of Mrs. and Mr. Bolling, and plaintiff in this case, was standing near the hand-car, crying to take a ride on it. Mike O'Connor—who, the testimony shows, was much attached to the child, and made a pet of it—asked its mother to let it go with them on the hand-car, and Mrs. Bolling consented, saying, "Take good care of my boy, and bring him back safe." To this O'Connor replied, apparently in a joking manner, "Yes, we will bring him back safe, or we will bring him back a corpse." Upon this reply being made, Mrs. Bolling then told the men "to leave her boy alone, and not to take him." The men made no reply to this, but simply laughed. As to whether or not this conversation actually took place the proof was contradictory. After this conversation, Mrs. Meyer and Mrs.

of his employer,—then, however careless or reckless the means employed, the company is liable." *Smith v. Louisville & N. R. Co.* (1893) (Ky.) 22 L. R. A. 72.

A railroad company cannot be held liable for the act of a brakeman in shoving a trespasser off from a moving train after he has failed to compel him to give a small sum for the privilege of remaining. *Illinois Cent. R. Co. v. Latham* (Miss.), Dec. 10, 1894. In that case the court said the question here is whether the brakeman in doing what he did, as he did it, was acting for the company, or in the accomplishment solely of his own independent, willful, malicious and wicked purposes, using his authority to eject passengers as a mere cover under which to extort money not for fare but for his own pocket.

It is not clear upon what principle a distinction can be made as to the purpose of abuse of authority. If a brakeman is given authority to remove trespassers and he uses his authority to extort perquisites for himself and causes injury in attempting to enforce his authority, the cause of the injury is such attempt and it can make no difference what brought about his determination to make the attempt. So long as he is acting under and in accordance with his authority his master is responsible and the more outrageous the abuse he is capable of the greater the responsibility of the master for his negligence in entrusting such a person with such authority.

The distinction upon malice has not, however, been universally adopted. In regard to the case of *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 123, 7 Am. Rep. 418, a case in which this distinction was made in case of assault on a passenger, a subsequent case says: "*Isaacs v. Third Ave. R. Co.* is not to be interpreted as holding that a defendant is to be exonerated from liability for injuries occasioned by the errors and negligence of his reckless, careless, or unskillful servant because the driver manifests at the same time that he is ruffianly and brutal. It is nowhere intimated that the employment of car drivers or conductors of this latter class would benefit their masters when questions of pecuniary responsibilities for injuries arise." *Cohen v. Dry Dock, E. R. & B. R. Co.* (1876) 8 Jones & S. 874.

The reasoning of *Wright v. Wilcox*, 19 Wend. 843, 32 Am. Dec. 597, that the law holds a willful act a departure from the master's business, seems to be inconclusive and unsatisfactory. The same act is held to be within the master's service when performed with a good motive and a departure from

this service in a new and independent business of the servant when performed with a bad motive. How can an act of an agent resulting in injury to another, which is within the line of his duty when carelessly or recklessly performed, be taken out of such business or employment when repeated under the same circumstances with a similar result by the mere fact that it was performed from a malicious motive. If a principal will employ an agent of reckless disposition, irascible temper or ungovernable passion, in a responsible position requiring intelligence, tact, and judgment, he should be answerable for his willful or malicious conduct as well as negligence, especially to those with whom he is brought in contact solely by means of such employment, and while directly engaged in performing his duties. And to the same extent as if he himself were possessed of the same temperament and while performing the services had committed in person the identical injury. *Rounds v. Delaware, L. & W. R. Co.* (1874) 3 Hun, 329.

The fact that the conduct of the servants constituting the negligence complained of was a violation of their duty to the employer or was needless, reckless, or wanton, does not exonerate the master. Reasonable care and fidelity in his employment is a part of the servant's engagement; and every act of negligence on his part is in some sense a violation of his duty to his master and a deviation from his authority, nevertheless while so deviating and disregarding their instructions, they are still doing their employer's work though not according to their instructions. *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11.

The true criterion of the master's liability should be whether or not the act of the agent was performed in the course of his employment or while he was engaged in the business of his employer. The act and not the manner in which it was performed, or the mental condition of the actor, should determine its relation to the service in which he is employed. If the act itself be in the line of his duty and result in injury to another, the principal should be responsible whether the agent was acting in good or bad faith, negligently or willfully. *Rounds v. Delaware, L. & W. R. Co.* (1874) 3 Hun, 329.

The liability of the master "is to be attributed to the fact that the master has placed the servant in a position where he may do unauthorized acts. On what principle of fairness could it be contended that either the error or folly of employing an in-

Maxwell (or about that time) arrived, and got upon the hand-car, the plaintiff being taken charge of by Mrs. Maxwell, who held him in her arms while riding on the hand-car up to Mr. Kinnebrew's. After Mrs. Maxwell, Mrs. Meyer, the plaintiff, Falls Bolling, and the crew had got themselves upon the hand-car, they then proceeded up the road a distance of about three and one half miles, to Kinnebrew's, and on arriving there the ladies got off the car, O'Connor going with them up to the house. After sitting for a while in social conversation with the ladies, O'Connor returned to the hand-car, and started back to the section house. On its way back it overtook one Grant Johnson, a negro man, walking along the track. The hand crew, in the goodness of their heart, stopped it, and took Johnson aboard. Up to this time the child, Falls Bolling, had been riding on the front of the car, and was safe and sound. But shortly after Johnson had boarded the car the little fellow commenced to grow sleepy, and

began to nod. O'Connor and the crew observed this, and fearing the child might fall off the front of the car, O'Connor moved him back from the front to the side, close to the standards where the cog wheels work. The car continued on its journey, but shortly thereafter the boy fell asleep, and in some unexplainable manner got his hand caught in the cog wheel and crushed. In the court below it was contended by appellant that Mike O'Connor and his section men were acting wholly and entirely without the scope of their employment when they undertook to carry these ladies, the plaintiff, or the colored man upon the hand-car; that it was not a part of defendant's duty to carry passengers, either for hire or for pleasure, upon hand-cars; that such means for the transportation of passengers was unknown to defendant's system of business; that it was contrary to the usual mode of doing business upon this, as well as other, railroads; that the rules and regulations of the railway company forbade

competent or careless servant should bring damage on a stranger while the master who put him in a position where he might commit the wrong should be free from all obligation to respond for the injury? The appointment of such improper person by the master induced the wrong and if it was committed in the course of his employment, that is while the relation of master and servant actually existed in the particular service in the discharge of which the servant was engaged, the master is held to answer. Every act is willful which is the result of volition. The principle proceeds upon the ground that the injury by reason of the willful act is to be attributed to the negligence and want of care of the master in the selection of an improper servant for a particular charge. *Redding v. South Carolina R. Co.* (1871) 3 S. C. N. S. 1, 16 Am. Rep. 681.

Exemplary damages.

While the subject of exemplary damages is not included in this note, yet some of the cases which apparently hold against a liability in case of malice in fact merely refuse to add exemplary damages because of such malice.

Thus a principal is not responsible for the malice, vexation, or wantonness of his agent in suing out garnishment proceedings unless he authorized or participated in it or subsequently ratified it. *Alabama State Land Co. v. Reed* (1891) 99 Ala. 19.

But from the authorities cited in that case the meaning of the court evidently is that the malice of the agent will not subject the master to exemplary damages, for the Alabama rule is that the principal is not liable for vindictive damages because of the malice of the agent. *Pollock v. Gantt* (1881) 69 Ala. 373, 44 Am. Rep. 519. While in *Jackson v. Smith* (1883) 75 Ala. 97, it is said the principal is liable if his agent maliciously sues out an attachment without legal cause for the actual damages done but cannot be made liable for exemplary damages unless he authorized the attachment.

In another case where the action was for negligence in allowing wires to become dangerous whereby plaintiff was injured, the court says: "If the action on the part of the persons employed by the telegraph company was conceived in a spirit of mischief or criminal indifference of civil obligations, and this was brought home to the managers of the company, or if the managers did not exercise proper care in the selection of the agents, or if they had reason to know or the means of being informed that they were not skillful, prudent, or

careful, then the jury can add exemplary damages." *Henning v. Western U. Teleg. Co.* (1890) 41 Fed. Rep. 364.

Malice as preventing defenses.

An interesting fact about this question of malice is that when approached from another direction it not only ceases to be a defense to the master but also aids an injured person in maintaining an action which his own negligence would otherwise bar. Cases of this class are numerous, but since most of them do not discuss the subject from the point of view of this note they are not collected here. As illustrations it may be stated that—

Willful or reckless misconduct by the employees of a railroad company may give a right of action to a trespasser injured on the railroad track, when he could not have had a remedy except for such willfulness or recklessness. *Wright v. Boston & A. R. Co.* (1896) 142 Mass. 296.

Recklessly and wantonly driving a street-car against a wire which a telegraph company is wrongfully stringing along the public street will prevent the fact that the injured person was injured in an unlawful act from being a defense to an action for the injury caused thereby. *Banks v. Highland Street R. Co.* (1884) 136 Mass. 485.

So maliciously running against a pleasure yacht sailing on the Lord's Day will prevent the fact that the owner of the yacht was violating the law from being a defense to an action for the injury. *Wallace v. Merrimack River Nav. & Exp. Co.* (1893) 134 Mass. 95, 45 Am. Rep. 301.

The very fact that the presence of malice benefits the injured person whenever the attention of the court is not called to the fact that the malice has taken the servant out of the scope of his employment shows the injustice of the latter rule and also shows that such rule has no place in the legal thought of this age unless placed there by the binding force of a precedent based upon a legal fiction which never should have had existence.

The application of the malice doctrine to drivers of horses.

Almost all the shades of distinction noted above are illustrated by cases in which injuries have been done by drivers of horses.

Willfulness relieves master.

The master is not liable for the injuries caused by the willful act of his servant in whipping up his horse for the purpose of throwing a boy who had attempted to get into the wagon. *Wright v. Wilcox* (1898) 19 Wend. 343, 38 Am. Dec. 507.

it; that no employé had authority, power, or right to involve the defendant in such a manner. Defendant further contended, and evidence was introduced to show, that the printed rules and regulations of the defendant company positively forbade the section foreman, or any and all of his section hands, from using the hand-cars in their possession for any other purpose than doing work upon the road.

Messrs. Dodge & Johnson, for appellant:

It was not the duty of the defendant's employés to carry plaintiff and these ladies upon this hand-car; their acts in so doing were voluntary on their part, as an accommodation

to the parties, and in direct and positive violation of the rules of the company; having done so it was outside the scope of any delegated and designated authority, and for the results of their action, the defendant was not answerable.

Gulf, C. & S. F. R. Co. v. Dawkins, 77 Tex. 228; *Files v. Boston & A. R. Co.* 149 Mass 205; *Powers v. Boston & M. R. Co.* 153 Mass 191; *Chicago, M. & St. P. R. Co. v. West*, 125 Ill. 820; *Morris v. Brown*, 111 N. Y. 828; *Keating v. Michigan Cent. R. Co.* 97 Mich. 154; *Willie v. State Road Bridge Co.* 63 Mich. 644; 1 Parsons, Cont. 102; Cooley, Torts, 538; 1 Addison, Torts, § 550, note 1; 2 Hilliard, Torts, 482; Story, Ag. § 452; Paley, Principal & Agent, 296-298; Smith,

In that case the court says the dividing line is the willfulness of the act. The line where the master's liability shall terminate must be placed somewhere, and the acquiescence of Westminster Hall for many years in the rule laid down by Lord Kenyon in *McManus v. Crickett* (1800) 1 East, 106, is an evidence of the common law not to be resisted especially as it will not be found to conflict with any general principle of that law.

The master is not liable if his servant in charge of a horse and carriage willfully runs over a person in the highway, but is liable if he does so recklessly. *Cleveland v. Newsom* (1880) 45 Mich. 62.

A street railway company is not liable for the willful act of its driver in running upon a traveler upon the highway. *Whitaker v. Eighth Ave. R. Co.* (1878) 61 N. Y. 295, rev'g 5 Robt. 650.

A street-car company is not liable for the willful act of its driver in running against a vehicle which is obstructing the track. *Wood v. Detroit City Street R. Co.* (1884) 53 Mich. 402, 50 Am. Rep. 256.

The master is not liable for his servant's willfully driving against a person and injuring him. *Cleveland v. Newsom*, *supra*.

Case will not lie against the master if the servant willfully drives against a third person causing injury. *Savignac v. Roome* (1795) 6 T. R. 125.

Case will not lie against a master whose servant willfully drives against the carriage of another person, whereby it is broken. *Barnes v. Hurd* (1814) 11 Mass. 57.

Where plaintiff's and defendant's carriages became entangled and defendant's coachman struck plaintiff's horses with a whip, causing them to spring forward and injure plaintiff's carriage, the court says: "If a servant driving a carriage in order to effect some purpose of his own wantonly strikes the horses of another person, and produces the accident, the master will not be liable, but if in order to perform the master's orders he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in performance of the servant's employment. *Croft v. Allison* (1831) 4 Barn. & Ald. 580.

Willfulness to effect object of master.

If the driver of an omnibus turns across the path of a rival so as to obstruct the road, and injury results, the master will be liable although the act was willfully done, if it was done for the purpose of advancing the master's interests. *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 523, 32 L. J. Exch. 34, 11 Week. Rep. 147, 7 L. T. N. S. 641.

Where an injury was caused by the driver of a runaway team intentionally guiding them against a wagon to stop them, the court held that although he did so to save himself from peril, the master would be liable if the runaway was caused by the 27 L. R. A.

servant's negligence, and the act of stopping them in that manner was a prudent one under the circumstances and one calculated to be to the pecuniary advantage of the master. *Wolfe v. Mersereau* (1855) 4 Duer, 473.

In a case brought to recover for injuries inflicted by defendant's servant driving an ice wagon against plaintiff's carriage, the court says, for the acts of the servant within the general scope of his employment while engaged in his master's business and done with a view to the furtherance of that business and the master's interests, the master will be responsible whether the act be done negligently, wantonly, or even willfully. The acts for which the master will not be liable are such as were not done in the course of the service and were not such as the servant intended and believed for the interest of the master. *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543.

Malice.

In a case in which the servant in delivering bread from house to house drove his horse upon the sidewalk and when plaintiff remonstrated drove against plaintiff and injured him, the court said: "The rule may be stated thus: The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by wanton or reckless purpose to accomplish the master's business in an unlawful manner." *Howe v. Newmarb* (1866) 12 Allen, 49.

But other courts have taken a different view of this question.

If a coachman sees his enemy sitting on the box of another carriage driving along the same highway and he so guides his own team as to bring the carriages into collision whereby injury is done, the master is liable. *McClung v. Dearborne* (1890) 9 L. R. A. 304, 134 Pa. 396.

Mast. & S. 322; *Baker v. Kinsey*, 88 Cal. 681, 99 Am. Dec. 438; *Wright v. Wilcox*, 19 Wend. 343, 82 Am. Dec. 507; *Hoar v. Maine Cent. R. Co.* 70 Me. 65, 35 Am. Rep. 299; *Gardner v. New Haven & N. Co.* 51 Conn. 150, 60 Am. Rep. 12; *Chicago & A. R. Co. v. Michie*, 83 Ill. 429.

Where there is a division of the freight and passenger business of a railroad, the common presumption is, that a person found on a freight train is not legally a passenger.

Hobbs v. Texas & P. R. Co. 49 Ark. 860; *Jones v. St. Louis, N. & P. Packet Co.* 43 Mo. App. 410; *Chicago, M. & St. P. R. Co. v. West, supra*.

The act of a servant of a railway company in inviting a passenger to ride on a "hand-

car" cannot be assumed to be the company's act, unless the servant's authority to thus use the hand-car is shown.

International & G. N. R. Co. v. Cock, 68 Tex. 713; *International & G. N. R. Co. v. Prince*, 77 Tex. 560.

A railway company owes no duty to an intruder upon one of its timber trains, upon which passengers are not carried, except not to wantonly and willfully injure him.

Illinois Cent. R. Co. v. Meacham, 91 Tenn. 428; *Snyder v. Natchez, R. R. & T. R. Co.* 42 La. Ann. 302; *St. Louis, I. M. & S. R. Co. v. Ledbetter*, 45 Ark. 250; *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 502; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 264.

A master is liable for the act of his servant in whipping up his horse after the wagon is caught in a wire which a telegraph lineman is engaged in stringing and injuring the lineman, although he was notified to stop after the wagon was caught and refused to do so. *Clark v. Koehler* (1887) 46 Hun, 536.

Under the Illinois statute the owner of a stage-coach is liable for the willful acts of his servant the driver. *Fuller v. Voght* (1851) 13 Ill. 277.

In *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, where it was contended that the liability of the master for willful acts of his servant which had been established in case of the relation of passenger and carrier did not extend to the case of driving on the highway, the court says: "Two teams upon the highway each with a sleigh or vehicle coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment then such duty rests upon the master as well as the servant. The employer in such case being responsible for the performance of such duty by his delegated agency can no more escape liability for such failure when it occurs through the agent's gross negligence or willful misconduct than he can when it is by reason of his agent's want of ordinary care."

Additional damages.

If there is wantonness or mischief causing additional damages in the injurious act of a servant within the scope of his employment as where his servant drives against the carriage of another person wantonly as well as carelessly and negligently, the conduct will enhance the damages against the master. *Hawes v. Knowles* (1874) 114 Mass. 518, 19 Am. Rep. 383.

Arrest and malicious prosecution.

The master is liable for the act of his servant in unlawfully arresting a person whom it is the master's duty to protect. See note to *Mulligan v. Now York & E. R. R. Co.* (1862) (N. Y.) 14 L. R. A. 791.

In *Mall v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448, it was held that the owner of a store was not liable for an arrest of a suspected shoplifter by his superintendent, but in the later case of *Mallach v. Ridley* (1888) 15 N. Y. S. R. 4, a lower New York court held that the principles of *Mall v. Lord* had been departed from in later cases and that the proprietor of a store owed a duty to customers which would render him liable for a false arrest of them by his servants.

An express company is liable for the act of its agent in causing the arrest of one from whom he 27 L. R. A.

is attempting to collect charges on property taken without payment of charges, although it would not be if he was acting in the interests of the public in causing the arrest. *Cameron v. Pacific Exp. Co.* (1892) 48 Mo. App. 99.

A railroad company is liable for the act of its agent in making an arrest when he is acting within the scope of his employment. *Illinois Cent. R. Co. v. King* (1892) 69 Miss. 852.

5 *Mews' Digest*, p. 267, cites a case (*VandenEynde v. Ulster R. Co.* 5 Ir. C. L. Rep. 6, affirmed, 5 Ir. C. L. Rep. 328), in which the master was held liable for the act of a ticket agent and station master in arresting and searching one who went to the ticket office to purchase a ticket, because they thought he had stolen one.

A person is liable for the act of his attorney in unlawfully suing out process and causing the arrest of a person against whom suit is brought. *Collett v. Foster* (1857) 8 Hurlst. & N. 356, 26 L. J. Exch. 412.

It is within the scope of the employment of a salesman to cause the arrest and search of a person whom he believes to have stolen property from his custody. *Staples v. Schmid* (1893) 19 L. R. A. 824, 18 R. I. 207.

In that case the court in commenting upon the case of *Mall v. Lord, supra*, says: "It is true the master would have had no right to arrest and search an innocent person. But it is equally true that he would have had the right to detain a thief. The case therefore was one where the act aside from any excessive force might be lawful or unlawful according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact and where his duty to his master depended upon his decision. The decision was his and the act was one intended by him for the benefit of his master and which his duty required, if the fact was as supposed, hence as to third persons it was his master's act. The criterion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed.

Where the porter at a railroad station got into an altercation with certain persons who were there waiting for the train, and finally gave them and plaintiff, who was also at the station, into custody under the charge of obstructing and assaulting him in the discharge of his duty, the court ruled that he acted without the slightest authority and that the railroad company was not liable. *Lumsden v. London & S. W. R. Co.* (1897) 16 L. T. N. S. 609.

In a case where a bank was held not liable for the arrest of a person to whom the runner had been sent to collect a draft with whom a police officer had gone to protect him, who made the arrest at his request, the court said that in order to make the

To render the master liable for the acts of the servant the servant must be at the time employed in the business of the master.

Whart. Neg. §§ 157, 162, 168; Whittaker's Smith, Neg. p. 154, note, pp. 155, 156, 162, 163; 2 Thomp. Neg. p. 885, and cases cited; *N. Y. T. & M. R. Co. v. Sutherland*, 8 Willson, Civ. Cas. (Tex.) § 140, p. 177; *Herlihy v. Smith*, 116 Mass. 265; *Bard v. Yohn*, 26 Pa. 482; *Sheridan v. Charlich*, 4 Daly, 838; *Morier v. St. Paul, M. & M. R. Co.* 81 Minn. 351, 47 Am. Rep. 793; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 836; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, L. R. 3 O. P. Div. 357.

Though the servant be at the time in the

general course of his employment, yet if the particular act complained of is not a part of the duty which the servant is employed to perform, and has not been authorized by the master, the latter is not liable.

Whart. Neg. § 177; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Robertson v. New York & H. R. Co.* 22 Barb. 91; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Towanda Coal Co. v. Heeman*, 86 Pa. 418; *Higgins v. Chesapeake & D. Canal Co.* 3 Harr. (Del.) 411; *Chicago & A. R. Co. v. Michie*, 88 Ill. 437; *Lygo v. Newbold*, 9 Exch. 802.

bank liable there must have been express precedent authority or subsequent ratification. *National Bank of Commerce of Baltimore v. Baker* (1898) 77 Md. 462.

The principal will not be liable for additional damages because of the malice of his agent in suing out an attachment although he may be liable to make compensation for the bad judgment of his agent in suing it out wrongfully. *Wallace v. Finberg* (1876) 46 Tex. 35.

Assault.

In this case also the master is liable for an assault upon a person whom it is his duty to protect. See note to *Davis v. Houghtlin* (1891) (Neb.) 14 L. R. A. 737. See also *Ejection from cars*, *supra*.

The master is liable for an assault by his servant in guarding an orchard in charge of which he has been placed. *Ward v. Young* (1884) 42 Ark. 553.

The master is responsible for the assault of the foreman of his shop having authority to discharge employes, in attempting to remove from the premises an employe, whom he has discharged. *Bogahn v. Moore Mfg. & Foundry Co.* (1901) 79 Wis. 573.

A master who sends his servant to remove certain furniture from a house is liable for a willful assault committed by the servant in executing the order. *Levi v. Brooks* (1877) 121 Mass. 501.

One who employs a servant to aid him in maintaining forcible possession of property, is liable for an unlawful assault committed by the servant while so engaged, although it is contrary to his employer's orders. *Barden v. Felch* (1872) 109 Mass. 154.

Taking a garment off from a woman who had gone into a store to purchase it, because the employe thought she was a spy from a rival house is within the scope of their employment so as to render their employer liable for the assault. *Geraty v. Stern* (1886) 30 Hun, 426.

A master who sends his servant to get an article of furniture belonging to the master but which is in possession of a third person is liable for an assault committed by the servant upon such third person in getting possession of it, although he had given instructions not to use force and violence. *McClung v. Dearborne* (1890) 8 L. R. A. 204, 134 Pa. 386.

The proprietor of a hotel is liable for the injuries caused by an assault upon a person who in a state of intoxication has taken possession of one of the rooms, which is made in the endeavor by the clerk and porter to eject him therefrom. *Wade v. Thayer* (1871) 40 Cal. 573.

But an inn-keeper is not liable for an injury inflicted by his servant upon a guest during a personal altercation between them about a matter not within the scope of the servant's employment. *Curtis v. Dinneen* (1896) 4 Dak. 245.

A master is not liable for an assault by its servant I R. A.

ant unless at the time of making it he was acting within the scope of his employment. *McCann v. Tillinghast* (1865) 140 Mass. 337.

A master is not liable for an assault by his servant entirely outside of the scope of his employment. *Coffield v. McCabe* (Minn.) July 13, 1894.

A store keeper by reason of the invitation to the public to come to his store and trade undertakes to keep the premises safe and will be liable in case he permits cash boys to acquire the habit of snapping pins about the store in consequence of which a customer is hit in the eye and injured. *Swinarton v. Le Boutillier* (1894) 81 Abb. N. C. 231.

But there is an early English case which is not in harmony with the principles of later cases which held that where a person entered a shop to purchase some goods that are displayed in the window and the clerk refused to let him have them at the prices marked and after some words committed an assault on him, the court held that the owner of the shop was not liable for the assault, not having been present at the time. *Timothy v. Simpson* (1884) 6 Car. & P. 490, 1 Crompt. M. & R. 797, 5 Tyrw. 244.

In the following cases it would seem that the scope of the servant's employment covered the act.

The person in charge of a freight house is not acting within the scope of his authority in making an assault on a person who comes to the freight house to get a consignment of goods. *Hudson v. Missouri, K. & T. R. Co.* (1876) 16 Kan. 470.

A sleeping-car company is not liable for the act of its porter in assaulting and throwing out of the car one who goes to the door to ask permission to wash his hands. *Williams v. Pullman Palace Car Co.* (1898) 40 La. Ann. 57.

Where the lock-tender of a canal, whose duty was to open and close the locks and receive tolls, assaulted a boatman, it was held that he was not acting within the scope of his employment, and the master was not liable for his act. *Ware v. Baratania & L. Canal Co.* (1840) 15 La. 189, 35 Am. Dec. 189.

A railroad company who has stationed an agent at the entrance of cars to prevent persons entering who have not procured tickets, is not liable for an assault and battery committed by the agent upon one who persisted in entering the car without a ticket. *Priest v. Hudson River R. Co.* (1875) 65 N. Y. 599.

It is not within the scope of the employment of the foreman of a warehouse whose duty is to deliver property to consignees when they come for it, to assault a person for refusing to take a package because it is in bad condition and the master will not be liable for his act in so doing. *Meehan v. Morewood* (1899) 53 Hun, 566.

The owner of a boat is not liable for the act of a mate in striking an employe to compel him to work faster in carrying freight on board. *Smith v. Mem-*

The affirmative evidence of appellant showing that the superior officers of the section foreman had no notice, information, or knowledge of the violation of the rule forbidding the carriage of third parties on the hand-car, and there being no evidence to the contrary, and such violation not being of such nature as to make it known to such superior officers, and there being nothing in the character of a hand-car, or the work which a section foreman was employed to perform, to induce people to believe that it was intended by appellant for the carriage of passengers, especially to points beyond the section to which it belonged, the mere fact of such disregard of the rule by the section foreman is not suffi-

cient to show that the rule had been waived by the company, or that the foreman had authority to carry the plaintiff.

Prince v. International & G. N. R. Co. 64 Tex. 144; *Hull v. East Line & R. R. Co.* 66 Tex. 619; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 882, 15 Am. Rep. 518; *Robertson v. New York & E. R. Co.* 23 Barb. 91.

Messrs. Wells & Williamson and Dan. W. Jones & McCain, for appellee:

We do not contend that a grown person riding upon a hand-car as a passenger could recover for any injury he might sustain while so riding.

Of course the child could not be guilty of negligence, and the negligence of the mother

phis & A. C. Packet Co. (Tenn.) June 5, 1886; *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 411.

But the mere fact that a trespasser on a train is assaulted by a servant of the company is not sufficient to charge the company with liability unless it is shown that at the time of the assault the servant was acting within the scope of his employment. *Smith v. Louisville, E. & St. L. R. Co.* (1890) 124 Ind. 394.

Striking or whipping slave.

The master is not liable for the act of his overseer in so cruelly whipping a slave that death results. *Harris v. Nicholas* (1817) 5 Munf. 463.

A master is not liable for the death of a negro whom he has directed his overseer to whip until he is humbled, if he maliciously kills him, but he is liable if he negligently or carelessly punishes him until he dies. *Puryear v. Thompson* (1844) 5 Humph. 397.

A master is not responsible for the act of his overseer whom he has sent to call a slave belonging to a third person, in striking the slave on the head so as to inflict a mortal wound, there being nothing to show that he anticipated that such an act would be necessary. *McCoy v. McKowen* (1853) 28 Miss. 497, 59 Am. Dec. 264.

Shooting.

A railroad company is liable for the shooting of a passenger by a conductor in attempting to expel him from the train, although at the time of the shooting the trespasser was obeying the conductor's orders and there was no further necessity of any act of violence to effect the expulsion. *Southern Pac. R. Co. v. Kennedy* (Tex.) Dec. 13, 1894.

A bridge company is liable for the act of a watchman charged with keeping trespassers off from the bridge who shoots a person whom he is attempting to put off. *Haehl v. Wabash R. Co.* (1896) 119 Mo. 326.

In a case where a brakeman who had been directed to remove a trespasser from a train, fired a pistol at him causing him to fall under the car, the court held that he could recover for the reckless and willful act of the brakeman within the scope of his authority. *Mobile & O. R. Co. v. Seales* (1896) 100 Ala. 368.

A railroad company is liable for the act of its watchman in shooting a person whom he suspects of having attempted to break into a car, although in so doing he may exceed his authority. *St. Louis, L. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381. In that case the court says the better opinion seems to be, that the master is liable for the willful and malicious acts of the servant if they were performed about the master's business in the course of the servant's employment.

Persons who employ a watchman to guard a building are not liable for his act in shooting a person who is running away from it. *Golden v. Newbrand* (1879) 53 Iowa, 59, 35 Am. Rep. 237.

A railroad company is not liable for the act of its conductor in shooting a man whom he supposes has broken into one of the cars for the purpose of stealing from it. *Candiff v. Louisville, N. O. & T. R. Co.* (1890) 42 La. Ann. 477.

A master who employs a person to guard feed is not liable for his act in shooting another person lawfully on the premises while attempting to seize and detain him. *Davis v. Houghtelin* (1891) 14 L. R. A. 787, 33 Neb. 582.

The master is not liable for the shooting of a person where the servant does the act in attempting to maintain unlawful possession of land. *Sagers v. Nuckolls* (1896) 8 Colo. App. 95.

So where a servant engaged to aid in effecting a forcible entry upon certain real estate shot and killed a person resisting the entry, the court in holding that if the shot was fired with a premeditated design to effect the death then defendant would not be liable unless he directed or authorized the firing, said: "The principal putting the others in motion is answerable for all the necessary or legal and natural consequences that ensue, such as might in the ordinary and natural course of events follow. To this extent he must be regarded as intending all the consequences of the proceeding instituted and carried on by him. The acts of the agent are his acts. The law holds that he ought to have foreseen whatever results naturally or necessarily follow from his unlawful act and he will be liable for all that is done by his agents in furtherance of the general design, for acts within the general scope of the design or which legitimately or naturally result from the purpose. But the principal is not liable for the malicious and willful act of the servant done without his direction or authority," and it was held that the willful killing of a person could not be regarded as within the intention of the undertaking. *Fraser v. Freeman* (1871) 43 N. Y. 568, 8 Am. Rep. 740.

In the lower court in which it appeared that defendant had invited the servant to go in with him and fight it out, and that defendant knew that the servant was armed, the court says: "If a person therefore asks another already in his service to assist him and to do it by fighting an adversary in order to accomplish some purpose though lawful in itself and connected with the services, he must be responsible for the act of the servant because he has enlisted him to commit acts which otherwise would be held to be willful and without the line of duty or the service for which he was employed." *Fraser v. Freeman* (1870) 56 Barb. 234.

It is difficult to understand how that decision by the court of appeals can be justified.

Distinction between trespass and case.

Much confusion has been thrown around this question of liability for willful acts by the attempt to maintain the distinction between trespass and case. Cases which decided nothing more than that

could not be imputed to the child. The doctrine of imputed negligence has been entirely exploded.

Bishop, Non-Cont. L. 582; *Chicago City R. Co. v. Wilcox*, 21 L. R. A. 76, 188 Ill. 870; *Newman v. Phillipsburg Horse Car R. Co.* 8 L. R. A. 842, 52 N. J. L. 446; Chase, Torts, 231.

In case of an injury to a child, two causes of action arise—one in favor of the infant for his personal injuries, and one in favor of the parent for losses suffered by him or her.

Sibley v. Ratliffe, 60 Ark. 480.

Whether the father's action would have been barred by the negligence of the mother we need not discuss. It is certain that this did not bar the child.

A child of tender years, having no discre-

tion, must be supposed to be riding *in invitum*. When taken aboard a hand-car he is in no sense a passenger. If an engineer or conductor should tie a man and by sheer physical force put him aboard the engine or the coach of a passenger train, and carry him against his will, could the victim in such case be called a passenger?

If while being carried such a person were injured, he would be entitled to his redress, but he would not sue as a passenger.

Appellee's case is the ordinary one of a person injured by a dangerous piece of machinery, where the injury is caused by the negligence of those having the machinery in charge.

The "turn-table" cases furnish an analogy.

trespass was not the proper form of action have been subsequently cited as holding that no action would lie.

In *McManus v. Crickett* (1800) 1 East, 106, it was held that if the servant willfully drives against a third person and injures him, the master is not liable in trespass. The court says that the servant by willfully driving against plaintiff without his master's consent gains a special property for the time and so for that purpose the vehicle was the servant's. The language of that case is broad enough to hold that there is no liability in any form of action, but the case in reality seems to have turned upon the distinction between trespass and case.

Where defendant had instructed his servant to deposit some rubbish near but not to let it go against plaintiff's wall and by reason of the character of the rubbish some of it did go against the wall, the defendant was held liable. Bailey, J., said: "If in execution of the order it was the necessary or natural consequence of the act ordered to be done, that the rubbish should go against the wall, the master is answerable in trespass." Little-dale, J., said: "Where a servant does work by order of his master and the latter imposes a restriction in the course of executing his order, which it is difficult for the servant to comply with, and the servant in executing the order breaks through the restriction, the master is liable in trespass. But if the injury arises from want of ordinary care in the servant, the master will only be liable in case." *Gregory v. Piper* (1839) 9 Barn. & C. 591, 4 Mann. & R. 500.

In *McLaughlin v. Pryor* (1842) 4 Mann. & G. 53, 4 Scott, N. R. 655, Car. & M. 364, it is said that a servant cannot make his master a trespasser against his will. But in that case the master sat upon the box of the carriage and saw the postboys attempt to force their way into a line of carriages without remonstrance, and he was held liable in trespass for the injury done by them.

As to liability for acts done in the presence of the master generally, see I.

A landlord is not liable in trespass for the act of the bailiff in wrongfully seizing property for rent unless he authorized or ratifies the act. *Freeman v. Roher* (1849) 13 Q. B. 790, 18 L. J. Q. B. 340, 18 Jur. 881.

If a servant is commanded to pull down a little wooden house, in which plaintiff was and would not come out, and the servant is told to take care not to harm plaintiff, and if in pulling down the house the plaintiff is wounded, the master is not liable in trespass. *Kington v. Booth* (1895) Skin. 221.

Trespass will not lie against a master for the acts of his servant in cutting timber on the land of a third person without the consent or approbation

of the master and contrary to his express directions, as where the servant was sent to cut timber on land adjoining that where the trespass was committed. *Blackburn v. Baker* (1840) 1 Ala. 173.

Trespass will not lie against a railroad company for the killing of stock on the track by the negligence of persons in charge of the train. *Selma R. & D. Co. v. Webb* (1873) 49 Ala. 240.

A master cannot be held liable in trespass for an act committed by his servant in the ordinary course of his business unless the act was done by his authority or command or he assented to it or it was a necessary incident to the discharge of the business which the servant was set to do. *Fergusons v. Terry* (1840) 1 B. Mon. 96.

A railroad company is not liable in trespass for the act of its servant in running an engine over a wagon at a highway crossing. *Philadelphia, G. & N. R. Co. v. Wilt* (1839) 4 Whart. 143.

Trespass will not lie against the master for the act of his servant. *Yerger v. Warren* (1858) 31 Pa. 319; *Lindsay v. Griffin* (1853) 22 Ala. 629.

Trespass will not lie against the master for the acts of his servants in driving cattle out of a field of which acts he was ignorant. *Lindsay v. Griffin* (1853) 22 Ala. 630.

Case and not trespass is the proper form of action against the master for the acts of his agent. *Illinois Cent. R. Co. v. Reed* (1856) 17 Ill. 562.

Case and not trespass is the proper action against the master for an injury caused by the negligent driving of his servant. *Morley v. Galsford* (1796) 3 H. Bl. 442.

If the servant in the performance of the master's work uses the property of another and injures it, the master is not liable in trespass unless he directed the servant to use the property. *Gordon v. Rolt* (1849) 7 Dowl. & L. 87, 4 Exch. 365, 18 L. J. Exch. 432. In that case the court makes a distinction between trespass and case and during the argument says: "If your servant is driving your cart for you, he is engaged in an occupation for your benefit, yet if he were to run over a man you would not be liable in trespass but case, unless you gave the order from which the accident resulted."

In *Bath v. Caton* (1877) 37 Mich. 199, in which servants had ignorantly committed a trespass because they had not been instructed as to the true boundaries of the land on which they were at work, the court says: Conceding that the negligence would render the one failing to give the information liable in point of law for the damage, a proposition not free from question, still his liability will be in case for the negligence and not in trespass for the act of force committed by others. The damage by the trespassers might give the measure of the amount recoverable of him but his being liable through his neglect alone for the damage consequent on the trespass of others could not

In *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745, the court held that a railroad company was liable for injuries suffered by an infant while playing on a turn-table negligently left unfastened.

See also *Barrett v. Southern Pac. R. Co.* 91 Cal. 296.

So far from the appellee being a passenger, his rights are precisely the same as if he had been hurt by the car without being aboard of it.

The true test of the master's liability is that laid down by Blackstone, bk. 1, p. 431, "The damage must be done while he (the servant) is actually employed in the master's service."

Philadelphia & R. R. Co. v. Derby, 55 U.

S. 14 How. 468, 14 L. ed. 502; *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440; *Ward v. Young*, 42 Ark. 558; *Cooley, Torts*, § 538; *Ritchie v. Walker*, 63 Conn. 155; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11.

In cases of injury done by servants in the performance of their master's business, it can never be a matter of any interest or importance to know what private instructions they had as to how they should or should not conduct themselves in their business.

Wood, *Maat. & S.* § 283, *et seq.*

Hughes, J., delivered the opinion of the court:

confound the ground of his liability with that of theirs. His wrong would not be theirs. His non-feasance, his mere omission to keep others from future trespass would be distinct from their act of trespass and not of the same actionable nature. The fact of his being liable will not make the direct act of force of the workman his direct act of force and hence his trespass.

In *Thames S. B. Co. v. Housatonic R. Co.* (1855) 24 Conn. 40, 63 Am. Dec. 154, the watchman on a wharf cut loose a steamboat which had taken fire and let it drift away and consume, whereas it might have been saved if he had not done so. Trespass was brought against the owners of the wharf and the court after arguing the presumption that the act was not within the scope of the servant's business said: "The principle that subjects a master for the tortious act of the servant done in the performance of the master's business and within the scope of the general authority conferred, is the same as that which subjects him for the act of his servant done by his express direction given at the time . . . the master should be responsible for the acts of the agent to the same extent that he would be if he personally committed the wrong. But the remedies applicable to these several injuries are entirely different. In the former case he is liable only in an action on the case founded upon the negligence of the servant in the performance of the master's lawful business. Whereas in the latter case he is liable in an action of trespass caused by the act of the servant. But his liability to be sued in trespass does not rest at all upon the relationship of master and servant which exists, but upon the fact that the act complained of was done by his express direction and command and so in reality as well as in law is his own act, though done through the instrumentality of another. A man should not be made a trespasser against his will, though he may be made liable in an action on the case for the negligence of the servants while engaged in the business of the master, however contrary to the master's wishes such negligence may be; and the reason is because he who is damaged ought to be recompensed and a man must so use his own as to do no injury to another, and where one or two innocent persons must suffer it is the more reasonable that he should suffer whose act of employing an unskillful or negligent servant was the cause of the injury, than that the other who has been wholly in the right should be compelled to bear the loss brought upon him through another's want of care in not attending to his own business, and in entrusting it to the carelessness of his servant." And it was held that in that case trespass would not lie.

In Vermont it is held that the master is liable in trespass for the negligent act of his servant which constitutes a trespass. *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680.

27 L. R. A.

V. WHEN THE RESULT OF ABUSE OF AUTHORITY WILL BE SERIOUS OR THE TEMPTATION TO ABUSE IS STRONG.

There have always been cases in which the question of the servant's authority has been ignored and the liability of the principal placed on its true ground, that is his duty to prevent injury to third persons by the use or abuse of a commission which he has given to another to act for him. Such is the case of newspaper publication of libels. In such case the employer must make compensation for injury done regardless of the character of the employé's act. See note to *State v. Mason* (1894) (Or.) 26 L. R. A. 770.

So in other cases.

The master is liable for the publication by his agent of a libel. *Pollasky v. Minchener* (1890) 9 L. R. A. 102, 81 Mich. 230.

A master is responsible for the acts of his agent in circulating slanders among customers about a business rival, which was directly within the line of the agent's business, whether the acts were done negligently, wantonly, or even willfully. *Buffalo Lubricating Oil Co. Limited v. Standard Oil Co. of New York* (1898) 8 N. Y. S. R. 450.

One who writes a libel and employs another to translate it into another language in which it is published, is liable for the act of the latter. *Wilson v. Noonan* (1871) 27 Wis. 568.

But in *Henry v. Pittsburgh & L. E. R. Co.* (1891) 130 Pa. 239, it is intimated that a railroad company will not be liable for a libel on one of its employées published by its superintendent.

So an express company is not liable in damages for a libel written by its local agent in regard to a matter over which he had no authority. *Southern Exp. Co. v. Fitzner* (1892) 59 Miss. 551, 42 Am. Rep. 370.

So in the case of the sale of food and drugs, the master is responsible for injury done by impure articles furnished by his clerk. See note to *Craft v. Parker* (1893) (Mich.) 21 L. R. A. 139.

A druggist is liable for the negligent act of his clerk in putting wrong labels on a poisonous medicine which has been put up by him, by reason of which injury is done to a customer. *Thomas v. Winchester* (1852) 6 N. Y. 397, 67 Am. Dec. 455.

The master is liable for the neglect of his servant to comply with the statute requiring poisons sold by druggists to be labeled. *Osborne v. McMasters* (1890) 40 Minn. 102.

The courts have from time to time placed the liability directly upon this ground. See *supra*, IV. b, *Railroad cases*; IV. e; subd. *Servant in charge of horse*, under IV. b, and IV. h.

In a case where a railroad company was held liable for the action of its section foreman in dumping dirt on the house of a third person, which was located partly on the company's right of way, the court says: "Where a master appoints a ser-

In *Flower v. Pennsylvania R. Co.*, 69 Pa. 210, 8 Am. Rep. 251, the facts were as follows: A train of defendant, coming into the city, the engine, tender, and one car were detached from the remainder, and were, under the charge of the fireman in the engineer's place, sent to a water station belonging to the defendants. At the station, the fireman asked a boy, ten years old, standing there, to turn on the water. While he was climbing the tender to put in the hose, the remainder of the train came down with their ordinary force, and struck the car attached to the engine; the jar threw the boy under the wheels, and he was killed. In an action by the parents for his death it was held that, it not being in the scope of the engineer's or fireman's employ-

ment to ask any one to come on the engine, the defendants were not liable; that the boy, in climbing on the tender at the request of the fireman, did not come within the protection of the defendants, and they therefore owed no duty to him. The appeal in this case was before *Justices Agnew, Sharswood, and Williams*. Judge Agnew delivered the opinion of the court. He said: "Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence, when there is clear negligence on the part of the company. The true point of this case is that, in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did

mean thereby the employé is enabled to do the mischief."

means whereby the employé is enabled to do the mischief."

Custody of dangerous agencies.

When the courts came to consider accidents resulting from the wrongful use of the more dangerous agencies employed in modern life the discussion quickly reached the true ground.

If a master entrusts the custody of dangerous agencies to his servants the proper custody as well as the use of them becomes a part of the servant's employment by the master and his neglect in either regard is imputable to the master in an action by one injured thereby. And where the injury results from the negligence of the servant in the custody of the instrument it is immaterial so far as the liability of the master is concerned as to what use may have been made of it by the servant. *Pittsburgh, C. & St. L. R. Co. v. Shields* (1890) 8 L. R. A. 464, 47 Ohio St. 387.

In that case an injury was caused by the explosion of a torpedo left exposed by a trainman. The court says: "The duty entrusted by the company to the conductor in regard to these torpedoes was not only to use them as signals with the requisite care and caution but to observe like care and caution in the custody of them when not in use. . . . And in taking them from the place where they were kept when not in use and in mere caprice, placing them on the track for the purpose of frightening ladies, he was not within his employment as to the use of them; but in so doing he violated the duty connected with his employment as custodian of them and thereby made his master liable for the consequences of his negligence." "It is necessary in this and all similar cases to distinguish between the departure of a servant from the employment of the master and his departure from or neglect of a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside of his employment of the master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty entrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business without making the master liable for the consequences. Suppose a servant employed with a construction train repairing track for his master. He may for a time quit his employment and go on affairs of his own. Whilst thus out of the master's employment he may build a fire which may consume property of a third person; and in the meantime loss of life and property may result from a collision with the train negligently left standing on the track. The master will not be liable for the result of the fire but it is equally cer-

vant to discharge a particular work, the duty by virtue of an implied contract is thereby devolved upon the master to see that the servant in the discharge of the work allotted to him shall properly respect the persons and property of others; and if in the performance of the appointed labor, the servant shall injure the person or property of third persons, the master is liable whether the trespass is due to the malice or the simple negligence of the servant. It becomes the duty of the master to protect such third persons from violence and insult on the part of the employés. *Ft. Worth & N. O. R. Co. v. Smith* (Tex.) March 21, 1894.

In *Lane v. Cotton* (1702) 12 Mod. 473, 1 Ld. Raym. 646, Lord Holt against the opinion of the other judges thought that the postmaster should be liable for a letter taken by his servant on the ground that the office was for the public good and that he ought to be required to take such care of the letters that the servant could not abstract one.

The principal must necessarily be answerable within reasonable limitations for the manner in which his instructions are carried into effect. This responsibility does not rest in a case of this character in any special relation, the principal has assumed to the other party by virtue of an agreement between them express or implied, but is founded on that primary obligation which every person in society owes to every other person to inflict as little injury upon an aggressor as is consistent with the preservation of one's own rights. *Rounds v. Delaware, L. & W. R. Co.* (1874) 3 Hun, 329.

The master owes the duty of abstention from wanton and willful injuries in the use of his property and will be liable for the act of his servant in the scope of his employment, but not for those done outside of it. *Alabama G. S. R. Co. v. Harris* (1893) 71 Miss. 74.

In all cases where it appears that the employment of the person supplied the agent the means or opportunity which he used while so employed in committing an injury on a third person, the person must be held responsible. The willful trespass or injury of the agent derived from the authority confided to him by the principal as the source of power in the exercise of his master's employment will make the principal responsible. And this upon the reason that he who employs and confides shall be the loser rather than the stranger. *New Orleans, J. & G. N. R. Co. v. Allbritton* (1899) 38 Miss. 242, 75 Am. Dec. 98.

In *Smith v. Webster* (1871) 23 Mich. 288, where the employés were found to have been acting within the scope of their employment and that therefore the master was liable for their acts, the court said: "That there are many cases of willful misconduct for which an employer will not be liable. Yet even for willful misconduct there are some instances of liability where the employer has furnished peculiar

means whereby the employé is enabled to do the mischief."

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not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation." In *Eaton v. Delaware, L. & W. R. Co.*,

57 N. Y. 382, 15 Am. Rep. 513, it is said that: "Railroad companies have the right to make a complete separation between their freight and passenger business. When this is done, the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the natural and apparent divisions of the business. . . . In the great transactions of commercial cor-

tain that for the loss occasioned by the servant's negligence in leaving the train on the track, the master will be liable in damages; for the plain reason that in abandoning the custody of the train he was guilty of negligence in the employment of the master whilst in building the fire he was not. *Pittsburgh, C. & St. L. R. Co. v. Shields* (1890) 8 L. R. A. 464, 47 Ohio St. 387.

A railroad company which entrusts its servants with the management of a train of its cars and the custody of torpedoes to be used as signals in such management is liable for their negligence in leaving the torpedoes in a public place where they are likely to cause injury to passers-by, and which in fact do cause such injury. *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11.

The common-law rule that the master is not liable for the tortious acts of his agent committed without the scope of his employment does not apply to railroad companies because absolute necessity requires more stringent rules in regard to them. Having placed under the control of its agent an instrument of so much power to injure as a steam engine it is but reasonable that the law should demand the utmost caution in the selection of its agents and hold the company to strict accountability for injuries which inflict the citizen for the want of such caution. If in the conduct of his engine and while at his post in the line of his employment the servant wantonly uses his engine for purposes of sport or malice to another's injury, as where he blows the whistle to frighten a horse, the master will be liable. *Nashville & C. R. Co. v. Starnes* (1871) 9 Helsk. 52, 24 Am. Rep. 297.

The same principle was applied in another connection in a New Hampshire case.

In *Page v. Hodge* (1886) 68 N. H. 610, the servant was in charge of a mowing machine, he left the horses attached to it standing in the road while he engaged in a personal encounter with a third person. The horses ran away and injured the mowing machine. The master sued the third person for the damage and the court held that he could not recover, saying: "By entrusting his team to the servant for the purpose of driving it home the plaintiff put it in the servant's power to manage the team negligently and must be deemed to have assumed the risk of the servant's negligence in the execution of the trust so committed to him, and moreover as in the contemplation of the law, he who does a thing by the agency of another does it by himself. The case further stands in respect to the servant's negligent act in leaving the team unhitched and unattended in the public highway, precisely as it would if that act had been done by the plaintiff himself."

Similar statements have been made in other connections.

Wherever the master entrusts a horse and carriage or anything which may readily be made an implement of mischief to his servant to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing entrusted to the servant, so long as the lat-

ter is using it or dealing with it in the ordinary course of his employment. *Rayner v. Mitchell* (1877) L. R. 2 C. P. Div. 367, 25 Week. Rep. 683.

Where the owner of a toll-gate was held liable for an injury inflicted on a traveler by the negligent management of the gate-beam by the keeper after the hours during which toll was collected, it was insisted that the liability of the owner for the acts of the servant ceased with the close of toll hours, but the court said: "The gate was entrusted to his management at all times and he was therefore at all times the servant of the company so far as the care and management of the gate was concerned." *Noblesville & E. Gravel Road Co. v. Gause* (1881) 76 Ind. 142, 40 Am. Rep. 224.

So if the master entrusts the keeping of a mischievous dog to a servant, the negligence of the servant will be that of the master. *Baldwin v. Casella* (1872) L. R. 7 Exch. 825, 41 L. J. Exch. 107, 20 L. T. N. S. 707, 21 Week. Rep. 16.

Injuries by guns.

In a case where the master sent his servant, a young mulatto girl, to bring his gun, which she negligently discharged injuring a third person, the master was held liable, the court saying the owner of an instrument of mischief must keep it from the reach of doing injury, and if he chooses to remove it he must do so with due precaution and by a safe conveyance. *Dixon v. Bell* (1816) Holt, N. P. 223, *note*.

A master who sends his servant with a gun to drive away a negro who is wrongfully taking his sugarcane is liable for the act of the servant in shooting the negro. *Priester v. Augley*, 5 Rich. L. 44.

But in New York this principle does not appear to be recognized. Thus it was held that the owner of a yacht is not liable for the act of its master in firing a salute at a time when he had been commanded not to do so, merely because he had been placed in charge of the means to do so. *Haack v. Fearing* (1867) 5 Robt. 522, 4 Abb. Pr. N. S. 297, 35 How. Pr. 459.

VI. NEGLIGENCE OR DISOBEDIENCE OF STATUTORY REQUIREMENTS.

The fact that the master of a vessel stows cargo on deck contrary to the provisions of a statute even if it is for the benefit of the owner, will not, if the owner is ignorant of it, avoid his policy of insurance on the cargo. *Wilson v. Rankin* (1865) 34 L. J. Q. B. 62, 41 Jur. N. S. 173, 12 L. T. N. S. 20, 12 Week. Rep. 404, 6 Best & S. 208.

Under a penal statute against cutting timber on another's land, a person cannot be made liable for the acts of his servants, done contrary to his instructions. *Cushing v. Dill*, 3 Ill. 460; *Satterfield v. Western U. Teleg. Co.* (1887) 23 Ill. App. 446.

The fact that the injury is caused by the servant's failure to obey the law of the road, violation of which is made a criminal offense, will not prevent the maintenance of a common-law action against his master for the damage caused by the accident. *Reynolds v. Hanrahan* (1868) 100 Mass. 512.

porations convenience requires a subdivision of their operations among many different agents. Each of these may have a distinct employment, and become a general agent in his particular department, with no powers beyond it." Page 389. In *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635, it is said: "The rule is that for all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express authority conferred

upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible. For acts which are not in these conditions, the servant alone is responsible." In *Storey v. Ashton, Cockburn, Ch. J.*, said: "We cannot adopt the view of *Ersakine, J.*, in *Sleath v. Wilson*, 9 Car. & P. 607, that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can

The master is not liable to the statutory penalty for failure to drive to the proper side of the road upon meeting a vehicle, if his vehicle at the time is in charge of his servant. *Goodhue v. Dix* (1854) 3 Gray, 181.

The act of a servant not done by the master's command cannot impose liability upon the master under the Georgia statute providing a penalty for the killing or injuring of animals. *Smith v. Causey* (1858) 22 Ala. 568.

VII. QUESTION FOR JURY.

The question whether or not the employé was within the scope of his employment is for the jury. *Hoffman v. New York Cent. & H. R. R. Co.* (1880) 14 Jones & S. 522; *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 31 Am. Rep. 597; *Brunner v. American Teleg. & Teleph. Co.* (1894) 160 Pa. 300.

It is for the jury to say whether or not a ticket agent is acting within the scope of his employment in attempting to compel a person whom he takes to be drunk to leave the waiting room of the station. *McKernan v. Manhattan R. Co.* (1887) 22 Jones & S. 354.

The question is for the jury whether or not a person employed to attend to the ladies waiting room in a railroad station is acting within the scope of his authority in attempting to eject a supposed negro from it. *Redding v. South Carolina R. Co.* (1871) 8 S. C. N. S. 1, 18 Am. Rep. 681.

Whether or not a brakeman is acting within the line of his duty in ejecting a trespasser from a train is a question for the jury. *St. Louis, I. M. & S. R. Co. v. Hendricks* (1886) 48 Ark. 177.

Where a foreman of a wharfinger who was engaged in loading iron on a boat was dissatisfied with the way in which the cartmen were unloading it and jumped upon the cart and himself threw off some of the iron, causing injury to plaintiff, the court said it was for the jury to say whether or not he was acting within the scope of his employment, so as to render the wharfinger liable for the injury. *Burns v. Poulson* (1873) 42 L. J. C. P. 802, L. R. 8 C. P. 563, 20 L. T. N. S. 329, 22 Week. Rep. 20.

Where a flagman had for a long time been in the habit of warning persons approaching a crossing, of the approach of trains, although he testified that it was not his duty to do so, but that he did it to prevent accidents, and on one occasion he motioned a person forward at the wrong time, so that injury occurred, the court held that it was for the jury to say whether or not he was acting within the scope of his employment. *Peck v. Michigan Cent. R. Co.* (1885) 87 Mich. 3.

Where the conductor of a car kicked a boy from the steps of a moving train, the court held that the question whether the conductor was acting within the scope of his authority was for the jury. *Hoffman v. New York Cent. & H. R. R. Co.* (1878) 12 Jones & S. 1.

Where the driver of a street-car, finding plaintiff's carriage obstructing the tracks because of a jam of vehicles which made it impossible for him to drive on, after some violent language drove the

car against the carriage and injured it, the court held that it was for the jury to say whether or not he was acting within the scope of his employment. *Cohen v. Dry Dock, E. B. & R. R. Co.* (1876) 8 Jones & S. 374.

Upon the question whether or not the servant was acting within the scope of his employment, the finding of the jury is conclusive. *Schuite v. Holliday* (1884) 54 Mich. 73.

Whether or not what the brakeman did (in ejecting a trespasser from a train) was in the scope of his authority or in the line of his employment is a question of law or of mixed law and fact to be determined by the court alone from the proof, if indeed that were required, and from common observation and experience and from knowledge of the nature of the business and the daily practice which is obtained in its exercise. *Smith v. Louisville & N. R. Co.* (1886) (Ky.) 22 L. R. 72.

VIII. CONTRIBUTION TO INJURY.

A branch of the general subject of liability of a master for the acts of his servant which has never been much discussed as yet, is the question of inciting the servant to commit the wrong. For example if a trespasser on a railway train tantalizes or incites the conductor for the purpose of making him lose his temper and use unnecessary violence in ejecting him, he should not be permitted to hold the master responsible. So one who causes a servant to disobey his master's instructions should not be permitted to recover for injuries caused by such disobedience.

Thus a person injured through the negligence of employés while riding on a switch engine by permission of a brakeman cannot hold the company liable for the injury. *Stringer v. Missouri Pac. R. Co.* (1888) 96 Mo. 299.

So if a third person is injured by the negligent act of the servant in carrying out a special arrangement between them which is contrary to the instruction of the master, he cannot recover. *Snider v. Crawford* (1891) 47 Mo. App. 8.

And there is an Illinois case which though perhaps correctly decided upon the principle upon which it was placed might properly have been placed upon the doctrine of contribution.

A flagman of a railroad company who in attempting to compel boys to desist from playing on the right of way of the company incurs their ill will by reason of which they bedaub his watch house and he in attempting to punish one of them gets into an altercation with him and after being threatened with stones and called names loses his temper and throws a lump of coal at one of them injuring him, is not acting within the scope of his authority, and the railroad company is not liable. *Illinois Cent. R. Co. v. Ross* (1886) 31 Ill. App. 170.

It certainly cannot be law that a person can interfere with and obstruct a servant in the discharge of his duties and then hold the master responsible for injuries which are more the result of his own wrongful act than of the master's negligence.

H. F. F.

be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. L. R. 4 Q. B. 476. Thus it will be seen that, in the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment." Wood, Mast. & S. 546. In the case at bar the section foreman was not only not authorized, expressly or by implication, to permit persons to ride on the hand-car, but had been expressly forbidden by the rules of the company and otherwise to permit it, and there was no custom to permit persons to ride on the hand-car shown to have been known to or acquiesced in by the officers of the railroad company. "In order that the railroad company should be made responsible by reason

of such a custom, it was necessary to show that it was actually known to the officials who conducted its business, or that it was so general, and of such long continuance, that it must be fairly inferred that it was known and assented to by them." *Taunton v. Wareham*, 153 Mass. 191. Such is not shown to have been the case here. The court deems it needless to set out or discuss the instructions.

The court is therefore of the opinion that there is a total failure in this case of evidence to show any liability upon the part of the railroad company, wherefore *the judgment is reversed*, and the cause is dismissed.

The Honorable Carroll D. Wood, being disqualified, did not participate in the determination of this cause.

Rehearing denied October 6, 1894.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *ex rel.*
Henry N. HOFFMAN, *Appt.*,
v.

M. H. HECHT *et al.*, *Respts.*

(.....Cal.....)

1. A majority may organize and act where a majority of the body may act after organization.
2. The disqualification of two out of fifteen freeholders elected to prepare a city charter under Const., art. 11, § 8, which does not in terms require the joint action of all the members of the board, but does provide that it shall be signed by the members or a majority of them, does not prevent the lawful organization and action as a board by the other members.
3. Disqualification of freeholders elected to prepare a city charter, based on their lack of five years' residence in the city, does not prevent them from being *de facto* officers.

(January 16, 1895.)

A PPEAL by relator from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in a quo warranto proceeding to determine the question of the validity of the organization of defendants as a board which had been elected to prepare a charter for the city of San Francisco. *Affirmed in part; reversed in part.*

The facts are stated in the commissioner's opinion.

Mr. Robert Ash, for appellant:

The qualification of members of this board is a condition precedent and necessary to legislation, which they must propose.

Cooley, Const. Lim. p. 78.

It must be the board provided by the constitution, or it is not a constitutional body and its acts are illegal.

People v. Hoge, 55 Cal. 612.

Two of the members were not qualified and

this fact is admitted, and under the constitution there is no constitutional board.

People v. Gunn, 86 Cal. 238.

Messrs. Henry N. Clement and William F. Gibson, with **Mr. Harry T. Creswell**, for respondents:

When one acts under color of office his acts are binding, though not legally qualified.

Whippley v. McKune, 12 Cal. 361; *McCrory, Elections*, § 216.

A person indisputably ineligible may be an officer *de facto* by color of election.

Baird v. Bank of Washington, 11 Serg. & R. 411; *Pritchett v. People*, 6 Ill. 529; *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Mechem*, Pub. Off. § 26; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Taylor v. Taylor*, 10 Minn. 107; *Tower v. Du-rell*, 9 Mass. 381; *Lovell v. Flint*, 20 Me. 404; *Keyser v. McKissan*, 2 Rawle, 189.

The thirteen eligible defendants are a legal board of freeholders, with or without the two ineligible.

Searls, C., filed the following opinion:

This is a proceeding by quo warranto, brought in the superior court, to determine by what authority the defendants, as individuals or as a board, are acting as a board of fifteen freeholders to prepare and propose a charter for the city and county of San Francisco. Two several demurrers were interposed to the complaint; one by and on behalf of William B. Bourn and I. W. Hellman, two of the defendants, and the other by all the defendants. The demurrers and each of them were sustained by the court, and, the relator declining to amend, final judgment went for the defendants, from which judgment the plaintiff appeals.

The complaint, which, for the purposes of this case, is to be taken as true, avers in substance as follows: (1) The city and county of San Francisco is, and at all the times herein mentioned has been, a municipal corporation, duly organized and existing under and

NOTE.—As to quorum in general, see note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308.
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by virtue of an act of the legislature of the state of California approved April 19, 1856, and the several acts of said legislature amendatory thereof, and supplementary thereto, and contains a population of 800,000 inhabitants. (2) On the 11th day of September, 1894, the properly constituted authorities of said city and county of San Francisco, by due proceedings, ordered that a board of fifteen freeholders, who shall have been at least five years qualified electors thereof, should be elected by the qualified voters of said city and county, at the general election on the 6th day of November, 1894, whose duty it should be to prepare and propose, within ninety days after such election, a charter for such city and county, under and by virtue of section 8 of article 11 of the Constitution of the state of California. (3) Thereafter, and in due time, forty-three persons were regularly nominated as candidates for the said offices of board of freeholders, certificates of such nominations duly filed as required by law, all of whom were believed to possess the qualifications required by law to fill said offices. (4) The names of the persons so nominated were placed upon the ballots as candidates for said office. (5) On the 26th day of October, 1894, a proclamation was duly made, issued, and published by the proper officers, as required by law, that there would be chosen and elected on the 6th day of November, 1894, a board of fifteen freeholders. (6) At the general election of November 6, 1894, the said persons so nominated were voted for by the qualified voters of said city and county, each receiving the number of votes mentioned in the complaint. (7) The vote was duly canvassed, and the defendants herein declared duly elected to fill said office. (8) Thereafter defendants, and each of them, received certificates of election, duly qualified, and organized as a board of fifteen freeholders, and entered upon the discharge of their duties as such board, and are still so acting, and preparing a charter. (9) The defendants are not now, and never have been, a legally constituted board of fifteen freeholders, but have usurped the functions of said board, without authority or right. That no board was chosen by the voters, as required by the election and article of the constitution referred to herein, for the reasons: (a) Defendant I. W. Hellman was ineligible to said office in that he had not been for at least five years a qualified elector of said city and county; that he had been such qualified elector for but three years, and that prior to said three years he had been resident and elector of the city of Los Angeles, Cal. (b) The defendant W. B. Bourn was ineligible because he had not been for five years a qualified elector of the city and county of San Francisco, as required by the constitution; that he had been an elector but two years, and that prior thereto he was a resident and elector of the county of Napa, Cal. (c) The remaining defendants and members of the board are but thirteen in number, and do not constitute a board of fifteen freeholders. (d) The above-named thirteen defendants are all eligible and qualified to hold the office as members of the board

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aforsaid, and have accepted the certificates and acknowledged the right of said defendants Bourn and Hellman as members of said board, and are sitting with said Bourn and Hellman as members of said board, and claim that said persons are and constitute a board of fifteen freeholders.

The general demurrer of all the defendants is upon the ground "that said complaint does not state facts sufficient to constitute a cause of action." The separate demurrer of Hellman and Bourn is upon the ground that the "said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them." Section 8 of article 11 of the Constitution of the state of California, as amended, and the ratification thereof declared December 30, 1892, is in part as follows: "Any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them," etc.

The first question for consideration relates to the eligibility of the defendants I. W. Hellman and William B. Bourn as freeholders under the constitutional provision. They had not been for at least five years qualified voters of the city and county in which the election was held, and for which the charter was to be prepared. The language used by the framers of the constitution in relation to the qualification essential to eligibility to the office or position of a freeholder is plain and unequivocal, and the authority to prescribe the qualification is not open to doubt. The reason of the rule is apparent, and need not be stated. The defendants Hellman and Bourn, not having been for at least five years qualified electors of the city and county of San Francisco, were ineligible to the office of freeholder, and their separate demurrer should have been overruled.

2. Do the remaining thirteen members who were regularly elected constitute a legal board, with authority to act? The contention of appellant is that in order to constitute a valid board it is essential that fifteen qualified members be elected, and that without such number thus qualified there can be no constitutional board, and hence that the thirteen members should be inhibited from acting, either with or without the two who are disqualified. We think this position is unwarranted under the language of the constitution, and not in consonance with public policy or the analogies in similar cases. It is true the constitution provides for the election of a board of fifteen freeholders; but the persons who are, when elected and qualified, to constitute such board, are elected and must qualify as individuals, and the entity known as the board has no legal exis-

tence until it is organized by the individuals who come clothed with the *insignia* of authority afforded by a certificate or other adequate proof of an election. The electors select the persons who are to constitute the board, but do not create the board. That is done by the organization of the members. When the electors have elected, by a plurality of all the votes cast, fifteen members to constitute the board, and furnished them with the evidence of said action, their power in the premises is exhausted, and the requirement of the constitution is so far complied with that it only remains for the persons so selected, or a majority of them, to organize and exercise the power which by virtue of their election is vested in them. An interpretation which holds that the ineligibility or death or unwillingness to act of a single member thus selected invalidates the entire election would work great hardship, and tend to thwart the will of the electors in many instances, and should not be indulged unless rendered imperative by the mandate of the constitution. The same constitution (section 5, article 11) provides that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of "boards of supervisors," etc. Other portions of the constitution provide for a supreme court, "which shall consist of a chief justice and six associate justices." Again, "the senate shall consist of forty members and the assembly of eighty members." It would, we think, hardly be contended that, because the constitution provides for a board of supervisors, an election for supervisors, in which a single member elected was disqualified would either invalidate the election of other members, or prevent their organizing and acting as a board. Like considerations apply to the election of members of the senate and assembly, and to the election, organization, and action of the supreme court. The code provides that "words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." Pol. Code, § 15. The earlier doctrine was that where a board of commissioners was created by the legislature, and discretionary powers conferred upon them to decide upon matters of public interests, and the law had made no provision that a majority should constitute a quorum, all must be present and consult, though a majority might decide. *People v. Coghill*, 47 Cal. 868, and cases cited. The rule prior to its modification by the code may be stated thus: The power or authority given to public officers, commissioners, or committeemen was a joint authority to be exercised by all of them, and (except as provided by statute) all must meet and deliberate; but, this done, a majority could decide. To the exercise of this joint authority it was sometimes held, and it would seem logically, that the existence of a full board was necessary. If the authority was, in contemplation of law, to be exercised by all the members, then there should be members capable and competent to its exercise; but

under our codes this authority, although joint where given to three or more, is to be "construed as giving such authority to a majority of them," unless it is otherwise expressed in the act giving the authority. If a majority possesses all the authority of the whole, then such majority must be competent to its exercise. For all practical purposes, the majority becomes the full board. It is the receptacle—the reservoir—of all the authority conferred upon the whole, and its action, if it is submitted, cannot be stayed by the nonaction, failure to qualify, absence, death, or want of eligibility of the minority. These were the very obstacles intended to be surmounted by the statute.

Since the enactment of the code it was held in *People v. Harrington*, 63 Cal. 257, that the action of a quorum was the action of the board of supervisors, and that the action of a majority of such quorum, though not constituting a majority of the board, was valid and binding. In *State v. Huggins*, Harp. L. 189, court of appeals of South Carolina, the facts were that of eighteen managers of elections appointed by the legislature two had refused to qualify, one was dead, and one disqualified to serve, and the court held that a majority, viz., eight of the remaining fourteen, properly formed a board to determine on the validity of a contested election; a majority of the managers qualified to serve being all that is required by the legislature. Colcock, J., in the course of his opinion, said: "Now, if necessity and public convenience may require that, where all the managers of these elections are alive, and have qualified, a majority may act, does not the same reason operate to authorize the managers of an election to act where some of those who have been nominated are dead or have not qualified?" Words giving a joint authority to three or more public officers will be construed as giving it to the majority, unless otherwise expressed. *Talcott v. Blanding*, 54 Cal. 289. If the authority is given to and may be exercised by the majority, and the minority, if present and acting, cannot defeat it, it must follow that such minority cannot, by absence or failure to qualify, defeat the will of the majority. This doctrine was illustrated in *Oakland v. Carpentier*, 18 Cal. 540, where it was argued that, as the charter provided that a board of five trustees should be elected, etc., and as only four qualified, their acts were void for want of a legal organization. The court disposed of the question by saying: "We can see no reason for holding that a majority of the members elected to this board should not as well be held empowered to act at the first as at any subsequent meeting of it." There is nothing inherent in the duties to be discharged by the freeholders to invoke a more strict rule of construction against them than would be called for in the case of other boards or bodies invested with public functions. The provision of the constitution is self-acting. *People v. Hoge*, 55 Cal. 612. The constitution does not in terms require the joint action of all the members of the board of freeholders. It does provide that the charter prepared by them must be "signed

in duplicate by the members of such board or a majority of them."

Under the doctrine which was formerly upheld by many of the courts, that all the members of a board, committee, or commission must meet and deliberate, though a majority could decide, the contention of appellant in support of the theory that the presence and action of all the members is necessary to an organization may be upheld. The consensus of modern opinion, however, is believed to be that, where a majority may act, such majority may organize and act. This is believed to be the very object of the fifteenth section of the Political Code. Again, the office of freeholder is created by the constitution. It is a *de jure* office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were there under color of office, and presumptively entitled to the office. They were *de facto* officers in the discharge of the duties of a *de jure* office, and as such their acts while they remained such were as valid and binding as those of *de jure* officers. There must be a *de jure* office to be filled, before there can be a *de facto* officer. If the former exists, and the latter holds it under and pursuant to a regular commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds, upon principles of policy and justice, to be valid, so far as they involve the public and third parties notwithstanding the personal liability of the incumbent for intruding into such office. A leading case upon the subject of officers *de facto* is that of *State v. Carroll*, 88 Conn. 449, 9 Am. Rep. 409, in which Butler, *Ch. J.*, after an exhaustive discussion of the doctrine, and a review of the English and American cases, uses the following language: "A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First. . . . Second. . . . Third. Under color of a known election or appointment, void because the officer

was not eligible, . . . such ineligibility . . . being unknown to the public."

We reach the following conclusion:

1. The thirteen freeholders, constituting as they do a majority of all the members of the board, were competent to organize and act as a board of freeholders under the constitution and law, and may lawfully prepare and propose a charter for the city and county of San Francisco.

2. I. W. Hellman and William B. Bourn were not eligible to the office of freeholder, and, although regularly elected and commissioned, are not *de jure* officers of the board.

3. Said Hellman and Bourn, having been elected and commissioned, became *de facto* members of the board, and as such their acts were and are valid as to the public and third parties.

We are asked by the counsel, in the event of holding that Bourn and Hellman are not entitled to their seats, to indicate: (1) Whether or not Patrick Reddy and J. C. Whiting, who received the next highest number of votes, are entitled to demand and receive certificates of election; and, if not, then (2) how shall the vacancies be filled? The first query seems to be settled in this state. *Saunders v. Haynes*, 18 Cal. 145; *Crawford v. Dunbar*, 52 Cal. 86. We must, however, decline to pass upon either of the foregoing propositions, for the reason that they are not involved in the issues presented in the case, and anything which might be said would be mere *obiter dictum*, and of no binding force should the same questions again arise.

The judgment appealed from should be affirmed as to all the defendants except I. W. Hellman and William B. Bourn, and reversed as to said two last-named defendants, with directions to the court below to overrule the separate demurrer of said I. W. Hellman and William B. Bourn, with leave to answer.

I concur: **Haynes, C.**

Per Curiam: For the reasons given in the foregoing opinion, *the judgment appealed from is affirmed as to all the defendants except I. W. Hellman and William B. Bourn, and reversed as to said two last-named defendants, with directions to the court below to overrule the separate demurrer of said I. W. Hellman and William B. Bourn, with leave to answer.*

ILLINOIS SUPREME COURT.

City of PEKIN, *Appt.*,

v.

Patrick McMAHON, Admr., etc., of Frank McMahon, Deceased.

(.....ILL.....)

1. Unguarded premises supplied with dangerous attractions are regarded as

NOTE.—As to liability for dangerous condition of private grounds lying open beside a highway or frequented path see *note to Lepniak v. Gaddis* (Miss.) 26 L. R. A. 696.

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holding out implied invitation to children which makes the owners responsible for injuries to them.

2. A pond or pit in a populous city in which the water is from five to fourteen feet deep, with logs and timber floating therein on which children are in the habit of playing, near a driveway across vacant lots but partially enclosed from the streets on the sides thereof, renders the city which owns them liable for the drowning of a child playing there if the premises are found by the jury sufficiently attractive to entice children into danger and to suggest the probability of such an accident.

See also 32 L. R. A. 825; 33 L. R. A. 755; 38 L. R. A. 573; 39 L. R. A. 112; 40 L. R. A. 531; 42 L. R. A. 288; 43 L. R. A. 148; 44 L. R. A. 655; 45 L. R. A. 591; 48 L. R. A. 291.

3. The attractiveness of dangerous premises for children which will render the owner liable for accidents to them is a question for the jury.
4. A child eight years of age is bound to use such care as children of his age, capacity, and intelligence are capable of exercising.
5. A municipal corporation owning vacant lots is chargeable with the same duties and obligations which devolve upon individuals in respect to their condition.
6. A city is estopped from denying its duty as to a dangerous pit where it has passed an ordinance declaring such pits to be a nuisance.
7. Execution cannot be ordered to issue against a city in an action for damages.

(January 14, 1895.)

APPPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Tazewell County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Magruder, J.:

This is an action on the case, brought by appellee, administrator of the estate of his deceased son, Frank McMahon, against appellant, the city of Pekin, to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of said city. Verdict and judgment in the circuit court were in favor of the plaintiff. The appellate court has affirmed the judgment, and the present appeal is from such judgment of affirmance.

The declaration alleges that on April 12, 1892, the city owned lots 7, 8, 9, and 10, in block 11, in Bailey's addition to Pekin; that for a long time before that date it had caused a dangerous hole or pit to be made in said lots, by digging thereon, and removing sand and gravel therefrom; that it permitted water to accumulate and remain in said hole or pit, so that it became a nuisance, and dangerous to the lives of citizens, and "of children of tender years, incapable of exercising ordinary care or discretion, who might be attracted thereto;" that it was defendant's duty to cause the same to be drained, so as to remove the water therefrom; that the deceased, a child of tender years, and incapable of exercising ordinary care or discretion, was attracted thereto, and, necessarily and unavoidably, on account of defendant's failure to drain the water from said pit, without fault on his part or on the part of his parents, fell into the said pit, and was drowned. The plea was the general issue, with notice of special matter of defense to the effect that the premises were the property of the city; that it was incorporated under the general act of incorporation; that the lots were inclosed by a fence on the east and west sides thereof, and nearly inclosed on the south and north sides thereof; that the deceased entered and remained upon the premises as a mere trespasser, and engaged in play, without the knowledge, permission, or invitation of defendant, and carelessly, accidentally, or neg-

ligently fell into a pool of water thereon, and was drowned. The proof tends to show that the city became the owner of the lots in 1887; that they constituted about half a block in size; that they were bounded on the north by a public alley 10 feet wide, on the west by Capitol street, on the south by St. Julien street; that these streets were each 60 feet wide, and improved, and open to public travel; that there had originally been a natural watercourse across the lots from northeast to southwest, sufficient to carry off the surface water accumulating to the northeast, and southeast over an area of 200 or 300 acres; that this water had passed through said watercourse across said lots to the Illinois river; that the lots were in the thickly settled limits of the city; that, before its taking possession of the lots in 1887, the city had built a sewer, with an aperture of four feet, at the southwest corner thereof, under the junction of Capitol and St. Julien streets; that thereafter it dug into the watercourse, to get gravel to improve its streets; that the excavation thus made was some 200 feet long and 100 feet wide; that its banks were steep; that the depth was about 10 feet below the mouth of the sewer, so that the water could not run off; that the deepest water was over 14 feet; that the city stopped taking out gravel in 1890 or 1891 that the fence along the west side on Capitol street was bad, and caved in somewhat; that there was a gap or opening in the fence, more than 40 feet wide, on the south side on St. Julien street, and another gap in the fence, 30 or 40 feet wide, upon the alley near the northeast corner; that, with a view of filling up the pit, a causeway or driveway had been thrown up across from the north gap southwesterly to the south gap by the dumping in of rubbish and cinders; that parties had been in the habit of passing along this causeway for a year before April 12, 1892, when deceased was drowned, using it to go across the lots, instead of going round the corner; that this driveway was open, so that the public could use it; that the boys had been in the habit of playing upon planks and logs in the water in the pit, and had fallen into the water; that the city authorities had been notified by parents of the danger, and requested to remove it; that the dangerous condition continued a year before the accident; that, after building the roadway, there were two bodies of water; that the deceased was eight years and two months old; that his father was a laboring man, and had gone to his work at 6 o'clock A. M. on April 12, 1892, and did not return until a quarter past 6 P. M.; that the mother had been doing washing on that day; that she had four children besides the deceased, the youngest being eight months old; that she had heard of the pit, but had never visited it; that deceased came home from school at 4 P. M., and was given permission by his mother to play; that he and a boy named Harry Evans met one Soady, driving a wagon, who allowed them to get in and ride; that Soady drove to his barn, on the north side of said alley, opposite the opening or gap in the north fence; that there the boys dismounted from the wagon; that

deceased went through the opening onto the causeway, and stepped upon a log in the water, which rolled, and threw him into the pond, and he was drowned at a point a few feet south from Soady's barn, near the north-east corner of the lots.

Messrs. G. W. Cunningham, W. L. Prettyman, and William Don. Maus for appellant.

Messrs. T. N. Green and W. R. Curran, for appellee:

If the land of a private owner is situated in the midst of a populous city or in a public place, adjacent to public streets or roads and alleys, and he keeps and maintains thereon dangerous machinery, gates or turntables, dangerous pits or ponds of water, which he has made and excavated for his own use, adjacent to such public streets and alleys and which he has notice are attractive to children of tender years, incapable of exercising ordinary care or discretion, and which do attract children of that character, then the law is that such private owner must use reasonable care and diligence to protect such children from harm in coming on his premises, without fault on the part of their parents; and the fact that such children are technically guilty of trespass in coming on his premises will not defeat an action for damages sustained by them in meddling with his machinery, gates or turntable, or falling into the water in such excavations and being drowned.

Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Union Pac. R. Co. v. Dunden*, 87 Kan. 1; *Evansich v. Gulf, O. & S. F. R. Co.* 57 Tex. 128; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Ferguson v. Columbus & R. Railway*, 75 Ga. 637; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *O'Mara v. Hudson River R. Co.* 38 N. Y. 445, 98 Am. Dec. 61; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 35 Am. Rep. 269; *Birge v. Gardiner*, 19 Conn. 509, 50 Am. Dec. 261; *Smith v. O'Connor*, 48 Pa. 218, 86 Am. Dec. 582; *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356; *Loomis v. Terry*, 17 Wend. 497, 31 Am. Dec. 306; *Townsend v. Wathen*, 9 East, 277; *Hydraulic Works Co. v. Orr*, 83 Pa. 382; *Powers v. Harlow*, 53 Mich. 515, 51 Am. Rep. 154; *Bransom v. Labrot*, 81 Ky. 643, 50 Am. Rep. 193; *Whirley v. Whiteman*, 1 Head, 610; *Sanders v. Reister*, 1 Dak. 146; 1 Shearm. & Redf. Neg. §§ 73, 97, 98, *note* 1; 1 Thomp. Neg. pp. 804, 805, *note*; *Whart. Neg.* §§ 250, 265; *Mackey v. Vicksburg*, 64 Miss. 777; *Harris, Damages by Corporations*, §§ 465, 466; *Jones, Neg. of Mun. Corp.* 286, § 150; *Joliet v. Verley*, 35 Ill. 58, 35 Am. Dec. 342.

A municipal corporation, in its private character as the owner, lessee, or controller of lands, houses, public docks, piers, water and gas works, etc., is to be regarded in the same light as an individual and dealt with accordingly.

15 Am. & Eng. Encyclop. Law, p. 1155; *Cooley, Torts*, 619, 620; *Clark v. Peckham*, 9 R. I. 465; *Pennoyer v. Saginaw*, 8 Mich. 534; *Cumberland & O. Canal Corp. v. Portland*, 63 27 L. R. A.

Ma. 504; Hannon v. St. Louis County, 63 Mo. 813; 2 Dill. Mun. Corp. 4th ed. p. 1210; *Thayer v. Boston*, 19 Pick. 516, 81 Am. Dec. 157; *Bailey v. New York*, 3 Hill. 531; *Allen v. Decatur*, 23 Ill. 332, 76 Am. Dec. 692; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431; *Chicago v. McGraw*, 75 Ill. 566; *Joliet v. Shufeldt*, 18 L. R. A. 750, 144 Ill. 403; *Gregston v. Chicago*, 145 Ill. 464.

Magruder, J., delivered the opinion of the court:

1. The main question in the case arises out of the refusal of the trial court to give the second and third instructions asked by the defendant. Is an individual landowner obliged to respond in damages for the death of a child occurring upon his premises under such circumstances as are developed by the testimony in this case? The general rule is well settled that the private owner or occupant of land is under no obligations to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation, either express or implied, and merely to seek their own pleasure, or gratify their own curiosity. 1 Thomp. Neg. p. 308; 2 Shearm. & Redf. Neg. 4th ed. § 715. An exception, however, to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children. "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." 2 Shearm. & Redf. Neg. 4th ed. § 705; 4 Am. & Eng. Encyclop. Law, p. 53, and cases cited in *note*. In such case the owner should reasonably anticipate the injury which had happened. 1 Thomp. Neg. p. 804.

There is a conflict in the decisions upon this subject, some courts holding in favor of the liability of the owner, and others ruling against it. Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even

though they may be technical trespassers. To charge him with such an obligation under such circumstances is merely to apply the well-known maxim, "*Sic utere tuo ut alienum non laedas.*" It is true, as a general rule, that a party guilty of negligence is not liable if he does not owe the duty which he has neglected to the person claiming damages. *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L. R. A. 353. But, although the private owner may owe no duty to an adult under the facts stated, the cases known as the "Turntable Cases" hold that such duty is due from him to a child of tender years. The leading one of the turntable cases is *Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745. There the company was held liable in an action by a child about six years old, who had injured his foot while playing with a turntable belonging to the company, although it was contended that he was a trespasser, and had received the injury because of his own negligence, and that the company owed him no duty; it appearing that the turntable was located upon the private grounds of the company, in a settlement of from 100 to 150 persons, about 80 rods from the depot, near two traveled roads, and was a dangerous machine, and was not guarded or fastened, and that a servant of the company had previously seen boys playing there, and had forbidden them to do so. And it was further held that the care and caution required of a child is according to his maturity and capacity, and is to be determined by the circumstances of each case; that the fact of the child being a technical trespasser made no difference in his right of recovery; that the question of the defendant's negligence was one for the jury to determine; and that the jury were justified in believing that children would probably resort to the turntable, and that the defendant should have anticipated their resort to it from the fact that several boys were at play there when the accident occurred, and had played there on other occasions within the observation and to the knowledge of defendant's employes. To the same effect are the following cases: *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 398; *Kansas Cent. R. Co. v. Fitzsimmons*, 23 Kan. 686, 81 Am. Rep. 208; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Union Pac. R. Co. v. Dunden*, 87 Kan. 1; *Evansich v. Gulf, O. & S. F. R. Co.* 87 Tex. 128; *Ferguson v. Columbus & R. Railway*, 75 Ga. 637, 77 Ga. 103; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269.

In many, if not all, of the foregoing turntable cases, stress is laid upon the facts that the turntable was in a public or open and frequented place; that it was dangerous, and left unfastened, and, when in motion, was attractive to children by reason of their love of motion "by other means than their own locomotion;" and that the servants of the railroad companies knew, or had reason to believe, that it was attractive to children, and that children were in the habit of playing on or about it. The doctrine of the cases is that the child cannot be regarded as a voluntary trespasser, because he is induced

to come upon the turntable by the defendant's own conduct. "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." *Keffe v. Milwaukee & St. P. R. Co. supra*; *Union Stock Yards & Transit Co. v. Rourke*, 10 Ill. App. 474. We are unable to see any substantial difference between the turntable cases and the case at bar. Here was a half block of ground in a populous city, bounded on two sides by public streets, and on the third side by a public alley, with an opening of some 40 feet in the fence, upon the street, on the south side, and an opening of equal dimensions in the fence upon the alley on the north side, with a causeway running from one opening to the other diagonally across the premises, inviting approach, and actually used for passage by men and teams. Upon this half block was a dangerous pond or pit, in which the water was always 5 or 6 feet deep, and sometimes 14 feet deep. Logs and timbers floated about in this pond, and boys had for some time been in the habit of playing upon them in the water. The city authorities had been notified of its attractiveness to children, and of its dangerous character. They not only suffered the pond to remain undrained, but the fences around it to be broken down in some places, and to be actually removed in others. The deceased boy, Frank McMahon, is proven to have entered the premises at the opening in the fence on the alley. This opening was only 17 feet from the barn of Soady, where he dismounted from the wagon on which he had been riding. The place where he was seen playing in the water was only a few feet from this opening on the public alley. The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach. The doctrine of the turntable cases is sustained by other cases where the injuries complained of were caused by agencies of a different character. Such are *Mackey v. Vicksburg*, 64 Miss. 777; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Hydraulic Works Co. v. Orr*, 83 Pa. 382; *Whirley v. Whiteman*, 1 Head, 610.

There are very respectable authorities on the other side of the question here under consideration. Such are *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Hargreaves v. Deacon*, 25 Mich. 1; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 354; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65; *Clark v. Richmond*, 83 Va. 355; *Clark v. Manchester*, 63 N. H. 577; *Frost v. Eastern Railroad*, 64 N. H. 220. Some of these cases are distinguishable from the case at bar. In the Pennsylvania case, a child seven years and ten months old fell into a well in the field of a private owner 100 feet from the public highway and 300 feet from the nearest house,

and not concealed in any way so as to escape notice. The scene of the accident was at a comparatively remote point, and the court below had held that the plaintiff could not be guilty of contributory negligence as matter of law, instead of submitting the question to the jury. Moreover, the case is inconsistent with the ruling of the same court in the previous case of *Hydraulic Works Co. v. Orr*, *supra*. In the Michigan case, a child of tender years fell into a cistern on property "immediately adjoining a highway; and it is expressly said: "We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children," etc. So in the Missouri case it was expressly stated that the agency causing the accident was not shown by the evidence to be "attractive to children." The supreme court of New Hampshire expressly repudiates the doctrine of the turntable cases. Such, also, seems to be the position of the court in the Wisconsin case. In the Indiana case, the excavation into which the child fell was in a shallow stream, which was part of a public street, and it was held that the city was liable for that reason; and, consequently, what was said as to excavations upon private property was not necessary to the decision of the case. It was said, however, that "whoever does anything . . . immediately adjacent to a public street to attract children of the vicinity into danger, which they cannot appreciate, owes the duty of protecting them by suitably guarding the source of danger." In the Virginia case, where the action was against the city of Richmond, the city was held not to be liable, because the child climbed up from the sidewalk upon a brick wall, and fell into the area beyond it, thereby receiving the injuries complained of. But, whether the cases which hold to the rule of nonliability under such facts as appear in this record can be clearly distinguished from the case at bar or not, we are not disposed to follow them in view of the authorities on the other side. We do not regard the case of *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269, as opposing, but rather as indorsing, the doctrine of the turntable cases. That case was decided when this court so far considered questions of fact as to determine whether the verdict of a jury was contrary to the weight of the evidence or not; and we held that, "in view of the isolated portion in which the turntable was located, the proofs fail to show that appellant was guilty of such want of care as could lawfully charge it with damages for this accident." The question whether the defendant has or has not been guilty of negligence in case of such an accident upon his land to a child of tender years is for the jury. Involved in this question is the further question whether or not the premises were sufficiently attractive to entice children into danger, and to suggest to the defendant the probability of the occurrence of such accidents, and therefore such further question is also a matter to be determined by the jury. *Mackey v. Vicksburg*, and *Sioux City & P. R. Co. v. Stout*, *supra*. The subject of the

attractiveness of the premises was submitted to the jury by the instructions given for the plaintiff in the case at bar.

It was also submitted to the jury by such instructions to determine whether the plaintiff or his parents were guilty of contributory negligence. In answer to special interrogatories submitted by the city, the jury found specially that the deceased, Frank McMahon, at the time of his death, was not of sufficient age and ability to exercise ordinary care and discretion in taking care of himself, and was without fault on his part, and did not at that time have discretion, intelligence, information, and knowledge sufficient to enable him to know that it was dangerous for him to play in the water upon the premises and to be at the place of drowning; that he necessarily and unavoidably fell into the pit, and was drowned; that the premises were not sufficiently fenced to warn him of his danger in entering thereon; and that his parents, at the time of his drowning, were without fault in respect to the same. In *Chicago City R. Co. v. Wilcox*, 188 Ill. 870, 21 L. R. A. 76, we held that where a suit for damages caused by the negligence of the defendant is brought by a child of tender years, the negligence of his parents cannot be imputed to him in support of the defense of contributory negligence. Here, however, the suit is brought by the father as administrator of a deceased child. In such case the contributory negligence of the parent, if it exists, may be shown in bar of the action. *Chicago City R. Co. v. Wilcox*, *supra*. The question whether the parents were guilty of such contributory negligence, having been fairly left to the jury, has been decided adversely to appellant, and cannot be reviewed here. Whether, as matter of law, a child seven years old, or under that age, can be justly held to be incapable of negligence, it is not necessary to decide. But where a child has passed the age of seven years, as was the case with appellant's deceased intestate, we are of the opinion that he is bound to use such care as children of his age, capacity, and intelligence are capable of exercising, and that the question whether he has done so or not should be submitted to the jury. *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146; *Chicago City R. Co. v. Wilcox*, *supra*; 2 Thomp. Neg. pp. 1181, 1189; *Sioux City & P. R. Co. v. Stout*, *Birge v. Gardiner*, *Daley v. Norwich & W. R. Co.*, *Union Stock Yards & Transit Co. v. Rourke*, *Evansch v. Gulf, C. & S. F. R. Co.*, and *Kansas Cent. R. Co. v. Pitesimmons*, *supra*. It was so submitted here, and the instructions given for the plaintiff are in accordance with these views.

2. A municipal corporation, holding property as a private owner, is chargeable with the same duties and obligations which devolve on individuals. Where it owns, leases, or controls lands, houses, docks, piers, water and gas works, it is liable, in respect to the care of the same, for injuries arising from neglect, in the same manner as an individual owner is liable, and must respond in the same way for creating or suffering nuisances. *Cooley*, Torts, marg. pp. 619, 620; 15 Am. & Eng. Encyclop. Law, p. 1155, and cases

cited; *Mackey v. Vicksburg* and *Clark v. Manchester*, *supra*.

3. The plaintiff introduced in evidence on the trial below section 8 of the city ordinances of the city of Pekin, which is as follows: "8. Any owner, or occupant, or person, in possession of any uninclosed lot or parcel of land in said city, who shall, by digging or removing earth, sand or gravel from any such lot or parcel of land make or cause to be made in such uninclosed lot or parcel of land any pit or hole of such depth and character as to be considered dangerous, unsightly or a source of annoyance to the persons residing in the vicinity thereof or adjacent thereto shall be deemed guilty of creating a nuisance, and any owner, occupant, or possessor of any such uninclosed lot or parcel of land who shall refuse or neglect to remedy or abate said nuisance by filling up or covering or securely fencing the same after being notified so to do by the superintendent of police, or by any member of the police force, or any person aggrieved thereby, shall be subject to a penalty of not less than five dollars nor more than fifty dollars and a further penalty of two dollars for every day after the first conviction that said nuisance shall by him be continued." It is claimed that the court erred in admitting this ordinance in evidence. The declaration alleged that defendant had negligently permitted large quantities of water to accumulate in the pit upon the lots in question, "so that the same became a nuisance, and dangerous to the lives . . . of children of tender

years," etc. The plea of the general issue had the effect of putting it at issue whether the excavation was a nuisance or not, and the ordinance was to some extent evidence of the affirmative of such issue. Moreover, in its notice of special matters of defense, the defendant had stated that the premises "were nearly inclosed upon the north and south sides thereof." Under the ordinance, it was an owner's duty, after notice, to "securely, and not partially or ineffectually," fence the same. We are not satisfied that the admission of the ordinance injured the defendant. In connection with the other proof as to the character and condition of the excavation upon the lots, it had a tendency to show what the character and condition of the excavation ought to have been under the requirements enacted by the city itself of private owners of land. The city was therefore estopped from denying its duty under the circumstances.

4. The judgment of the circuit court was unquestionably erroneous in ordering execution to issue against the city. The appellate court has found that this order was a mistake of the circuit clerk, and has entered an order making the necessary correction, and directing the circuit court to amend its record accordingly. The final judgment of the appellate court affirms the judgment of the circuit court as thus modified. We do not think that there was any error in such action of the appellate court.

The judgment of the Appellant Court is affirmed.

MICHIGAN SUPREME COURT.

City of DETROIT *et al.*

v.

Adolphus A. ELLIS, Attorney-General.

(.....Mich.....)

A decision against a city by a court of competent jurisdiction as to the validity of consent to the use of streets by a street railway company in the exercise of its franchises is a bar to proceedings against the company by quo warranto in the name of the attorney-general based on a denial of the right upheld in the former action.

(January 22, 1893.)

APPPLICATION by the City of Detroit and certain of its citizens for an order requiring the Attorney-General to show cause why he should not file an application in the nature of a quo warranto to oust the Detroit Citizens' Street Railway Company from the privilege of maintaining its tracks in certain streets of the city. *Denied*.

The facts are stated in the opinion.

NOTE.—On the merits of the question sought to be raised by the above suit, see *Detroit v. Detroit City Railway* (U. S. C. C. A. 6th C.) 26 L. R. A. 667.

The phase of the subject of *res judicata* presented in the above case seems to be an entirely novel one.

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Messrs. C. A. Kent and Burton Hanchett for relators.

Mr. Ashley Pond, with Messrs. Russell & Campbell, for respondent:

The matter is *res judicata* as against the relator.

Quo warranto against a private corporation is in effect a private action, although conducted in the name of the people.

High, Extr. Legal Rem. § 605; *People v. Atty. Gen.* 41 Mich. 728.

Where a municipality has power to make a grant to a street railway company for the full term of thirty years, and the municipality makes no objection, the state is not interested in the validity or regularity of the proceedings taken in exercise of that power.

Atty. Gen. v. Detroit Suburban R. Co. 96 Mich. 65.

Messrs. F. A. Baker, Henry M. Duffield, and Sidney T. Miller also for respondent.

McGrath, Ch. J., delivered the opinion of the court:

This is an application for an order to show cause why the attorney-general should not file an application in the nature of a quo warranto to inquire by what right the Detroit Citizens' Street-Railway Company claims to exercise, and does exercise, in certain streets

of the city of Detroit, the right of maintaining and using street-railway tracks in said streets. Petitioners allege that in November, 1863, the common council of the city of Detroit passed an ordinance whereby consent was given to one Bushnell and his associates, who were about to organize as a corporation, to lay street-railway tracks, and to operate a street-railway system in and upon certain streets in the city of Detroit; that afterwards, on the 9th day of May, 1868, said Bushnell and his associates organized into a corporation which, by its articles, was to continue for thirty years, under the name of the Detroit City Railway, which entered into possession of said streets, and built and maintained street-car lines and exercised all the usual franchises connected therewith; that November 14, 1879, another ordinance was made, adding other provisions to the agreement between the street-railway company and the city, and providing that "the powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1863, and the amendments thereto, are hereby extended and limited to thirty years from this date;" that in 1891 the Detroit Citizens' Street-Railway Company was organized for a period of thirty years, and, soon after its organization, received a conveyance of all the property rights and franchises of said Detroit City Railway Company, and under such conveyance the Detroit Citizens' Street-Railway Company claims the right to operate, and is now using, all the franchises in said streets; that the value of the franchises and rights in said streets occupied and claimed by said Citizens' Street-Railway Company is very great, and that its claims are a great obstacle, as your petitioners are informed and believe, and therefore aver, to the making of the best terms which the city can make for the public accommodation by the establishment and maintenance of improved street-car lines on said streets, and are therefore injurious to the city and all residents; that, if the claims of said Citizens' Company are declared void, arrangements can readily be made with other street-car companies by which the car service can be greatly improved, and either the fares much reduced, or the amount paid to the city be greatly increased, or both; that the said ordinance of 1879, attempting to extend the franchises and rights of said Detroit City Railway thirty years from November 14, 1879, was void after May 9, 1893, because the life of said grantee expired at that time. In 1892 the city of Detroit filed its bill in the circuit court for the county of Wayne, in chancery, against the Detroit City Railway, Detroit Citizens' Railway Company, and others, setting forth at length the matters which are substantially set forth in the petition herein, and praying that defendants might be enjoined from operating street-railways in said streets after the 9th day of May, 1893. The said cause was afterwards removed to the circuit court of the United States for the eastern district of Michigan, in equity, where a decree was finally entered in accordance with the prayer of the bill. *Detroit v. Detroit City R. Co.* 60 27 L. R. A.

Fed. Rep. 161. Defendants took the case to the court of appeals, where it was heard upon its merits; and in October, 1894, a decree was entered reversing the decree of the circuit court, and dismissing the bill. *Id.* 64 Fed. Rep. 638, 26 L. R. A. 667.

Why must not the question here sought to be raised by quo warranto be regarded as *res judicata* against the moving parties, the city of Detroit and certain of its citizens? Under its charter, the city of Detroit has the charge and supervision of the streets of that city. It has the power to establish, open, widen, extend, straighten, alter, vacate, and abolish streets; to clean, grade, pave, repair, and improve the same; to protect and prevent incumbering or obstructing highways; to remove incumbrances from such streets; and to control, prescribe, and regulate the manner in which streets within the city shall be used and enjoyed. In the very act containing the grant to the street-railway company, the supervision and control, by cities and other local municipalities, over streets and highways, is recognized, and the exercise of the right granted is made dependent upon the consent of the local entity. If a street-railway company is operating its system upon the streets of the city of Detroit in the absence of a valid and binding consent granted by the city, the municipality is certainly a proper party, if not the proper party, to take proceedings to enjoin such operation, not only by virtue of its control over the streets, but also because the power to consent involves the authority to prevent. The municipality moves in such case, not as a proprietor, but in its representative capacity,—as the representative of the public,—as the proper party to complain of the unauthorized use of such streets. The only question in issue is as to the validity of the consent granted.

Counsel for the petitioners say in their brief that "this application is made by the municipal authorities of the city, who are the trustees of the public, for the protection of the interests of the public in the streets." Again they say: "In this case the municipality itself makes the complaint. It is vested with the control of the streets in the interest and for the protection and benefit of the public. It is hindered and prevented from the exercise of such control by the acts of defendant. The bill in the case in the United States was filed by the same authorities, in precisely the same capacity, and to reach the same result. Can the adjudication, then, be avoided by the simple addition of individual members of the body comprising the beneficiaries? If so there will be no end to the litigation. In the case of *Clark v. Wolf*, 29 Iowa, 197, cited in *Wells on Res Adjudicata* (sec. 186), it was held as to a county—and the same principle would apply to a city—that a judgment against it, or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding, not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by

name. This must be the true rule as to matters of public concern, when the proper representative of the public has moved or has been made a party to the proceeding. If the authority to consent to the use of its streets be regarded as a delegation of power to the municipality, and the authority over the streets be also considered as a delegation of power to the city, the municipality must be regarded, as is said in *Citizens' Horse R. Co. v. Belleville*, 47 Ill. App. 888, as "related to the state as its agent," in so far, at least, as to conclude the state by litigation had in good faith, respecting the subject-matter. Again, the state has regarded the matter of consent as one of purely local concern. A controversy arose between the city of Detroit and the Citizens' Railway Company as to whether the consent of the city had been given in such a manner as to be available to the present company and binding upon the city, and the city appealed to the courts, where the matter has been determined. The only question litigated was whether the consent given survived to the present company. In a proceeding instituted by the municipi-

ality, a court of competent jurisdiction has determined that matter in favor of the company, and that determination is conclusive upon all parties concerned.

The order to show cause must be denied.

Long, Grant, and Montgomery, JJ., concurred with **McGrath, Ch. J.**

Hooker, J.:

Without dissenting from the views expressed by my brother, I prefer to concur in the result reached in the case upon other grounds.

It is nowhere shown that this proceeding is of concern to the state. Indeed, counsel say that all that is asked is that the attorney-general shall permit the use of his name to the relators, thus practically confirming the already obvious fact that the city of Detroit wishes to be allowed to continue a litigation in the name of another which it cannot lawfully do in its own, being foreclosed by an adverse decision from a court of competent jurisdiction in a suit instituted by itself. It would be anomalous to grant a discretionary writ for such a purpose.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Anna E. BULLOCK, *Appt.*,

v.

Thomas O. BULLOCK *et al.*, *Respts.*

(.....N. J.....)

1. The jurisdiction acquired by the courts of one state over parties to an action incidentally affecting lands in another state is a jurisdiction purely *in personam*; the decree or judgment in such action cannot have any extra-territorial force *in rem*.
2. A decree or judgment of the courts of one state requiring and directing lands in another state to be conveyed or charged or otherwise disposed of may be enforced by their process, and when enforced or submitted to, by the execution of a conveyance, mortgage, or other instrument, as directed, such conveyance, mortgage, or other instrument is effective in the *situs* *rei*, but not the decree.
3. The courts of the *situs* of lands are not bound by the decree or judgment of the courts of another state affecting such lands, made in an action in which their jurisdiction is purely *in personam*; for, their jurisdiction being limited, their decree and judgment can extend no further. Full faith and credit will be given to such decrees and judgments, under section 1 of article 4 of the Constitution of the United States, by according to them a force merely personal upon the parties, and enforceable alone by their process.
4. Such decrees and judgments do not create a personal obligation upon the party which the courts of another state are bound

*Headnotes by **MAGIE, J.**

NOTE.—On the important question involved in the above case, as to the effect of a decree attempting to charge alimony upon lands in another state, no attempt at annotation will be made in view of the extensive briefs and discussion by the court.
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to compel him to perform. At the most, they impose a duty, the performance of which may be enforced by the process of the courts pronouncing them.

5. The courts of the *situs* of lands cannot be compelled to issue their decrees to enforce the process of the courts of another state, or the performance of acts required by the decree of such courts, ancillary to the relief thereby granted, affecting such lands.
6. A court of New York, having jurisdiction over the action and parties, dissolved the bonds of matrimony between them, fixed the amount, and directed the payment of alimony, and ordered the husband to execute and deliver to the wife a mortgage upon lands in New Jersey, to secure the payment of the alimony. *Held*, that a bill founded upon the order requiring such a mortgage to be given, and praying a decree that the mortgage should be given in conformity to the order, disclosed no equity, and was properly dismissed.

(*Van Syckel, Dixon, Lippincott, Reed and Bogert, JJ., dissent.*)

(November 23, 1894.)

A PPEAL by complainant from a decree of the Chancery Court in favor of defendants in a proceeding brought to set aside certain mortgages and conveyances and to compel defendant Bullock to execute to complainant a mortgage upon the property pursuant to a decree of a New York court. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward Q. Keasbey, for appellant:

The subject-matter of the suit was within the jurisdiction of the supreme court of New York, and the court, acting as a court for the adjudication of questions of divorce, had undoubted power to decree the payment of alimony and make an order upon the defendant directing him to secure the payment thereof.

N. Y. Const. 1848, art. 6, §§ 3, 6; Code Proc. 1848, § 69; Code Civ. Proc. §§ 1772, 2339; 1 Pom. Eq. Jur. § 171; Willard, Eq. Jur. p. 654; *Forrest v. Forrest*, 25 N. Y. 601.

The obligation is one affecting the person of the defendant, and the court of New York has not attempted to affect the title to lands in New Jersey.

This duty being created by a court having jurisdiction of the person and of the subject-matter of the litigation, is binding upon the person of the defendant everywhere, and he carries it with him wherever he goes.

This court is required by the Constitution of the United States to give full faith and credit to the order of the court of the state of New York which imposed the obligation upon the person of the defendant.

U. S. Const. art. 4, § 1.

It is true that the courts of one state cannot adjudicate directly upon the title to lands in another state.

Story, Conf. L. § 591; *Davis v. Headley*, 22 N. J. Eq. 115; *Lindley v. O'Reilly*, 1 L. R. A. 79, 50 N. J. L. 636.

But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

Mossie v. Watts, 10 U. S. 6 Cranch, 148, 3 L. ed. 181; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Earl of Kildare v. Eustace*, 1 Vern. 419; *Toller v. Carteret*, 3 Vern. 494; *Lord Portarlington v. Soubry*, 3 Myl. & K. 104; *Sutphen v. Fowler*, 9 Paige, 281, 4 L. ed. 701; *Vreeland v. Vreeland*, 49 N. J. Eq. 322.

The courts of a state where a man lives can give personal rights and impose personal duties which can be enforced by the courts of other states with respect to lands within their borders.

Companhia de Moambique v. British South African Co. [1893] 2 Q. B. 358; *Elizabethtown Sav. Inst. v. Gerber*, 35 N. J. Eq. 158; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123; *McIlmoyle v. Cohen*, 88 U. S. 13 Pet. 812, 325, 10 L. ed. 177, 183; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640; *Sutphen v. Fowler*, *supra*; *Gardner v. Ogden*, 23 N. Y. 327, 78 Am. Dec. 192; *Lewis v. Darling*, 57 U. S. 16 How. 1, 14 L. ed. 819; *Oheever v. Wilson*, 76 U. S. 9 Wall. 108-121, 19 L. ed. 604-607; *McLean v. Lafayette Bank*, 8 McLean, 587; *MacGregor v. MacGregor*, 9 Iowa, 65.

"Equity regards as done that which ought to be done," and the court considers that upon the execution of a contract the person in whose favor it is made obtains in equity an interest in the thing which is the subject of the contract.

1 Pom. Eq. Jur. § 865; *Crawford v. Bertholf*, 1 N. J. Eq. 460; *Hoagland v. Latourrette*, 2 N. J. Eq. 254; *Huffman v. Hummer*, 17 N. J. Eq. 264; *King v. Ruckman*, 21 N. J. Eq. 599.

An agreement, on a sufficient consideration, to give a mortgage on specific property, creates an equitable lien upon such property, which

takes precedence of the claims of the promisor's general creditors, and of the claims of subsequent purchasers and incumbrancers with notice of the lien.

Jones, Liens, § 77; Jones, Mortg. §§ 163-167; 3 Pom. Eq. Jur. § 1337.

Mr. James Buchanan for respondents.

Magie, J., delivered the opinion of the court:

The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz.: That she had commenced an action in the supreme court of the state of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process, and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved, that respondent should pay to her, as alimony, \$100, on the 1st day of each month, commencing June 1, 1892, and should execute a mortgage, as security for such payments, upon lands in the state of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge, and deliver to appellant a mortgage of a specified form, and containing specified provisions upon lands in this state, which were particularly described in the order; that respondent had failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration, and with the fraudulent purpose of defeating appellant's rights. It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands, prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands, in accordance with the decree and order. Upon these statements and charges, the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decreed, pursuant to the said decree and order of the New York supreme court, to execute and deliver" to her "the mortgage on said premises, therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief. Respondent moved the court of chancery to dismiss the bill, pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection. The motion was heard by Vice Chancellor Bird, and, upon his advice, a decree was made dismissing the bill. The opinion of the vice chancellor is reported in 51 N. J. Eq. 444. From this decree appellant has prosecuted the appeal which is now to be decided.

A motion to dismiss a bill, under chancery

rule 215, is a substitute for a demurrer. The rule was designed to furnish a speedy mode of bringing to adjudication questions which, before its adoption, could only be raised by demurrer. Obviously, all facts stated in the bill which are relevant and well pleaded must be deemed to be admitted to be true upon such a motion, as upon a demurrer, of which it is the substitute. Looking at the bill to discover what facts must have been taken to be true upon the hearing of the motion to dismiss, I find difficulty in determining how extensive a jurisdiction is thereby asserted to have inhered in the supreme court of New York. It is expressly stated that the action commenced in that court was for the purpose of dissolving the marriage of the parties, and there is a conjoined statement that the court had jurisdiction of the case. From these statements it was obviously to be assumed that the court in question had jurisdiction to decree a divorce and annul a marriage. But is it to be inferred—for there is no express averment of it—that the same court possessed jurisdiction to fix the amount and require payment of alimony, and especially to require a defendant to secure the payment of alimony by a charge upon lands lying beyond the territorial jurisdiction of the court? Alimony is, in general, an incident of divorce. It may be justifiable to infer that a court empowered to dissolve the bonds of matrimony would also be clothed with authority to determine on the amount of alimony, and to render judgment therefor. But how, without some further averment, is an inference to be drawn that the same court was authorized to require security for the payment of alimony to be given by the mortgage of lands, and of lands beyond its jurisdiction? If, however, the bill is defective in the respect suggested, the defect was not included in the causes set out in the notice of the motion to dismiss, and no objection upon that ground was made in the court below or here. From this I think we must deem it to have been conceded that the bill properly averred the jurisdiction of the supreme court of New York to make the decree and order mentioned in the bill, and copies of which were annexed to and made a part thereof. The decree, in this respect, ordered respondent to pay to appellant the alimony, from time to time, during her natural life, and to execute and deliver to her a mortgage on his real estate, and particularly that located in the state of New Jersey, to secure such payments. The order simply required respondent to perform the decree by executing, acknowledging, and delivering to appellant a mortgage on particular lands in New Jersey, of a form shown in a schedule annexed to the order. The order and requirement of the court was therefore directed *in personam*, and there was no attempt to adjudicate or enforce an adjudication *in rem*.

It is scarcely necessary to observe that a court of New York could not have been empowered to affect, by its decree of judgment, lands lying within another state; for no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate

upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property. Story, Conf. L. §§ 543, 591. The concession as to the jurisdiction of the supreme court of New York in this case must therefore be deemed to be limited to a jurisdiction to proceed *in personam*, and not to extend to a determination, adjudication, or decree *in rem*. The jurisdiction thus conceded to the supreme court of New York is exactly analogous to the jurisdiction which, since the decision of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, has been universally recognized as inherent in courts administering equity. This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust, and specific performance against persons brought into those courts, notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam* only, and did not extend to the utterance of decrees *in rem*. In the leading American case, *Chief Justice Marshall* declared that the question was whether the question presented was an unmixed question of title, or a case of fraud, trust, or contract. *Massie v. Watts*, 10 U. S. 6 Cranch, 148, 3 L. ed. 181. If relief cannot be effectively given by the decree *in personam*, such courts will not retain the bill. *Morris v. Remington*, 1 Pars. Sel. Eq. Cas. 387; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79. Nor will the power be exerted *in personam* to compel an act affecting lands in another jurisdiction of doubtful legality. *Blount v. Blount*, 8 N. C. 365. The power of such courts to make effective such decrees is limited to its process operating upon the party, such as sequestration of property within jurisdiction, attachment for contempt, and the like; it will not extend to validating a conveyance of the foreign lands, made by its master or commissioner, in default of the performance of the decree by the party. *Watts v. Waddle*, 31 U. S. 6 Pet. 390, 8 L. ed. 433; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621. When, by the process of the court acting upon the party, obedience to the decree is enforced as by the conveyance, it is the conveyance, not the decree, that affects the lands in the foreign jurisdiction. *Davis v. Headley*, 23 N. J. Eq. 115. The long line of cases illustrating this doctrine and its limitations is collected in 23 Am. & Eng. Encyclop. Law, p. 918. Nowhere has the doctrine been more clearly stated than in our own courts. *Wood v. Warner*, 15 N. J. Eq. 81; *Davis v. Headley*, *supra*; *Potter v. Hollister*, 45 N. J. Eq. 303, 46 N. J. Eq. 609; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79. In my judgment, it does not admit of doubt that the jurisdiction of the supreme court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony, and its being secured by mortgage on lands

in New Jersey, only *in personam*, and to enforce it by any process against respondent which is proper in that state. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction. From these considerations, I deem it evident that the theory of this bill that, by virtue of the decree and order of the supreme court of New York, appellant acquired an equitable lien on lands in New Jersey, and a right to have such lands disposed of in a certain manner, cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court do not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

But it is ingeniously contended in this court that the decree and order of the supreme court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation, as it would compel him to perform his contract to convey or mortgage lands, in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the Constitution of the United States, requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, impart to this decree and order a conclusive force, with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by decrees in conformity therewith. Doubtless, the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus, it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony, an indebtedness arises from time to time as such payments become due, an action at law would lie thereon, and the decree would furnish conclusive evidence of such indebtedness.

But the question upon the solution of which this case must turn is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties, but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other states, and as was said by Chancellor Zabriskie in *Davis v. Headley*, *supra*, "leave to the courts of this state only the ministerial duty of executing their decree;" for the doctrine that jurisdiction respecting lands in a foreign state is not *in rem*, but only *in personam*, is bereft of all practical force if the decree *in personam* is conclusive, and must be enforced by the courts of the *situs*. If such is the effect which must be given to the judgments and decrees of the courts of a sister state respecting lands situated here, it is ex-

traordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position. In *Elizabethtown Sav. Institution v. Gerber*, 85 N. J. Eq. 153, the question was as to the effect to be attributed by our courts to an order of a court of New York directing a New Jersey corporation to pay money due from it to one Ahern, in part satisfaction of a judgment which the savings institution had recovered against Ahern in New York. The decision of this court went upon the ground that the New York court had not acquired jurisdiction of the New Jersey corporation which had been ordered to pay, and that its order was consequently void. What was said by the learned chief justice who wrote the opinion respecting the power of our court of chancery to enforce a right to money under such an order was unnecessary to the decision, but can doubtless be supported, because the New York order was for the payment of money raising an indebtedness, which in that case required to be enforced in the court of chancery as the debt, which was the subject of the order had then been paid into that court. But the effect of a foreign judgment or decree as to money in another state must differ from the effect of such a judgment and decree as to lands in another state. *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604, presents a closer parallel to the case in hand. In that case a divorce court in Indiana made an order that one of the parties to an action for divorce should pay to the other party a certain proportion of the rents to accrue from real estate situated in the District of Columbia, and should execute to him a sufficient power to collect such rents. She executed the power as prescribed, and the question before the court was what interest in the rents passed thereby. Mr. Justice Swayne, delivering the opinion of the court, incidentally said that the order "could have been enforced in the *situs rei* by proper proceedings, conducted there for that purpose." But this statement is not supported by the cases cited, and was unnecessary to the decision, as the learned judge immediately pointed out, by showing that the party had executed an assignment which vested in the other party the interest in the rents which she had been ordered to convey. The whole question was as to the effect of that assignment.

The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a "personal obligation." At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process, or to make our decrees operate as process. Moreover, the substantial part of the

decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony. The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands to be enforceable must be entered into and evidenced in a particular mode; but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts, and for our courts to construe the rule so prescribed, and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another state, proceeding *in personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree *in personam* may and must be conclusive in our courts, and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject. For these reasons, I shall vote to affirm the decrees below.

Garrison, J., concurring:

I concur in the result announced by Mr. Justice Magie, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the court of chancery.

The object of the complainant's bill is to execute, through the medium of our court of chancery, an order made by the supreme court of New York upon the defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this state is justified under that provision of the federal law that gives conclusive force in one state to the records and judicial proceedings of another. The vice of this deduction in the case before us is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "judgment" of that state, within the meaning of the Federal Constitution and the act of congress.

The transcendent force given by the federal law to the judicial proceedings of sister states is confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of execution, or to orders merely ancillary to some special form of relief.

In cases that proceed to judgment in common-law form this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes, where judgment, in decretal form, is often accompanied by special orders for particular forms of relief,

or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one, that must not be overlooked because of the form in which the decretal order may be framed.

That only is judgment that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every state the same conclusive force possessed in the state where they are rendered. After judgment in a state court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution, or in aid of execution. No interpretation has ever been placed upon the Federal Constitution giving conclusive effect, or, indeed, any effect at all, to the executions of the judgments rendered in sister states, or to any order merely in aid thereof. Such orders lack the quality of judgment, and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record, or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution no extraterritorial force is given by the federal law.

That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant. Upon the record thus submitted, the supreme court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant, and particularly located in the state of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions of this judgment and decree on the part of the defendant, as may be directed and approved by this court."

In my opinion, this order was ancillary to execution, and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason, I think the complainant's bill was properly dismissed.

Inasmuch as the only object of this memorandum is to indicate the ground upon which I base my affirmance of the decree below, no useful purpose will be served by elaborating my views upon the interesting questions pre-

sented. For the same reason, I do not express any view upon the questions discussed in the opinions that have been read, by which variant results are reached as to the potency of judgments rendered by other states when made the basis of direct equitable remedy, through the medium of our chancery.

Van Syckel, J., dissenting:

The supreme court of New York made a decree for divorce in favor of the wife, and ordered that the husband pay \$100 per month alimony, and that, to secure it to the wife, he should execute a mortgage on lands which he owned in New Jersey. Personal service was made upon the husband in the New York divorce suit, and the decree for divorce, including the order to execute the mortgage, was obtained on the 1st day of July, 1892. On the 19th of November, 1892, on the application of the wife's attorney, an order was entered in the New York court specifying the lands in New Jersey upon which the husband should execute the mortgage. Thereupon the wife filed a bill in the court of chancery of this state to compel the husband to execute the mortgage in accordance with the New York judgment, and also to set aside conveyances of the property in this state by the husband, which are alleged to be fraudulent.

The first question is whether the New York court, on common-law principles, had the power to decree a mortgage to be executed to secure the wife's alimony. The ecclesiastical courts had no such power. These courts enforced their decrees by excommunication until an act was passed (53 Geo. III. chap. 127) forbidding excommunication, and providing imprisonment for contumacy in its stead. The power of the New York court, if it exists, must be statutory. Prior to the judgment, the presumption, in the absence of proof, would be that the common law prevailed, and that no such power rested in the New York court. But, after judgment, the presumption will be that all things were rightly done, and that the power did exist by statute in New York. This presumption will prevail until evidence is produced to repel it. In this case there is an entire absence of proof on this point. Admitting this to be so, the judgment in New York constitutes no lien upon lands in this state. *Davis v. Hendley*, 23 N. J. Eq. 115; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79.

But this does not dispose of the case. The question is whether our court of equity will establish a lien upon the New Jersey lands, so as to give effect to the New York decree. It may be conceded that the *lex fori* must apply to the remedy to enforce the New York judgment in our courts. *Harker v. Brink*, 24 N. J. L. 333; *Garr v. Stokes*, 16 N. J. L. 404; *Armour v. McMichael*, 36 N. J. L. 92. While we will give full faith and credit to the New York judgment, we cannot be asked to give greater efficacy to a decree for alimony made in New York than we can give to a like decree made in our own courts. For instance, if the common law prevailed here, we would enforce the New York decree for alimony only according to the common-law practice, for

that would exhaust our power in that respect. Under our statute concerning alimony, it has been held that equity may decree that it shall be a lien upon the husband's lands. *Snover v. Snover*, 18 N. J. Eq. 261. I do not find that a decree has been made expressly requiring the husband to execute a mortgage, but it is not necessary here, as the decree that it shall be a lien by its own force attaches to the land. It is a difference in mere form, not in substance.

The right to establish the lien must carry with it the power to require the husband to execute any conveyance requisite to its enforcement. The question to be solved, therefore, is whether, under that provision of the Federal Constitution which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, the wife is entitled to invoke the aid of our courts to give effect to the New York judgment in conformity to our practice. It is undoubtedly true that the New York court had no power to create a lien upon New Jersey lands; and it is also true that the New York court could have acted upon the person of the husband while within its jurisdiction, and constrained him to execute such a writing as would have been effective to pass the title to, or establish a lien on, the New Jersey lands. The question, however, is not what the New York court could have done, but what the courts of New Jersey, in discharge of her constitutional obligations, should do in aid of the wife after rendition of the judgment in New York. The New York court having jurisdiction of the person of the husband, and also of the subject-matter of the suit there, the judgment in that state, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey, and should be enforced in equity here. A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect a different principle could be applied is not apparent. In either case, obedience to the mandate of the Federal Constitution would give effect to the judgment here. In *Elizabethtown Sav. Inst. v. Gerber*, 35 N. J. Eq. 153, this court held that a judicial order in New York that the garnishee owes a debt to the defendant in a judgment, such moneys being in the custody of a court of equity, creates *per se* a right to apply to such court for such moneys, in the same way as an assignment of such moneys to the plaintiff in the judgment would have passed such right. Such a decree in the New York court settled the plaintiff's right to the fund, and that right was an equitable one, which was enforced in this state. The decree or judgment in New York has the effect of being, not merely *prima facie* evidence, but conclusive proof, of the rights thereby ad-

judicated; and a refusal to give it the force and effect in this respect which it had in the state in which it was rendered denies a right secured by fundamental law. The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband. It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123; *McElmoyle v. Cohen*, 88 U. S. 13 Pet. 812, 10 L. ed. 177. In *Cheever v. Wilson*, 76 U. S. 9 Wall. 108-121, 19 L. ed. 604-607, there was an order of the divorce court in Indiana directing the wife to pay one third of her rents as they became due to her husband. The land was in Washington, where suit was brought to enforce payment of the rents to the husband. The court said that the decree in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound those who were parties in the case, and could have been enforced in the *situs rei* by proper proceedings for that purpose. The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey.

The New York judgment is conclusive between the parties to it (1) as to the right to a divorce; (2) as to the right of the wife to

the alimony allowed; (3) it is equally conclusive, as against the husband, as to her right to have such alimony secured by a mortgage on his New Jersey lands, that being expressly a part of the adjudication in New York. The judgment imposed an obligation upon the husband, from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this state. The lien does not, by mere force of the extraterritorial judgment, attach to lands in this state. To impress that lien upon lands here, the intervention of our court of equity is necessary, just as it is necessary to sue here upon a New York judgment before execution can issue from our courts to obtain satisfaction of it. The husband has had his day in court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded. The question, in its true form, is whether we will give full faith and credit to the judgment of the New York court in so far as it finally adjudges the questions legally submitted to it, when it had jurisdiction both of the subject-matter of the controversy and of the parties to it. It seems to me that there can be but one answer to this question, and that the court below erred in dismissing the complainant's bill.

Dixon, Lippencott, Reed, and Bogert, JJ., also dissent.

IOWA SUPREME COURT.

N. P. WIND *et al.*, *Appts.*,

v.

ILER & CO.

(.....Iowa.....)

1. The reservation of the right to inspect goods does not of itself indicate that title shall not pass until the goods are tested.
2. The title does not pass on an option to purchase if satisfactory until the option is determined; but it is otherwise in case of a purchase with an option to return if not satisfactory.
3. A statutory right to recover money paid on an unlawful purchase of intoxicating liquors cannot apply to a purchase made in another state where it was valid, although the seller's intent to aid the purchaser to violate the laws of his state would defeat his right to recover for the purchase price on grounds of public policy.
4. Sales of intoxicating liquors shipped to another state in the original packages before the passage of the Wilson bill, are not subject to the laws of that state respecting the recovery of money paid on such sales.
5. The drawing of a bung from a barrel

NOTE.—On the right to recover price of property sold for illegal use, see *note* to *Graves v. Johnson* (Mass.) 15 L. R. A. 834.

On use of small quantity of goods purchased to test quality, as a waiver of the right to rescind, see *note* to *Cream City Glass Co. v. Friedlander* (Wis.) 21 L. R. A. 136.
27 L. R. A.

in which intoxicating liquors were shipped from another state, in order to obtain a small quantity for testing the article to determine an option to reject the purchase, does not destroy the nature of the original package.

(January 21, 1895.)

A PPEAL by plaintiff from a judgment of the District Court for Mills County in favor of defendants in an action brought to recover back money paid for intoxicating liquors. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. E. R. Duffie, John P. Breen, and John Y. Stone for appellant.

Messrs. Congdon & Hunt, James M. Woolworth, and Smith McPherson for appellees.

Deemer, J., delivered the opinion of the court:

Plaintiff is a copartnership composed of N. P. Wind and George F. Silvers, heretofore, and during the years 1881, 1882, 1883, and 1884, doing business as wholesale and retail liquor dealers in the city of Ottumwa, Iowa. Defendant Iler & Co. is a copartnership composed of the other defendants, doing a wholesale liquor business in the city of Omaha, Neb. Sometime during the latter part of the year 1881 defendants' traveling man, one Gilmore, called upon the plaintiffs

at their place of business in Ottumwa to induce them to order some liquors from the firm which he represented. The evidence shows without conflict that this agent had no authority to make sales. He had power to take orders, which were submitted to the defendants for their rejection or approval, and, if approved, the goods ordered were shipped to the proposed purchaser. Plaintiffs gave this agent an order for some goods, which was submitted to the defendants, and by them approved, and the liquors were delivered to the railroad company for shipment to plaintiffs at Ottumwa, plaintiffs paying the freight thereon. An arrangement was made between the plaintiffs and defendants' agent by which plaintiffs might thereafter order such liquors as they desired by mail or by telegram, and in accordance with this arrangement they ordered large quantities of liquor, which they paid for through the Ottumwa banks in response to drafts made upon them for the purchase price. All liquors so paid for, except three bills, were ordered by wire or mail. It is claimed by the plaintiffs that all these various sales of liquor, amounting in number to about eighty, and in value to more than \$2,000, were unlawful and that they are entitled to recover all payments made thereon, under Code, section 1550, which provides that all payments made for intoxicating liquor sold in violation of our liquor law shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise of the receiver to pay to the person furnishing such consideration the sum thereof.

The first question which arises is, Were the sales made in this state? From what we have already stated it would appear that the sales were each and all made in Nebraska. But plaintiffs contend that, while the defendants' agent may have had no authority to do more than take their orders for the goods, yet there is testimony tending to show that the liquors were all shipped subject to their approval, and that the title to the goods did not pass until the liquors were received and tested by them. The testimony on this point is as follows: Witness George W. Silvers said, in substance, that Gilmore, the agent, said: "If the goods isn't satisfactory after you receive them, you can send them back to Omaha." And Silvers told him (Gilmore) if the goods were not as he said they should come back. "The goods came, and we inspected them,—gauged them. We had a government gauge there,—a thermometer we called a 'tester.' We tested the goods before we paid the freight. Gilmore said, 'If you receive the order all in good shape, and the goods are satisfactory, and you need any more, and I am not around, why, send your orders in to the house, and they will be filled.'" This witness further testified that when the goods came to the depot at Omaha they were taken by a drayman from the freight house, and delivered at plaintiffs' place of business, the drayman paying the freight in the first instance, and afterwards collecting it from the plaintiffs. Witness further testified that one bill of goods which plaintiffs ordered shipped

to Des Moines, to a customer of theirs at that place, was returned, and credit asked of defendants therefor, and that defendants gave them a small discount on one of their bills. He further said: "If they were not satisfactory, they were to be returned. That was the contract. We never returned any from Ottumwa." Witness Wind testified that Gilmore said: "If his goods were not as represented we had the privilege of returning them. We told him we wanted to examine the goods after they came, and see if they suited us. He said we had that privilege." "We had a gauge or whiskey tester that we used. We took out the bung, and took a little out, and used the tester. We told Mr. Gilmore our method of examining it. He said it was satisfactory." Witness Silvers also testified that within three or four days after giving the order the plaintiffs received a bill for the goods, and entries were then made on the plaintiffs' ledger of the amount of the bill. It is an elementary proposition of law, needing no citation of authority in its support, that title passes in the sale of personal property when from all circumstances surrounding the transaction it is evident that the parties to the sale intended it to pass. It is wholly a question of intention to be arrived at from the contract and the acts and conduct of the parties thereto. In the absence of all stipulations and conditions in the contract, the title will be presumed to pass, when the parties live at different places, when the goods are delivered by the seller to a transportation company for carriage to the buyer, subject to the seller's lien or right of stoppage *in transitu*. This is certainly the rule where the buyer is to pay the freight. It is also a general rule that the buyer has a right to inspect unascertained goods to determine whether they are such as are bargained for or not. Newmark, Sales, § 252; Benjamin, Sales (Bennett's ed.) pp. 669-690; *Hirshhorn v. Stewart*, 49 Iowa, 418. This right of inspection, however, does not of itself postpone the passing of the title. It simply authorizes a rescission of the sale in the event the goods are not as contracted for. So that the reservation of the right to inspect the goods by the plaintiffs in this case does not of itself indicate that title was not to pass until the goods were tested, for it gives to plaintiffs no greater rights than they would have had under the law without such reservation.

It is claimed that by the terms of the contract the title was not to pass until the plaintiffs were satisfied, after testing the liquors, that they were the kind ordered. The law has made a somewhat refined, yet no less obvious, distinction between an option to purchase if satisfactory and an option to return if not satisfactory. In the one case title will not pass until the option is determined, and in the other case the property passes at once, subject to the right to rescind and return. The former may be said to be a conditional sale, and the latter has been denominated a "sale or return." *Hunt v. Wyman*, 100 Mass. 198; *Foley v. Felrath*, 98 Ala. 176; Newmark, Sales, § 810; *Bussell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262; Benjamin Sales (Bennett's

ed.) p. 569, and cases cited. It is also well settled that the rule that title does not pass so long as anything remains to be done to the goods to ascertain their value, quality, or quantity, is only applicable to cases of constructive delivery. *Bogy v. Rhodes*, 4 G. Greene, 133. Under this rule the right reserved to plaintiffs to inspect and test the goods after they came into their actual possession would not operate to postpone the transfer of title, but merely gave them the right to rescind the contract and return the goods. See also in this connection, *Foley v. Peirath*, *supra*, and cases therein cited; 2 Kent, Com. 496. We are satisfied from the fact that the drayman, who must be considered as plaintiffs' agent, paid the freight on these liquors, took them from the carrier, and delivered them to plaintiffs, and from the further fact that the plaintiffs credited defendants with the liquors as soon as they received the bills for them, which was in advance of the delivery of the goods, with the understanding that they were to have credit for such as might be returned, that both parties intended title to pass when the goods were delivered to the railroad company at Omaha, Neb., for transportation to Ottumwa; and that the sale was not one on trial or on approval, or if satisfactory to plaintiffs, but rather a completed sale, with an option in plaintiffs to return them if they did not meet the test plaintiffs proposed to give them. Our conclusions find support in the following cases: *Engs v. Priest*, 65 Iowa, 232; *Whitlock v. Workman*, 15 Iowa, 351; *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 118, and are not in conflict with *Gipps Brewing Co. v. De France* (Iowa) 58 N. W. Rep. 1087, and *Tolman v. Johnson*, 43 Iowa, 127. The following cases from other states are directly in point: *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 18 R. I. 298; *Gill v. Kaufman*, 16 Kan. 571; *McCarty v. Gordon*, Id. 35; *Snider v. Koehler*, 17 Kan. 432; *Dolan v. Green*, 110 Mass. 322; *Abberger v. Marrin*, 102 Mass. 70; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140.

If the sales were made in Omaha, then they were not unlawful in such sense as that recovery can be had for money paid thereon, although there is evidence in the record that defendants' agent knew plaintiffs had no permit to sell liquors in this state,—which they were at that time required to have to make lawful sales. It is no doubt true that if a nonresident makes sales of liquors in another state to a resident of this state, for the purpose and intent of enabling the purchaser to violate the liquor laws of this state, or participates or assists in a design on the part of the purchaser to dispose of them unlawfully in this state, his complicity in the illegal scheme will prevent him from recovering the price in an action against the purchaser. *Davis v. Bronson*, 6 Iowa, 410; *Whitlock v. Workman*, 15 Iowa, 351; *Second Nat. Bank of Louisville v. Curren*, 36 Iowa, 555. And it is also true that, while mere knowledge on the part of the vendor that the purchaser intends to violate the law may not vitiate the sale, yet it is a fact from which the jury might infer an intent to violate such law.

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Tegler v. Shipman, *supra*. Such unlawful participation in the illegal design of the purchaser will defeat an action by the seller to recover the purchase price of the liquors sold on the grounds of public policy. But will it enable the purchaser to recover the amount of payments made on the contract under section 1550 of the Code? We think not. The sale in such case is not unlawful under this statute, for as we have already seen, the non-resident has a perfect right to make the sale in his state, and recover the purchase price. His act is unlawful because the policy of the law forbids his participation or assistance in the violation of our laws by the purchaser of the liquors, and on the grounds of public policy he cannot recover. The statute referred to gives the purchaser the remedy for recovering back his payments when the sale is of intoxicating liquors in violation of the liquor laws of this state. It is clear, then, that if the matter had been submitted to the jury, and it had found that defendants, in making the sale in Omaha, intended thereby to enable plaintiffs to violate the law of this state, there could be no recovery under section 1550 of the Code. It must be remembered in this connection that all purchases and payments thereon for which recovery is sought in this action were made prior to the enactment of what is known as the "Wilson Bill," and it should further be borne in mind that under the decisions of the United States Supreme Court in *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 81 L. ed. 700, 1 Intern. Com. Rep. 828; and *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 8 Intern. Com. Rep. 36, sales like those in question, if made in Omaha to a resident in this state, were perfectly lawful in and of themselves. See also *Richards v. Woodward*, 113 Mass. 285. The statutes of this state regulating and licensing the traffic in liquors therein were void, and of no effect, so far as they interfered with commerce between the states. *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 8 Intern. Com. Rep. 148. So that defendants had the right to sell their liquors for importation into this state without reference to our police regulations. The sales in and of themselves were not unlawful.

Let it be conceded, however, for the purposes of this case, that the sales of the liquor took place at Ottumwa, and that payments were made for it there. What, then, is the state of the case? Defendants insist that if this be true, then, as the sales were made in the original package in which the liquors were imported, section 1550 has no application to them, because it is a regulation of commerce between the states, and is unconstitutional under the cases from the Supreme Court of the United States before quoted. We are well satisfied that defendants' contention is correct. Indeed, it is practically conceded by the plaintiffs' counsel. But they insist that as soon as the barrels were opened for the purpose of testing the property became incorporated into the general mass of property in the state, and subject to the police regulations adopted to preserve the health and morals of the community. That section 1550

was adopted to restrain the traffic in intoxicants, and to aid in the general enforcement of the general liquor laws of the state, in virtue of the police power lodged in the state, cannot be doubted. And, if this be true, it is a direct restraint and interference upon trade and traffic in liquors, and, under the decisions before quoted, it is, or was prior to the enactment of the Wilson bill, unconstitutional so far as it relates to commerce between the states or the inhabitants thereof. This doctrine finds support in the cases of *State v. Coonan*, 82 Iowa, 400; and *State v. Corrick*, 82 Iowa, 451. What is said to the contrary in the case of *Connolly v. Scarr*, 72 Iowa, 228, which was decided prior to the case of *Leisy v. Hardin*, must be considered as overruled. It is our duty to follow the decision of the highest tribunal in this country—the final arbiter on these grave constitutional questions—without reference to the fact that there is a strong dissent to the doctrines announced by that court, which many of us think announces the better rule. The question, however, is of little importance at this time, because of the enactment of the Wilson bill, which fortunately gave to the states the right to exercise the policy powers vested in them, without reference to the interference the exercise of those powers might have upon interstate commerce.

The question yet remains, Did the drawing of the bung in the barrels in which the liquors were shipped into the state have the effect claimed for it by the appellants? We think not. The barrel was opened in order that a small quantity might be taken from it and tested,—not used,—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the state. Plaintiffs, according to their theory, tested it to see if they would accept it, and make it their property. And if the mere act of testing made it theirs, there was no necessity for the test, because it became theirs by the act itself. We do not think they want such a rule applied in this case. In *Leisy v. Hardin*, *supra*, it is said: "Under our decision in *Bowman v. Chicago & N. W. R. Co.*, *supra*, they had the right to import this beer into the state, and in the view we have expressed they had the right to sell it, by which act alone it would be commingled with the general mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure." This court is committed to the doctrine that the size or form of the package has very little to do with the question we are now considering. The point has been made to turn rather upon whether the liquors themselves were imported or not than upon the form or inviolability of the package. *Collins v. Hills*, 77 Iowa, 181, 8 L. R. A. 110; *State v. Coonan*, *supra*.

We are well satisfied with the conclusions reached by the lower court, and the judgment is affirmed.

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W. L. CULBERTSON, *Appt.*,

John NELSON.

(.....Iowa.....)

1. The words "with exchange" in a draft destroys its negotiability.
2. Statutes providing that negotiable notes should be for "any sum of money," or for "a sum of money in property or labor," do not change the common-law rule as to the certainty of amount.

(January 15, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court of Council Bluffs, in favor of defendant in an action brought to recover upon an accepted bill of exchange to which the defense was want of consideration, fraud in the inception of the bill, and alteration after delivered. *Affirmed.*

The facts are stated in the opinion.

Messrs. McCrary & Craig and Flickinger Bros., for appellant:

When the evidence indubitably shows a party to be the bona fide holder of a negotiable instrument purchased for value before maturity without notice of outstanding equities and in regular course of business, fraud or deceit in its inception or any infirmity not recognized by statute is incompetent to effect any alteration in his position or to impair any of his rights.

NOTE.—*Provision for exchange as affecting negotiability.*

The cases are not far from evenly divided on the question as to whether the fluctuation to which exchange is subject is such a contingency or uncertainty as the rule that a negotiable instrument must be for a sum certain was intended to guard against.

Cases holding that negotiability is not impaired.

In one line of cases it is held that an instrument for the payment of a specific sum of money is not prevented from being a promissory note negotiable under the law-merchant by a provision making it payable with exchange on a place other than the place of payment. *Hastings v. Thompson*, 21 L. R. A. 178, 54 Minn. 184; *Smith v. Kendall*, 9 Mich. 223, 80 Am. Dec. 68; *Johnson v. Frisbie*, 15 Mich. 236.

So in *Johnson v. Frisbie*, *supra*, it was said that *Smith v. Kendall*, *supra*, was based upon the assumption that such notes are negotiable wherever they may have been made payable.

And in *Bradley v. Lill*, 4 Bias. 478, it was held that a note payable in exchange is not thereby prevented from being a promissory note though the rate of exchange is not specified, refusing to follow *Lowe v. Bliss*, 24 Ill. 168, 70 Am. Dec. 742, set forth, *infra*, under heading, *Cases holding that negotiability is destroyed.*

And in *Whittle v. Fond du Lac Nat. Bank (Tex.)* June 20, 1894, it was held that a draft is not rendered non-negotiable by its calling for exchange where the amount to be paid as exchange is susceptible of ascertainment.

So in *Orr v. Hopkins*, 3 N. M. 45, the words "with exchange" in a promissory note were held to be mere surplusage not affecting its negotiability.

And the same rule was held in *Clauser v. Stone*, 29 Ill. 114, 81 Am. Dec. 289, distinguishing *Lowe v. Bliss*, 24 Ill. 168, 70 Am. Dec. 742, hereinafter set out on the ground that in that case the exchange was

2 Rice, Ev. p. 1122; *Sully v. Goldsmith*, 83 Iowa, 397; *Lay v. Wisman*, 86 Iowa, 306; *Sully v. Goldsmith*, 49 Iowa, 690.

A purchaser for value of a bill or note before maturity is not affected by what has occurred between other parties unless he had knowledge thereof at the time of his purchase.

Brown v. Spofford, 95 U. S. 476, 24 L. ed. 508.

To hold that the words "with exchange" destroy the negotiability of the paper seems absurd, when this court has held that the words with "collection and attorney's fees" do not destroy the negotiable character of the instrument.

Sperry v. Horr, 82 Iowa, 184; *Jewett v. Lyons*, 3 G. Greene, 577; *Knipper v. Chase*, 7 Iowa, 147; *Green v. Austin*, 7 Iowa, 522; *Johnson v. Friebis*, 15 Mich. 286; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83; *Leggett v. Jones*, 10 Wis. 85; *Grutacap v. Wouluise*, 2 McLean, 581.

The weight of authority is in favor of the negotiability of drafts and notes containing the agreement to pay exchange.

Tiedeman, Com. Paper, § 28 A, p. 66; *Dan, Neg. Inst.* § 54, p. 63; *Randolph, Com. Paper*, § 200; *Smith v. Kendall*, and *Johnson v. Friebis*, *supra*; *Bullock v. Taylor*, 39 Mich. 187, 83 Am. Rep. 358; *Leggett v. Jones*, 10 Wis. 34; *Pollard v. Herries*, 3 Bos. & P. 335; *Grutacap v. Wouluise*, 2 McLean, 581; *Price v. Teal*, 4 McLean, 201; *First Nat. Bank of Canton v. Dubuque S. W. R. Co.* 52 Iowa,

378, 85 Am. Rep. 280; *Sperry v. Horr*, 82 Iowa, 184; *Bradley v. Lill*, 4 Biss. 473.

Messrs. Wherry & Walker, and Wright & Baldwin, for appellees:

Did the defendant intend to execute negotiable paper, or did he know that he was executing negotiable paper when he signed the paper sued on? If not, then the plaintiff is not entitled to protection even though he is a bona fide holder.

Fayette County Sav. Bank v. Steffen, 54 Iowa, 214; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675; *Walker v. Egbert*, 29 Wis. 194, 9 Am. Rep. 548; *Briggs v. Ewart*, 51 Mo. 245, 11 Am. Rep. 445; *Grieffths v. Kellogg*, 39 Wis. 290, 20 Am. Rep. 49.

Is the instrument sued on a negotiable instrument? If not plaintiff cannot recover, and it will make no difference whether he is an innocent holder or not.

Absolute certainty is one of the essential requisites of negotiable paper. It must be certain as to a payee, the payor, the time of payment and the amount paid.

1 *Parsons, Notes & Bills*, pp. 80, 87 88; *Sperry v. Horr*, 82 Iowa, 184; *Smith v. Maryland*, 59 Iowa, 649; *Bank of Carroll v. Taylor*, 67 Iowa, 572; *Storv v. Lamb*, 52 Mich. 525; *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781; *Louie v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742; *Maryland Fertilizing & Mfg. Co. v. Newman*, 60 Md. 548, 45 Am. Rep. 750; *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201; *Windor Sav. Bank v. McMahon*, 8 L. R. A. 192, 83 Fed. Rep. 283; *Hughitt v.*

on a distant place while the note in suit was simply "with exchange."

So in *Hill v. Todd*, 20 Ill. 101, and *Christian County Bank v. Goode*, 44 Mo. App. 126, a provision in a note payable at the place where it was drawn for the payment of current exchange was held not to deprive it of negotiability as in such case there could be no exchange and the provision should be rejected as surplusage.

And in *Bullock v. Taylor*, 39 Mich. 187, 83 Am. Rep. 358, a provision in a note for the payment of exchange or express charges was said to be nugatory as the expense of the transmission of the money would fall upon the promisor in any event, but the case was decided upon other grounds.

So in *Leggett v. Jones*, 10 Wis. 85, agreements in the form of a promissory note made in one place and payable in another providing for the payment of exchange on the place where they were made was said to have been everywhere treated as commercial paper both by the business world and by the courts, but all that was decided was that the agreement in question was a contract for the payment of money which might be declared on as such.

And in *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781, in which the stipulation in question was to pay expenses of collection, while it was said that *Leggett v. Jones*, *supra*, could not be justly regarded as authority for the proposition that an instrument like the one then in question is a promissory note the court upheld the proposition in argument on the ground that a note payable in one place with exchange on another requires the same amount to pay it as it would if payable in the latter place, and is therefore certain in amount.

There are also several cases in which the instrument in suit containing a provision for payment of exchange was treated as a promissory note, but 27 L. R. A.

the question as to its effect upon negotiability was not raised.

In *Pollard v. Herries*, 3 Bos. & P. 335, a recovery was allowed on an instrument payable in Paris with course of exchange between London and Paris at the rate existing at the time of presentment.

And in *Price v. Teal*, 4 McLean, 201, it was held that the rate of exchange at the time of the maturity of the note should be taken and not that at time of the trial.

And in *Balch v. Colman*, 3 McLean, 85, the court laid down the rule as to the amount of recovery for exchange as the current rate at which drafts on the place on which exchange was contracted for sold at the place where the instrument was payable.

And in *Grutacap v. Wouluise*, 2 McLean, 581, it was merely held that the difference of exchange may be recovered or a note given in New York payable at Detroit with current exchange on New York, without stating the facts.

Cases holding that negotiability is destroyed.

On the other hand, quite a line of cases agree with the principal case holding that an instrument in which the maker promises to pay a designated sum with exchange is not negotiable, as exchange is constantly fluctuating and the amount to be paid at maturity is thereby rendered uncertain. *Hughitt v. Johnson*, 28 Fed. Rep. 365; *Russell v. Russell*, 1 McArth. 263; *Fitzharris v. Leggett*, 10 Mo. App. 529; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Read v. McNulty*, 12 Rich. L. 445, 78 Am. Dec. 467; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504; *Palmer v. Fahnestock*, 9 U. C. C. P. 172; *Fahnestock v. Palmer*, 20 U. C. Q. B. 307; *Saxton v. Stevenson*, 23 U. C. C. P. 503; *Nash v. Gibbon*, 4 Allen (N. B.) 479; *Caset v. Kirk*, Id. 542.

Johnson, 28 Fed. Rep. 865; *Fitzharris v. Leggatt*, 10 Mo. App. 528; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Palmer v. Fahnstock*, 9 U. C. C. P. 172; *Saxton v. Stevenson*, 23 U. C. C. P. 503; *First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Cayuga County Nat. Bank of Auburn v. Purdy*, 56 Mich. 6.

When we begin to interpolate one element of uncertainty into commercial paper we may do so with another and another and on *ad infinitum* until we find ourselves involved in an endless sea of uncertainty. Nearly every state in the Union as well as the federal courts have held that contracts of this kind are not negotiable.

Carroll County Sav. Bank v. Strother, *Lowe v. Bliss*, *Hughitt v. Johnson*, *Windsor Sav. Bank v. McMahon*, *Fitzharris v. Leggatt*, *Palmer v. Fahnstock*, *Saxton v. Stevenson*, *First Nat. Bank of New Windsor v. Bynum*, and *Cayuga County Nat. Bank of Auburn v. Purdy*, *supra*; *Huss v. Hamblin*, 29 Iowa, 508, 4 Am. Rep. 244; *Sperry v. Horr*, *supra*; *Woodbury v. Roberts*, 59 Iowa, 848, 44 Am. Rep. 685; *Smith v. Marland*, 59 Iowa, 645; *Bank of Carroll v. Taylor*, 67 Iowa, 574.

Thus in *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742, an instrument for the payment of a designated sum of money with current rate of exchange at a place other than the place of payment was held not to be a promissory note to which the law imparts a consideration on the ground that it is not a promise to pay a specific sum ascertainable by computation independent of extrinsic evidence.

Lowe v. Bliss, 24 Ill. 168, 76 Am. Dec. 742, however, was overruled by *Bilderback v. Burlingame*, 27 Ill. 336, on the ground that the consideration was otherwise shown, but the question of negotiability was left untouched.

So in *Flagg v. Barnes County School Dist. No. 70* (N. Dak.) 26 L. R. A. 363, it was held, *Wajlin, J.*, dissenting, that bonds and interest coupons providing for the payment of exchange on a point other than the place of payment in addition to principal and interest are not negotiable instruments and are subject to the defense of want of consideration good as between the original parties though in the hands of an innocent purchaser for value before maturity, for the reason that resort would have to be had to evidence outside of the papers themselves to determine the amount due.

And in *Windsor Sav. Bank v. McMahon*, 3 L. R. A. 192, 38 Fed. Rep. 283, it was held that a clause in a promissory note binding the maker to pay exchange between two places renders the amount payable uncertain and defeats its negotiability where there is no fixed rate of exchange established by law or by the terms of the note.

And in *Grant v. Young*, 23 U. C. Q. B. 387, an instrument for the payment of a specified sum of money with current exchange was said not to be a promissory note, but the case was decided upon other grounds.

So in *Caset v. Kirk*, 4 Allen (N. B.) 543, it was held that an indorsee could not recover as such on an instrument in the form of a bill of exchange payable a specified period after date with current rate of exchange on New York, as such exchange must be computed at the time of making the bill and the exact amount inserted in it.

And in *Nash v. Gibbon*, 4 Allen (N. B.) 479, a complaint on an instrument in writing in the form of a promissory note payable to the maker's own order with current rate of exchange on Boston was held 27 L. R. A.

Deemer, J., delivered the opinion of the court:

This is another case where the unsuspecting has been imposed upon by the patent-right swindler, and, in its facts, is somewhat similar to the case of *First Nat. Bank of Grand Haven v. Zeims* (Iowa) 61 N. W. Rep. 483, (decided at October term). In this case the patent was on a water heater or feed cooker, and in the *Zeims* case it was on a fence. The lower court made a finding of facts from which he drew certain conclusions of law, which were as follows: "(1) That the draft in controversy was obtained of the defendant through fraud and misrepresentation of the payee therein, Thos. E. Hall, and is wholly without consideration. (2) That the draft contained the words 'with exchange,' and, by reason thereof, is not a negotiable instrument. (3) That, the draft not being negotiable, the fraud and failure of consideration can be pleaded against it in the hands of this plaintiff. (4) The plaintiff, holding the draft, is subject to the same equities and defense that the original payee would hold it. The court is not called upon to decide whether or not plaintiff stands in a different position than the original payee in the draft, and whether

defective in not averring what the rate of exchange was and what Boston was intended, but that the defect might be cured by amendment if the plaintiff thought he could recover on such a contract.

In *Russell v. Russell*, 1 McARTH. 263, the court said that the transaction might not have been objectionable if the note had been payable at the place on which the exchange was provided for, distinguishing *Grutcap v. Woulluse*, 2 McLean, 581, on the ground that in that case the note was made and the transaction had in New York, but was made payable at Detroit with exchange on New York so that it merely amounted to a note payable where it was made.

But in *Hughitt v. Johnson*, 28 Fed. Rep. 865, it was said that if the note was made at the place of payment that would not affect the question as the maker would have to pay exchange if he happened to be in another place when it fell due.

And in *Caset v. Kirk*, 4 Allen (N. B.) 543, *supra*, that a bill of exchange cannot be construed by rejecting a provision for current rate of exchange as surplusage. But see cases treating provision as surplusage under heading: *Cases holding that negotiability is not impaired*.

In *Cayuga County Nat. Bank of Auburn v. Purdy*, 56 Mich. 6, a note payable with exchange and with an increase of interest if not paid when due the maker therein agreeing to pay all expenses, including attorney's fee incurred in collecting waiving exemption and all relief from valuation and appraisal laws, was held not to be negotiable.

And in *Story v. Lamb*, 62 Mich. 525, a promise to pay a specified sum with interest on or before a specified time with current rate of exchange and express charges reciting that it was given for the purchase of a specified instrument which was not to be removed from the township and the title to which was to remain in the payee until payment of the note giving him the option in case of default to take possession or enforce the note by process of law, and providing that he should not be liable to refund moneys previously paid if he seized it, was held not to be a promissory note either negotiable or non-negotiable, and could not be enforced against an indorser as it lacks the necessary

or not he could recover if the draft had been a negotiable instrument. Wherefore, it is ordered, adjudged, and decreed by the court that the plaintiff's petition be dismissed, and the defendant have judgment against the plaintiff, W. L. Culbertson, for the costs in this action, taxed at \$41.75, and that execution issue therefor."

The following is a copy of the draft upon which the action is predicated:

Dec. 9, 1893.	Thomas E. Hall, Business Manager.	No. 10,032.
Accepted and payable at Council Bluffs,	Hall & Company.	Kansas City, Mo.
To the order of John Nelson,	October first, after date, pay to the order of Thomas E. Hall nine hundred dollars (\$900), with exchange, and eight per cent. interest from date, if not paid when due. Value received, and charge to the account of	Willita, Ia., Dec. 9, 1893.
Willita, Iowa.	To John Nelson,	Hall & Co.,
		By Thos. E. Hall.

There was ample testimony to sustain the findings of the court below that the draft was obtained through fraud and misrepresentation, and was and is wholly without consideration. Indeed, counsel do not challenge these findings. The error of the court, if any, is in his conclusions of law. The appellant contends that the draft is a negotiable instrument, and is not subject to the defenses lodged against it in the hands of a bona fide holder; while the appellee insists that it is not negotiable, and therefore subject to these defenses, because of uncertainty in the amount to be paid, for that it includes "exchange." It is to be regretted that this question, which is of so much moment to the business interests of the country, is in so unsettled a condition. If there is any branch of the law which should be reduced to a certainty, it is that relating to commercial paper. After long usage, the custom of traders finally ripened into the law merchant, and this law gave to notes and bills of exchange their present character, in which they, in a sense, become part of the circulating medium of the whole country; and it is exceedingly important that state lines do not mar the symmetry of the rules governing such paper. However, we find the question presented has been variously decided by the different courts of the country; and, if there is anything at present uncertain it is the negotiability of such an instrument. The following cases affirm the negotiability of such paper: *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 83; *Johnson v. Friebie*, 15 Mich. 286; *Leggett v. Jones*, 10 Wis. 85; *Morgan v. Edwards*, 58 Wis. 599, 40 Am. Rep. 781; *Bradley v. Lill*, 4 Biss. 478, Fed. Cas. No.

elements of certainty in time and amount of payment.

Nothing is said in either of the cases last above set out, however, to indicate that they turned on the stipulation for exchange.

But in *Flagg v. Barnes County School Dist. No. 70* (N. Dak.) 25 L. R. A. 363, the court in commenting on *Cayuga County Nat. Bank of Auburn v. Purdy*, *supra*, said that as provisions similar to all those in the note in suit except that for exchange had been held by many authorities not to destroy negotiability the case might have turned upon the question whether the provision for exchange destroyed it. But see Michigan cases under heading: *Cases holding that negotiability is not impaired*.

Reasons for the different rules.

The reason given for the rule that a provision for the payment of exchange in an instrument does not affect its negotiability is placed upon the ground that where proof of exchange is in and the time fixed the amount is a mere matter of computation, in *Bradley v. Lill*, 4 Biss. 478.

And that the rate of exchange between two places at a particular date is a matter of common commercial knowledge easily ascertainable by any one, and that such paper is usually looked upon as negotiable in commercial circles, and that the law-merchant which is founded upon commercial usages and customs should be construed with reference thereto and so far as possible in harmony with common understanding in such circles, in *Hastings v. Thompson*, 21 L. R. A. 178, 54 Minn. 184.

And that such instruments are considered as promissory notes by commercial men, and that exchange is an incident to bills for the transmission

of money from one place to another and its nature and effect are well understood in the commercial world, and that the law-merchant should be liberally construed so as to affect the object had in view, in *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 83.

On the other hand, the rule that negotiability is destroyed by such a provision is placed upon the ground that resort would have to be had to evidence outside of the papers themselves to determine the amount due. *Flagg v. Barnes County School Dist. No. 70* (N. Dak.) 25 L. R. A. 363; *Lowe v. Biss*, 24 Ill. 163, 76 Am. Dec. 743; *Caset v. Kirk*, 4 Allen (N. B.) 543.

In *Flagg v. Barnes County School Dist. No. 70*, *supra*, which is one of the most important cases on that side of the controversy, it is said that the test is whether the amount due is certain from the face of the paper at the time and place of payment and that exchange is contracted for to enable the creditor to receive the full amount of principal and interest without diminution because of being compelled to pay it himself, and this can be provided for by requiring the obligation to be made payable at the place he requires it to be remitted.

This case criticizes the reasoning in *Bradley v. Lill*, 4 Biss. 478, as clearly unsound and that of *Hastings v. Thompson*, 21 L. R. A. 178, 54 Minn. 184, as taking a position which is untenable though not devoid of strength, and in commenting on *Johnson v. Friebie*, 15 Mich. 286, says that the judges did not intend to express their views on the question as an original one, but merely states that the law was settled by a majority of the court in the prior case of *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 83.

F. H. R

1,788; *Price v. Teal*, 4 McLean, 201, Fed. Cas. No. 11,417; *Whittle v. Fond du Lac Nat. Bank* (Tex.) 26 S. W. Rep. 1106; *Hastings v. Thompson*, 54 Minn. 184, 21 L. R. A. 178; *Grutacap v. Woulluisse*, 2 McLean, 581, Fed. Cas. No. 5,854. On the other side of this question are the following cases: *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742; *Read v. McNulty*, 13 Rich. L. 445, 78 Am. Dec. 467; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504; *Palmer v. Fahnestock*, 9 U. C. C. P. 172; *Saxton v. Stevenson*, 28 U. C. C. P. 508; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Russell v. Russell*, 1 MacArth. 268; *Fitzharris v. Leggatt*, 10 Mo. App. 529; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Windsor Sav. Bank v. McMahon*, 38 Fed. Rep. 283, 3 L. R. A. 192; *Flagg v. Barnes County School Dist.* No. 70 (N. Dak.) 25 L. R. A. 863; *Christian County Bank v. Goode*, 44 Mo. App. 129; *Caset v. Kirk*, 4 Allen (N. B.) 543; *Nash v. Gibbon*, Id. 479.

Turning to the text-writers, we find that Randolph, in his work on Commercial Paper, at section 200; Daniel, in his treatise on Negotiable Instruments, at section 54; and Tiedeman on Commercial Paper, at section 280,—affirm the negotiability of such papers; while Benjamin's Chalmers on Bills and Notes, at page 18; Parsons on Notes and Bills, at page 38; and perhaps others,—deny it. Some of the cases cited relate more particularly to the question as to whether instruments in form of promissory notes, with such a stipulation, are promissory notes under the Statute of Anne (1705), or not, and some of them to the negotiability of such instruments. The only English case we have been able to find, having any bearing upon the case, is *Pollard v. Herries*, 3 Bos. & P. 385, where an instrument "payable in Paris, or, at choice of bearer, at Union Bank in Dover, or at payee's usual place of residence in London, according to the course of exchange upon Paris," was declared on, and treated as a promissory note. Here is most deplorable uncertainty. Probably, the greater number of cases deny the negotiability of such instruments. And, if the weight of authority were to be determined by the number of cases, no doubt it would be found to be on the negative side of the question. But such is not the true method of determining the preponderance. It becomes our duty, then, to try and untangle this maze, and solve the puzzle upon principle, in the light of the better-reasoned cases.

"A bill of exchange is an open letter by one person to a second, directing him, in effect, to pay absolutely, and at all events, a certain sum of money, therein named, to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer, and to the drawer himself." Dan. Neg. Inst. § 27. And it is among the fundamentals that such an instrument must be certain as an engagement to pay, as to fact of payment, amount to be paid, and must be for payment of money only. One of the most essential elements in it is that it must be certain as to the amount

to be paid. And this certainty must appear upon the face of the paper, and not from anything dehors the instrument. The maxim, "*Id certum est quod certum reddi potest*," does not apply, except the certainty required may be ascertained from the face of the paper. With these rules as our own guide, we think the agreement to pay a certain sum at a particular place, when the acceptor lives at a different one, "with exchange," introduces an uncertainty as to the amount to be paid, which destroys the character and negotiability of the instrument as a bill of exchange. If it were true that there was at all times a certain definite and unchangeable rate of exchange, then there would probably be no uncertainty in the instrument. But it is a fact well known to the business world that there is no such fixed and unchangeable rate. Indeed, the rate charged for exchange is oftentimes a financial barometer, indicative of the state of the money market. He who was an observer of the financial world during the year 1898 could not have failed to observe the varying rates charged for exchange during the panic which was upon us at that time. Moreover, it is well known that rates of exchange vary in the different localities, and oftentimes in the same locality. Here, then, an element of uncertainty is introduced into this bill of exchange, and the amount to be paid by the acceptor will never be known until he applies for his draft at such point as he may happen to be when the instrument is due. Again, neither the state of the money market, the condition of the bank and its account with its correspondent, nor the rate of exchange in the particular locality, can be determined until the time for payment arrives. In all the cases affirming the negotiability of instruments of this kind, these facts are practically conceded, and the only answer offered is, first, that a custom has lately grown up among banks to treat such instruments as negotiable, and that such custom should be regarded and recognized. It is sufficient to say, in reply, that we have never understood that the customary understanding of the law, no matter how general, changed the law itself. There would be some force in the position, if it appeared that there was a uniform custom in the business to charge a fixed and certain rate of exchange between all places, depending simply upon the amount called for by the bill. But such is not the case. It has also been said, second, that the amount of exchange, when any is charged, is so inconsiderable that such a provision ought not to destroy the character of the instrument. We cannot lend our approval to this doctrine. It is exceedingly unsafe to permit innovations upon well-settled rules of law. To do so would lead to "evils we know not of." We had better endure the hardships incident to a strict construction of the rules applicable to commercial paper, than tolerate an innovation which may lead to untold evils. It is of the utmost importance to the business world that the fixed rules with reference to commercial paper shall be preserved in their rigor and integrity. Another argument in support of the character and negotiability of such paper is that, when the ac-

ceptor is called upon to pay exchange upon a particular place, it is no more, in effect, than a requirement that the paper be paid at the place on which exchange is to be paid. But this is clearly unsound. As said by Mr. Justice Corliss in *Flagg v. Barnes County School Dist. No. 70*, *supra*. "There is a marked difference, both to debtor and creditor, with respect to the amount to be paid and received, between cases where the paper is payable at one place, with exchange on another, and cases where the paper is payable, without exchange, at the last named place. Suppose, when the money is payable in this state, the creditor wishes to use the money here. He is doubly benefited by the provision to pay here, with New York exchange. Had the paper been payable in New York, without exchange, he might be compelled to pay exchange on some western point, to bring the money to this state. But, by having it paid here, he saves this sum, and, in addition, places in his pocket the amount of New York exchange paid him by the debtor. In times of great financial fright, like those through which we have been passing, the difference might be equal to a considerable sum. Nor is the effect the same upon the debtor. Should his money be in New York, he must pay the cost of bringing it West, and also pay the creditor the further cost of sending it back, although the creditor may not desire it remitted, whereas, had the debt been payable in New York, without exchange, he would have saved both of these items of exchange." We have, as we think, sufficiently answered all arguments, worthy of the name, made in support of the negotiability of such instruments. And, while we do not think them utterly devoid of strength, our judgment is, they are untenable.

The decisions cited in support of the negotiability of such instruments are all based upon one or the other of the arguments we have attempted to answer. Some of them, however, we do not regard as authorities for the position they are cited to sustain. In the case in 9 Mich., there was a strong dissenting opinion by Justice Campbell, which we regard as stating the better law. In addition to this, the note in that case was dated in New York, and payable in New York, "with current exchange on New York." The words quoted were superfluous and surplusage. The court correctly decided the case, but, to our minds, gave a wrong reason. See *Hill v. Todd*, 29 Ill. 101, and *Clauer v. Stone*, 29 Ill. 114, 81 Am. Dec. 299, which are directly in point on this last proposition. The case in 15 Mich. simply followed the one in 9 Mich., the opinion being written by the justice (Campbell) who dissented in the first case. In a much later case *Oayuga County Nat. Bank of Auburn v. Purdy*, 56 Mich. 6, that court said: "The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the law merchant, affecting certainty as to amount due, . . . should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes. And they should

be relegated to the domain of ordinary contracts." The remarks of the court in the Wisconsin cases were clearly obiter, and so recognized in the *Morgan-Edwards Case*. Neither case is an authority on the question. The case in 4 Bias. (Fed. Cas. No 1,788) is, in its arguments and illustration, so manifestly unsound that no further attention need be given it. The case from 54 Minn. 184, is the only one, to which we have access, which is supported by argument of any force. But we cannot accede to the doctrine there announced. It is said, however by appellant's counsel, that we have recognized the negotiability of such instruments in the cases of *Sperry v. Horr*, 32 Iowa, 184, and *First Nat. Bank of Canton v. Dubuque S. W. R. Co.* 52 Iowa, 878. We do not think so. In the first case, we called attention to the conflict in the authorities on the subject, and expressly refrained from deciding the question. In the last case cited, the question was neither involved nor decided.

It is further insisted that the clause is similar in its nature to a stipulation to pay an attorney's fees for collection, and that, as we have held a note with such a stipulation negotiable, *a fortiori* should we hold the bill in suit negotiable. The distinction between the two provisions is accurately pointed out in the case of *Sperry v. Horr*, *supra*. In that case it is said: "The agreement for the payment of attorney fees in no sense increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued to enforce its collection, than to the sum the maker is bound to pay." See also *Shenandoah Nat. Bank v. Marsh* (Iowa) 56 N. W. Rep. 458. The distinction between such an agreement and one to pay a certain amount, with exchange, is so marked that we need not do more than rest upon this quotation.

Lastly, it is insisted that our statutes have changed the rules of the law-merchant. The sections of the Code relied upon are as follows:

Section 2082: "Notes in writing made and signed by any person promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange according to the custom of merchants."

Section 2085: "Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor, or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the words order or bearer, alone, will not manifest such intent."

The first section is a re-enactment of the

statute of Anne, before referred to, giving to promissory notes the same character as bills of exchange under the law-merchant. It has no application to this case. Section 2085 has been in force ever since 1851, and it has uniformly been held that a bill of exchange or promissory note, to be such, and to be possessed of the attributes of negotiability under the law-merchant, must be certain as to payor, payee, amount, time, and place of payment. *Smith v. Marland*, 59 Iowa, 649; *Gordon v. Anderson*, 88 Iowa, 224, 12 L. R. A. 483; *Bank of Carroll v. Taylor*, 87 Iowa, 572; *Woodbury v. Roberts*, 59 Iowa, 848, 44 Am. Rep. 685; *Hollen v. Davis*, 59 Iowa, 444, 44 Am. Rep. 688; *Miller v. Ponge*, 56 Iowa, 96, 41 Am. Rep. 82. So it has been held that a note payable "in currency," or "in current funds," is not prima facie negotiable. *Rindskoff v. Barrett*, 11 Iowa, 172; *Huss v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244. So we think that, even should it be held that this statute is applicable to the case, yet certainty in amount is essential to establish the character and negotiability of a bill or note. Such a holding in no way conflicts with the rule announced in the case of *Council Bluffs Iron Works v. Cuppy*, 41 Iowa, 104. It may further be added, in this connection, that if the words "with exchange," appearing in the instrument in suit, destroy its negotiability under the law-merchant, then there is nothing to indicate that it was the intention of the de-

fendant to make it negotiable, except the use of the word "order;" and this, under the statute, will not, alone, manifest such intention. The use of the words "value received" is not indicative of an intention on the part of the acceptor to make the bill negotiable. *Lord Denman* said in the case of *Hutch v. Trayer*, 11 Ad. & El. 702, "The words 'value received' express only what the law must imply from the nature of the instrument, and the relations of the parties apparent upon it." See also *Osgood v. Bringolf*, 32 Iowa, 265; *Dan. Neg. Inst.* § 108; *Townsend v. Derby*, 8 Met. 363; *Arnold v. Sprague*, 34 Vt. 402; *People v. McDermott*, 8 Cal. 288; *Hughes v. Wheeler*, 8 Cow. 77; 1 Parsons, Notes & Bills, 193. See also, as directly in point, *McCartney v. Smalley*, 11 Iowa, 85, and *Peddicord v. Whittam*, 9 Iowa, 471. "Where a bill is drawn payable to the order of a third person, the use of the words 'value received,' in the body of the bill, is ambiguous. They may mean either value received by the acceptor from the drawer, or by the drawer from the payee. But the latter is the more natural and probable construction, for, as said by *Lord Ellenborough*, it is more natural 'that the party who draws the bill should inform the drawee of a fact which he does not know, than one of which he must be well aware.'" *Dan. Neg. Inst.* § 108.

We think the lower court was right, both in its findings of fact and conclusions of law. *Affirmed.*

PENNSYLVANIA SUPREME COURT.

S. M. WILLOCK

PENNSYLVANIA R. CO., *Appt.*

(166 Pa. 184.)

A condition in a bill of lading that the shipper shall insure the goods for the carrier's benefit cannot protect the carrier against the consequences of its own negligence.

(January 21, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 8, for Allegheny County, in favor of plaintiff in an action brought to recover the value of oil shipped by plaintiff over defendant's road under a contract requiring plaintiff to insure against fire, which he neglected to do; and which was burned while in transit. *Affirmed.*

The facts are stated in the opinion.

NOTE.—A variation of the general rule against avoiding liability for a carrier's negligence by contract is furnished in the case of an agreement to insure for the carrier's benefit.

For limitation of the amount of liability in case of negligence, see *note* to *Ballou v. Earle* (R. L.) 14 L. R. A. 433.

For power to limit liability in the absence of negligence, see *note* to *Little Rock & Ft. S. Ry. v. Cravens* (Ark.) 18 L. R. A. 527.

27 L. R. A.

Messrs. William Scott and George B. Gordon, for appellant:

The carrier, as bailee, had an insurable interest in the property.

Richards, Ins. p. 85; Ostrander, Fire Ins. p. 155.

He may insure the property to its full value, and recover the same from the insurance company.

Richards, Ins. p. 87; Ostrander, Fire Ins. p. 155.

If he so insures, it is perfectly clear that neither the negligence of the carrier nor its employes, though the proximate cause of the fire, will be any defense to the policy.

Richards, Fire Ins. § 22, p. 29; American Ins. Co. v. Insley, 7 Pa. 223, 47 Am. Dec. 509; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 81 L. ed. 63; *Phenix Ins. Co. of Brooklyn v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873.

The carrier having the right to take out insurance which would protect both it and the owner from loss occurring by fire, and having the right to exact from the shipper (in addition to its charge for transportation), the premium for such insurance, entered into this contract with the shipper, by which he agreed, in consideration of the carrier making no extra charge for the insurance, that he would cause it to be properly, fully and

sufficiently insured from loss or damage by fire, and if the loss by fire occurred from any cause which should render the carrier liable, the carrier should have the benefit of the insurance, and that he would see that it should be so inserted in the policy.

This prima facie constituted a valid contract to procure insurance.

Miner v. Tagert, 3 Binn. 204; *New York Tartar Co. v. French*, 154 Pa. 273; *Phœnix Ins. Co. of Brooklyn v. Erie & W. Transp. Co. supra*; *Providence Ins. Co. v. Morse*, 150 U. S. 99, 87 L. ed. 1013; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730; *Missouri P. R. Co. v. International Marine Ins. Co.* 84 Tex. 149; *Gulf, O. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605; *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418; *Georgia R. & Bkq. Co. v. Reid*, 91 Ga. 377.

Those things only are contrary to public policy which are contrary to the public good. *Greenhood*, Pub. Pol. p. 2.

To hold that a person may for a valid consideration agree to perform part of the duties of another, and having neglected to do so hold that other liable for a loss resulting to himself, upon the ground that the contract was contrary to the public good, is to go far beyond any precedent.

Camden & A. R. Co. v. Baldauf, 16 Pa. 67, 55 Am. Dec. 481; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *Patterson v. Clyde*, 67 Pa. 500; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; and *Buck v. Pennsylvania R. Co.* 150 Pa. 171.

In determining the questions of limitations of the liability of the carrier all the circumstances must be regarded, and not any mere definition.

Lewis v. Great Western R. Co. L. R. 3 Q. B. Div. 195; *Rooth v. Northeastern R. Co.* L. R. 2 Exch. 173; *Pasmora v. Western U. Teleg. Co.* 78 Pa. 238; *Western U. Teleg. Co. v. Stevenson*, 5 L. R. A. 515, 128 Pa. 455; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883.

Messrs. Young & Trent for appellee.

Williams, J., delivered the opinion of the court:

Who shall be deemed a common carrier, and what are the nature and extent of his undertaking, are questions that were settled centuries ago upon common-law principles. A common carrier is bound to employ safe and sufficient means of carriage, trustworthy and competent servants, and by himself or his agent to exercise an intelligent supervision over the system of carriage which he employs. He is therefore to all intents and purposes an insurer against such perils of transportation as it is his duty to provide against; and these include all the perils of the journey, except such as arise from "the act of God or the king's enemies." Our forefathers brought this definition of the duties of a common carrier with them when they came to this continent, and its outlines remain substantially the same to this day. Some limitations upon his common-law liabilities have been sustained to protect the carrier against unjust and fraudulent claims on the part of customers, but the measure of care due from him

to those whom he serves has not been abated in the slightest degree. He is still held to be an insurer against such perils as it is his duty to provide against, and among these are such as arise from the use of defective or inadequate instruments of carriage, and from the employment of incompetent, negligent, or criminal servants. *Farnham v. Camden & A. R. Co.* 55 Pa. 53. What are commonly spoken of as limitations of the liability of the carrier, and have been upheld by the courts of this state as such, are, when carefully considered, undertakings of the shipper implied from the nature of the contract, and enforced against him at the instance of the carrier. Thus a stipulation that the carrier shall not be liable to the shipper for the loss of certain packages in a greater sum than that named in the receipt or bill of lading, unless the actual value of the package was fully disclosed to the carrier when it was delivered to him, so that he might know the amount of risk involved and charge accordingly, has been upheld, because good faith on the part of the shipper requires such full disclosure by him. So, also, if the contents of a package are perishable, or easily broken, or explosive, so that the danger of loss is increased, and the exercise of an unusual degree of care is made necessary, good faith requires the shipper to make the facts known to the carrier; and a failure to do so ought to affect the extent, and in some cases the right, of recovery for the loss of goods so shipped. The carrier is relieved in these cases, not from the duty to exercise care and diligence in the transportation of his customer's goods, but from the consequences of the failure of the shipper to advise him fully of facts and circumstances material to the contract the suppression of which is in effect a fraud upon him. His obligations as a common carrier are not reduced. He is bound to the exercise of great care by the nature of his undertaking. He must not be negligent. It is against public policy that he should be. It is also a violation of his contract, which is to carry safely. A stipulation that is intended to protect him in the violation of his contract as a carrier, and in disregarding a settled rule of public policy, will not be sustained. The cases in which this doctrine is recognized and applied in this state are very numerous. Among them may be named the following: *Beckman v. Shouse*, 5 Rawle, 179, 28 Am. Dec. 653; *Bingham v. Rogers*, 6 Watts & S. 495, 40 Am. Dec. 581; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 583; *Gooley v. Pennsylvania R. Co.* 80 Pa. 242, 72 Am. Dec. 703; *Powell v. Pennsylvania R. Co.* 82 Pa. 414, 75 Am. Dec. 564; *American Exp. Co. v. Sands*, 55 Pa. 140; *Pennsylvania R. Co. v. Miller*, 87 Pa. 395; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577; *Western U. Teleg. Co. v. Stevenson*, 128 Pa. 442, 5 L. R. A. 515; *Phœnix Pot Works v. Pittsburgh & L. E. R. Co.* 139 Pa. 284; *Buck v. Pennsylvania R. Co.* 150 Pa. 171.

It is a sufficient answer to an argument in favor of changing the rule in Pennsylvania, and permitting carriers to stipulate for a release from the consequences of their own negligence or fraud, that the question is not an

open one. It has been settled by the cases cited, and many others, and we are bound by the rule of *stare decisis*. The attempt to overturn the common-law doctrine fixing the liability of carriers was made in England by act of parliament. The result is, after several statutes upon the subject, that the carrier may make a contract limiting his liability on two conditions. The first is that the contract be actually signed by the shipper; the second is that the courts shall adjudge the limitation to be "just and reasonable." This works no substantial change in the law. It makes a contract for carriage of persons or property tripartite. The carrier and the shipper are the ostensible parties, but the public, as represented by the courts of law, is the third party, and may refuse its consent to stipulations on which carrier and shipper have agreed. When such a contract comes before the courts, the question is not, What terms have the parties incorporated into their agreement? but, Are the terms so incorporated "just and reasonable," so that they ought on grounds of public policy to be enforced? In determining this question, the courts have been constrained to apply common-law principles, and hold that to be just or unjust which was so held at common law. Thus, in *McManus v. Lancashire & Y. R. Co.*, 4 Hurlst. & N. 327, the contract provided that the live stock shipped over the defendant's railroad should be carried at the risk of the owner, and that the company should in no case be liable for any loss or injury sustained. The contract was signed by the shipper, but the court held it to be both unjust and unreasonable, and refused to enforce it. In *Kirby v. Great Western R. Co.*, 18 L. T. N. S. 668, the contract provided that the carrier should not be liable for injury to the goods shipped, occasioned by delay, no matter what the cause of the delay might be. The courts, representing the public,—the third party to the agreement,—declined to give assent, and held the provision relieving the carrier from the consequences of his own negligence to be unjust and unreasonable. Still nearer to the question in the case before us is *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473. The carrier in that case had a contract with the shipper containing a stipulation that he should not be liable for loss of the goods, unless their value was declared at the time of the delivery of the goods to him, and they were then insured to their full value by the shipper. This was held to be neither just nor reasonable, and its enforcement was refused. The courts of England have thus held, in substance, that the public have a greater interest in the transportation of persons and property than any individual shipper, and that public policy requires of a common carrier the exercise of constant care over his vehicles or means of transportation, and over his servants and employes in charge of them. They further hold that it is against the public good that he should be allowed to contract for immunity from the consequences of his own negligence or fraud, or the negligence or fraud of his employes, and that stipulations to that effect are incapable of

enforcement, because unjust and unreasonable.

The Supreme Court of the United States holds to the same doctrine upon this subject as the courts of Pennsylvania. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phœnix Ins. Co.* 129 U. S. 397, 32 L. ed. 788. The public is interested in securing the highest measure of safety in the transportation of passengers and goods, and to this end public policy requires that common carriers be held to the highest measure of care in the conduct of their business. Greenhood, in his treatise on Public Policy (page 513), says: "It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment, and to assert that he may do so seems almost a contradiction in terms." The carrier and the shipper do not stand on equal terms. The latter cannot afford to refuse that which the carrier demands as a condition to the transportation of his goods, and, in ninety-nine cases out of every hundred, if he does so refuse he will find himself discriminated against until his business is ruined, and he has nothing left to ship. The rule that stipulations, insisted on by carriers or other persons who stand in such a position towards their customers as enables them to compel compliance with their demands or destroy their customer's business, should be judged of by their fairness, and be held void whenever they are unreasonable or oppressive, is one of very general acceptance. Public policy compels its acceptance in all civilized countries. The learned counsel for the appellant cite *Phœnix Ins. Co. of Brooklyn v. Erie & W. Transp. Co.*, 117 U. S. 312, 29 L. ed. 873, as tending to sustain their contention. But an examination of that case shows that it was begun by libel filed by the insurance company asking subrogation to the rights of the shipper against the carrier. The first question to be determined was, therefore, what could the shipper recover upon the facts of that case? He had contracted that any insurance he might obtain should inure to the benefit of the carrier. He obtained insurance on the goods shipped, suffered a loss, and was paid the insurance money. The question presented on these facts was whether the right of the shipper to recover against the carrier was not extinguished to the extent to which his loss had been paid by the insurer. If so, subrogation must necessarily be refused, and it was refused for this reason. This point was elaborated in *Providence Ins. Co. v. Morse*, 150 U. S. 99, 37 L. ed. 1013, in which it was said that, in case of loss, the carrier is primarily liable to the shipper, and the position of an insurer is substantially that of a surety. The insurer can recover, therefore, after payment of a loss, by subrogation to the rights of the shipper, and upon no other ground; so that whatever amounts to an extinguishment of the right of action of the shipper against the carrier must defeat the insurer's right to subrogation. The general

proposition, that the surety who pays the debt of his principal succeeds only to the rights of the creditor whom he pays, is beyond all doubt; and in *Phenix Ins. Co. of Brooklyn v. Erie & W. Transp. Co.*, it was held to be applicable to contracts that, as we have seen, are tripartite, having the public as a third, though unnamed, party. In the case at bar the carrier inserted in its bill of lading a stipulation that the owner, shipper, and consignee severally shall cause the goods to be fully and sufficiently insured, and that in case of loss the carrier shall have the benefit of such insurance if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor." No insurance was effected. A loss occurred as the result of a collision of two of the carrier's trains. The shipper sues to recover the amount of his loss. The only defense set up is under the condition in the bill of lading; and the question raised is, Will the courts compel the performance of a contract between shipper and carrier requiring the shipper to protect the carrier against the consequences of its own negligence? There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose; but the question here presented is, Can he compel the shipper to insure the goods for his benefit? If so, he can compel the shipper to release him entirely, and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employees. This, in the language of the English courts, would be "unjust and unreasonable." In the language of our own cases, it would be "contrary to public policy." The thought is the same. Our own mode of expressing it is preferable, in this, that it suggests the reason on which the rule rests.

The judgment is affirmed.

COMMONWEALTH of Pennsylvania, *Appt.*,

v.
LEHIGH VALLEY R. CO.

(165 Pa. 162.)

1. The common law of one of the United States includes the long-recognized judicial practice of that state whether it was ever known in England or not.
2. The practice of rendering judgment by default on defendant's failure to appear, which apparently originated in usage, having been sanctioned by frequent statutory recognition and having been extended in its operation from time to time by judicial application, must be recognized as part of the common law of Pennsylvania.

The existence of an American common law, that as a common law which has grown up by long practice in this country or a portion of it, irrespective of any English law on the subject, is more clearly and sharply illustrated in the above case than in any other. As to the adoption of English common law in this country, see *note to McKennon v. Winn* (Okla.) 22 L. R. A. 501.

37 L. R. A.

3. A judgment by default against a corporation indicted for misdemeanor may be rendered on its failure to appear by virtue of the common law of Pennsylvania which has established this practice in civil cases, notwithstanding the lack of any precedents in criminal cases, since personal appearance of the defendant is no more necessary in case of misdemeanor than in a civil action.

(January 7, 1895.)

APPEAL by the Commonwealth from a judgment of the Court of Quarter Sessions for Luzerne County, refusing to enter judgment for default in a proceeding against defendant for alleged maintenance of a nuisance. *Reversed.*

The facts are stated in the opinion.

Messrs. John M. Garman and C. Frank Bohan, for appellant:

A corporation may become amenable to the criminal law in the matter of the creation and maintenance of things which amount to or become public nuisances and to be proceeded against by indictment.

1 Am. Crim. L. §§ 86, 87; *Delaware Division Canal Co. v. Com.* 60 Pa. 371, 100 Am. Dec. 570; *Northern Cent. R. Co. v. Com.* 90 Pa. 305; *Pittsburgh, V. & O. R. Co. v. Com.* 101 Pa. 198; *Com. v. Pennsylvania R. Co.* 117 Pa. 648.

It is now the law to indict when the object is the imposition of a fine on the corporation estate, or the abatement of a nuisance.

1 Whart. Crim. L. 9th ed. § 91; Whart. Crim. Pl. & Pr. § 100.

For that which is analogous to a mere trespass on land, an indictment may lie against it. Ang. & A. Priv. Corp. § 896.

The old mode of proceeding against a corporation as such to compel an appearance to an indictment was by distress infinite.

1 Whart. Crim. L. 9th ed. § 92; *Reg. v. Birmingham & G. R. Co.* 3 Q. B. 228; Ang. & A. Priv. Corp. 2d ed. 826, 687.

Distress infinite is a process commanding the sheriff to distrain a person from time to time by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon.

8 Bl. Com. 231.

Must we go back to the ancient and almost if not entirely obsolete practice of using a *venire facias* and enforcing obedience by a *distingas*, or shall the modern practice of entering judgment by default be ours?

A *venire facias* is a summons and judgment may be entered in default of appearance.

Boston, C. & M. Railroad v. State, 32 N. H. 215; *State v. Western N. O. R. Co.* 69 N. C. 585.

Messrs. Wheaton, Darling & Woodward for appellee.

Mitchell, J., delivered the opinion of the court:

It is settled and unquestionable that corporations may be indicted at common law, and it necessarily follows that they may be brought into court by compulsion if necessary, for the law is never powerless to enforce what it commands. Statutes may be imperfect, and proceedings under them, for

that reason, may be abortive; but, it is a settled rule of the common law that there is no right without a remedy. The question before us therefore is really, What is the proper form of remedy in the case of a corporation indicted for misdemeanor, and refusing or neglecting to appear? By the common law of England, prior to the settlement of this country, an appearance by the defendant was indispensable, both in civil and criminal cases. For want of it the proceedings came to a permanent stop. The end sought was commonly attained indirectly by process of outlawry, by which, in civil actions, after the outlaw's goods had been forfeited to the crown, satisfaction thereout was awarded to the plaintiff, but the action itself could not proceed to judgment. 8 Stephen, Com. 553; Tilghman, *Ch. J.*, in *Downey v. Farmers & M. Bank of Greencastle*, 18 Serg. & R. 288. In criminal cases, of course, the difficulty seldom arose, as the defendant was usually in arrest, and, his corporal appearance thus being secured, the contention was deferred till the next step in the proceedings, when a contumacious prisoner stood mute and refused to plead. Even then the case was halted, and resort was had to the *peins forte et dure* to obtain a plea. Sir James Stephen appears to be of opinion that this practice arose from the different modes of trial in criminal cases when the ordeal was usual, and the jury exceptional, only adopted on the election of the prisoner. 1 Hist. Crim. L. p. 298. However this may be, it is unquestionable that the necessity of an appearance as well as a plea was inexorable. And the reason of this seems to me to lie "in the fundamental idea of all common-law actions that they must be developed upon a defined issue. Without parties in court, there could be no *lis mota*; and without pleas no issue, and therefore no trial. The difficulty, though insuperable, was altogether technical. Hence appearance by attorney was the first solution, and satisfied the requirements of ordinary cases, for it is to be remembered that the usual writ in the commencement of actions was the *capias*, and the defendant was in court in custody either of the sheriff or of his bail. The failure to appear was therefore comparatively of rare occurrence, and this rarity in large measure accounts for the tardiness of the invention or adoption of the remedy of judgment by default. Corporations not being amenable to a *capias*, the practice in England, until altered by Stat. 7 & 8 Geo. IV. chap. 71, § 5, was to compel appearance by *venire facias* and *distringas*. *Reg. v. Birmingham & G. R. Co.* reported in its successive stages in 9 Car. & P. 469, 1 Gale & D. 457, and 2 Gale & D. 286. A *venire facias ad respondendum* is in fact a summons. "The practice . . . was for the sheriff to whom the writ was delivered to make out a warrant or summons to his officer, who thereupon summoned the defendant by delivering to him a copy, . . . and upon the sheriff's return of the names of the summoners, if the defendant did not appear, a *distringas* issued." 1 Tidd, Pr. 155. "As no *capias* lay, it was the only method of proceeding against peers of the realm, corporations, and hundredors on the statutes

of hue and cry." Id. 112. "The proper process on an indictment for any petty misdemeanor is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear." Tomlin's Jac. Law Dict. title *Process*, II.

We have, therefore, to consider the effect in Pennsylvania of a failure to appear after due service of a summons. The ordinary result is to render the party liable to a judgment by default; but the learned judge below, being of opinion that such judgment rests entirely on statute, and the Act of June 13, 1836, § 83 (Pub. Laws, 578), not applying to proceedings on indictment, refused to enter judgment in the present case. The act of 1836 was one of the consolidated statutes reported by the commissioners appointed under the resolution of March 23, 1830 (Pub. Laws 1829-30, p. 408), to revise the Civil Code, and introduces no new practice in regard to judgments by default for want of appearance. The explanatory remarks of the commissioners on the sections concerned make no reference to any change. See report in 2 Parke & Johns. Dig. title *Judiciary*, p. 804. In fact the practice was coeval with the commonwealth, and even antedated it. In the record of the court at Upland, in Pennsylvania (Memoirs of the Historical Society of Pennsylvania, volume 7), are numerous instances of such judgments. At the session of March 13, 1776-77 (*Helm v. Ooleen*) it is recorded: "The deft. remaining absent the Court doe order that the sd deft. appear att the next court day to defend his sd fact, or in case of further default, Judgment to passe against him according to Lawe and meritt." Page 47. In *Addams v. Gray*: "The deft. being default and the plt. making the Justness of his debt apaire the Court ordered judgment to bee entered against the defendant according to the plts. declaration." Page 88. In *Bacon v. Billop*: "The deft. being three tymes called did not appeare, and the action haveling been continued three court dayes in wch tyme notwithstanding hee had due notice and did promisse to appeare, hee hath not appeared and the plt. pressing for judgment, the Court thereupon examining the Case doe think fitt to pass judgmt against ye deft." Page 189. These examples from the record of the earliest court administering English law on the soil of Pennsylvania throw a strong light on the action of the colonists under Penn's charter, next to be noticed. In the sixth article of the laws agreed upon in England under the frame of government promulgated by Penn it was declared that in all courts all persons of all persuasions may freely appear in their own way, and personally plead their cause; that the party complained against shall be summoned no less than 10 days before the trial; and before the complaint of any person shall be received he shall solemnly declare in court that he believes in his conscience his cause is just. Duke of Yorke's Laws, p. 100. In the laws made at an assembly held at Philadelphia March 10, 1683, chap. 66, the foregoing was re-enacted, with the notable addition to the sentence last quoted above that, "if the party complained against shall not-

withstanding refuse to appear, the plaintiff shall have judgment against the defendant by default." *Id.* p. 128. I have not been able to discover in the time and with the books at my command how far this simple and effective mode of reaching a legal as well as just result agreeing with the practice already in use in the territory under the government of the Duke of York's charter, as shown by the record of the Upland court, was an original invention of the colonists, or was borrowed, adapted, or enlarged from some special or local practice in England. The latter would seem to be more probable, not only from the analogy of the way in which the actions of assumpsit and replevin and other common-law remedies were enlarged and adapted to new usefulness in Pennsylvania, but also from the fact that the judgment by default came into use about the same time in other colonies, though *Judge Bell*, who delivered the learned opinion in *Boston, C. & M. Railroad v. State*, 32 N. H. 215, 281, regarded it as an original invention in New England. But, whatever its origin, the practice has continued to the present time. The Act of 1688 (chapter 66) *supra*, was declared one of the fundamental laws of the province (Duke of Yorke's Laws, p. 154); was abrogated by the king and queen in council, 1698; was put in the petition of right (*Id.* 200); and passed through the usual vicissitudes of re-enactment and abrogation familiar to us in the contests between the early assemblies and the royal authority. It has been with substantial identity the law of the state from the earliest day to the present. See Acts 1710 (Duke of Yorke's Laws, 337); Acts 1715 (Duke of Yorke's Laws, 367); Acts 20th March, 1724-25 (1 Dallas' Laws, 223; 1 Smith's Laws, 164; and Purdon's Dig. 1830, title *Arrest*, p. 57),—where this act is given as the statute in force prior to the passage of the Act of 1836. None of these statutes apply in terms, or perhaps by implication, to cases of indictment. The Act of May 31, 1718, "for the advancement of justice, and more certain administration thereof" (1 Smith's Laws, 116), provides that, if any person indicted for one of certain capital felonies named shall not appear, a *capias* shall be issued, and, if the party be not found, proclamation and outlawry follow in prescribed course. The Act of September 23, 1791 (3 Dallas' Laws, 115) also limits outlawry to a few of the more serious felonies; and the existing Act of 31st March, 1860 (Pub. Laws, 447), is substantially a re-enactment of the Act of 1791. For the lesser felonies, and for all misdemeanors, therefore, the process of outlawry was practically abolished by these statutes, and, if a *capias* under the general power of the courts was not effective, or not applicable, as was the case in regard to corporations, there was no statutory substitute for the ancient process of a *venire facias respondendum* and *distringas*. But, as already seen, the whole object of the *venire* and distress infinite, was to secure an appearance, and the whole necessity for an appearance was to get over the technical difficulty in bringing the case to issue. The object and the necessity were the same in the

civil and the criminal courts. The older remedies have fallen entirely into disuse in the civil courts, and the end sought is now attained by a judgment entered for the default. The presence of the defendant is not required upon the trial of misdemeanors, and the necessity of an appearance is therefore as barely technical as in civil cases. There is no difficulty in applying the same remedy, and we see no reason why the courts should not recognize the change also in criminal cases, without express statute, by force of the common law of Pennsylvania. This was the result reached by the supreme court of New Hampshire in *Boston, C. & M. Railroad v. State*, 32 N. H. 215, and the decision was approved and followed by the supreme court of North Carolina in *State v. Western N. C. R. Co.* 89 N. C. 584. In the former case it was said by *Bell, J.*: "The foundation of the English common law with its infinite niceties was nothing more than usage, and usage here holds as high a place in our esteem as usage there." The remark is equally true of Pennsylvania. The late *Chief Justice* Sharswood, in a lecture before the Law Academy of Philadelphia in 1855, traced with great learning the development of a wide-reaching common law "by the silent, gradual, yet all-sufficient power of common usage and consent"; citing, among other instances, the right of a tenant for a term certain to the way-going crop (*Difedorffer v. Jones* [1783], cited in *Stults v. Dickey*, 5 Binn. 289, 6 Am. Dec. 411); but not to spring grain (*Demi v. Bossler*, 1 Penr. & W. 224); the nonexistence of markets overt (*Hosack v. Weaver*, 1 Yeates, 479); barring dower by a simple deed (*Dacey v. Turner*, 1 Dall. 11); and as showing that changes were not confined to the civil courts, the repudiation of the punishment of the ducking stool and some other punishments not in accordance with the notions of the people (*James v. Com.* 13 Serg. & R. 220). "Every country," says *Tilghman, Ch. J.*, in *Guardians of the Poor v. Greene*, 5 Binn. 554, "has its common law. Ours is composed partly of the common law of England and partly of our own usages. When our ancestors emigrated from England they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be unsuitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, until at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English constitution, but not without considerable variations." From the earliest days of the province, as we have thus seen, the failure to appear after due service of a summons has been treated as a contempt of the process of the court, and the dilatory and cumbrous methods of outlawry and distress to avoid the technical necessity of an appearance have been discarded in favor of the shorter, simpler, and more effective remedy of judgment for the default, apparently originating in usage, the fountain of common law, sanc-

tioned by frequent statutory recognition, and extended in its operation from time to time by judicial application. An instance of such judicial extension is found in the adoption of the equity rules by this court in 1865, whereby subpoenas to appear were abolished, and in their place was substituted the service of a copy of the bill, with a notice indorsed thereon to appear, and that on failure to do so a decree *pro confesso* might be entered thereon for the default. And a still more recent instance is to be found in *Longwell v. Hartwell*, 164 Pa. 588, where it was held that judgment might be entered by default for want of appearance against a garnishee, although the statute makes no express provision for any such judgment. We therefore conclude that the practice is entitled to recognition as an integral part of the common law of the state. It is true, we have found no precedents in the quarter sessions or in criminal cases, but, as indictments against corporations were even rarer in early times than they are now, the absence of reported decisions is not conclusive against the practice; and, as both the object sought and the technical objection to be avoided are the same, and as in misdemeanors, where the personal presence of the defendant is not necessary, the application of the remedy is equally convenient and effective, we see no good reason why the same remedy should not apply in one case as in the other.

The order refusing judgment is reversed, and judgment directed to be entered against the defendant by default for want of appearance.

NORM.—I am under obligations in this case to a supplemental brief prepared by John Douglass Brown, Jr., Esq., of the Philadelphia bar.

RE CONTESTED ELECTION OF SCHOOL DIRECTORS OF LITTLE BEAVER TOWNSHIP.

(.....Pa.....)

A voter cannot paste a slip ticket, or sticker procured from outside parties, over the printed matter as well as the blank spaces in the right-hand column of the official ballot, where the only prescribed mode of voting for persons who were not already named thereon is by inserting their names in blank spaces prepared therefor in such column.

(January 7, 1895.)

APPEAL by Albert McCowin *et al.* from a decree of the Court of Quarter Sessions for Lawrence County, which threw out certain ballots as illegal which had been cast at an election and counted in favor of appellants. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. J. Norman Martin and Charles E. Mehard, for appellants:

Statutory provisions for marking ballots and inserting names are merely directory. If the intention of the voter can be ascertained from an examination of the ballot his vote must be counted.

NORM.—As to sticker ballots, see also *Dewalt v. Bartley* (Pa.) 15 L. R. A. 771; *People v. Shaw* (N. Y.) 16 L. R. A. 606; *State v. Walsh* (Conn.) 17 L. R. A. 864.
27 L. R. A.

It has been the tendency of all courts and legislative bodies to construe election statutes with the utmost liberality in favor of the ascertainment of the expressed will of the voter, and whenever the statutes do not most explicitly declare that particular informalities shall avoid the ballot, their provisions are considered directory.

3 Dowl. & R. 181; *Woodward v. Sarsons*, L. R. 10 Q. P. 783.

Mr. Malcolm McConnell, for appellees:

The Act of 1893 provides for a secret ballot for the exclusive use of uniform ballots; the free posting and publication of the names of candidates before election; the voting in a room where electioneering and solicitation of votes is forbidden, etc.

De Walt v. Bartley, 15 L. R. A. 771, 146 Pa. 529.

It would seem that by the use of a slip ticket, such as was used in this case, the purpose of the law is defeated.

Sterrett, Ch. J., delivered the opinion of the court:

The controlling question in this case is whether, upon the undisputed facts, the votes in controversy, which were counted by the election officers for the appellants, Albert McCowin and R. J. Miller, respectively, for the office of school director, etc., should not have been rejected, for the reason that they were not cast according to the provisions of the Act of June 10, 1893, entitled "An act to regulate the nomination and election of public officers," etc. Pub. Laws, 419. The court found that "at the general election held in Little Beaver township on February 20, 1894, it was required that two persons be elected to the office of school director in said township. Ballots, of which a sample is attached to the petition, containing the list of officers and names of all persons duly nominated for this and other offices, were provided by the county commissioners, furnished to the election officers, and by them to the voters, as required by law. Many of the electors procured, at other places, printed slips or tickets of the form shown in the second specification of the petition, including a list of township officers to be voted for, with directions to mark names of candidates for the respective offices, prepared with adhesive paste on the reverse side, and of the size and form the same should have appeared on the official ballot if the persons named had been duly nominated for the respective offices. They affixed said slip tickets upon the right-hand column of the official ballot, which was devoted to blank spaces, and when so affixed the titles of the offices, directions for insertion of names, and the spaces indicated and defined by lines provided in the official ballot for township officers were covered and obliterated, and the titles of officers, direction for marking, spaces, and names provided therein on the prepared slip ticket substituted therefor. Cross-marks were also made in the squares opposite certain names, to the right of the names. The election officers counted, as votes for the respective persons, the names on said slips having the cross marked opposite their names. Seventy-six ballots so

cast were counted for Albert McCowin, and 75 ballots so cast were counted for R. J. Miller. The return of the election officers then showed that, for the office of school director, A. G. McGinnis had 54 votes; John M. Scott, 25 votes; M. L. Andrews, 13 votes; W. A. Kenney, 62 votes; Albert McCowin, 90 votes; R. J. Miller, 80 votes; J. Q. Adams, 1 vote." Certificates of election were accordingly issued to appellants; but the court below, holding that the 76 and 75 ballots counted as aforesaid for them, respectively, were illegally cast, adjudged and determined that W. A. Kenney and A. G. McGinnis, having received a majority of all the lawful votes cast at said election for the office of school director, etc., were duly elected to said office.

The question presented for our consideration is whether the learned judge erred in construing the Act of 1893, and ruling as he did against appellants. The first section of the act declares "that all ballots cast in elections for public officers within this commonwealth shall be printed and distributed at the public expense," etc., as thereafter provided; and section 27 declares: "None but ballots provided in accordance with the provisions of this act shall be counted." After specifically directing the manner in which the names of the candidates of each political party shall be arranged on the official ballot, etc., section 14 declares: "There shall be left at the right of the groups of candidates for presidential electors, and of the list of candidates for other offices (or under the title of the office itself for which an election is to be held in case there be no candidates legally nominated therefor), as many blank spaces as there are persons to be voted for, by each voter, for such office, in which spaces the voter may insert the name of any person whose name is not printed on the ballot as a candidate for such office, and such insertion shall count as a vote without the cross-mark hereinafter mentioned." The act also provides for delivery of one official ballot, by the proper election officer, to each qualified voter as soon as he is admitted within the hall; and the next or twenty-second section provides that, on receipt thereof, "the voter . . . shall prepare his ballot by marking, . . . or by inserting in the blank spaces prepared therefor any name not already on the ballot," etc. The "marking" mentioned in the last quotation is applicable only to candidates whose names are printed on the official ballot. They cannot be legally voted for in any other way than by marking, as specified in said section. In the case of a substituted nomination, filed with or transmitted to the county commissioners after the ballots have been printed, said commissioners are required by the twelfth section to "prepare and distribute with the ballot suitable slips of paper bearing the substituted name, together with the title of the office, and having adhesive paste upon the reverse side, which shall be offered to each voter with the regular ballot and may be affixed thereto." The only prescribed mode of voting for persons "whose names are not already on the ballot" is "by inserting [their names] in the blank spaces

prepared therefor" in the right-hand column of the official ballot. It is the "name" only that is to be thus inserted, and not the title of the office to be filled, etc. The latter is already printed there, and constitutes part of the ballot prepared for the use of voters. The name or names, as the case may be, cannot be inserted anywhere in said right-hand column, but only in the appropriate blank spaces prepared therefor. The voter is not authorized to insert anything in any part of said columns, save and except in the blank spaces prepared for names not already on the ballot. The manner of inserting is not prescribed. It may therefore be done in any appropriate way, such as by writing, stamping with metallic or rubber stamp, or by covering the proper blank space, in whole or in part, with a slip ticket or sticker, securely attached to said space by adhesive paste or other suitable material, on which ticket or sticker is printed or written a name or names "not already on the ballot." Everything necessary or proper to be done by the voter, in order to record the free and unconstrained expression of his choice of persons to fill the respective offices, is thus provided for, and the manner in which said right of choice shall be exercised is specifically pointed out. If he desire to vote for any of those whose names are printed on the official ballot, he must do so by "marking," as directed by the act. If he wishes to vote for persons whose names are not already on the ballot, he can do so by "inserting" their names in the blank spaces prepared therefor; but he has no right to insert anything else in said blank spaces, or in any other part of the right-hand column. In so far as the mode of voting is thus specifically prescribed by the act, all other modes are, by necessary implication, forbidden. *Expressio unius est exclusio alterius*. The ordinary rule, as has been stated by recognized authority, is that, where power has been given to do a thing in a particular way, then affirmative words, marking out the way, by necessary implication prohibit all other ways. To hold, as we are virtually asked to do by appellants, that by virtue of the authority given the voter to insert, in the blank spaces provided therefor, names not already on the official ballot, he may so use a previously prepared slip ticket, given to him by an outside party, as to entirely cover the right-hand column of the official ballot, and thus effectually obliterate or conceal everything printed thereon, would not be construction, but judicial legislation of the worst type. Moreover, the use of such a blanket ticket or sticker would tend to defeat the main purposes of the act. The right-hand column is part of the official ballot. In addition to the requisite number of blank spaces for the insertion of names not already on the ballot, the respective titles of the different offices to be filled, and instructions as to the number of names that may be inserted underneath said titles, respectively, are intended as guides, not only for the voter, but also for the election officers. To permit the voter to procure, from outside parties, a slip ticket or sticker, corresponding in size with said column, and paste the same over the

printed matter, as well as the blank spaces thereon, would be contrary to the letter, as well as the spirit, of the act. But it is enough for us to know that no authority can be found in the act for doing any such thing.

We have no doubt as to the correctness of the conclusion reached by the court below, and hence the decree should be affirmed.

Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

TENNESSEE SUPREME COURT.

CUMBERLAND TELEPHONE & TELEGRAPH CO., *App't.*,

v.

UNITED ELECTRIC R. CO.

(98 Tenn. 492.)

1. **The ordinary use of streets which a telephone company is forbidden to obstruct by a proviso in the statute giving permission to use the streets, includes the use of the streets by an electric street-car line.**
2. **The unnecessary conflict of poles and wires of a trolley railway company with those of a prior existing telephone plant to the damage of the latter makes the railway company liable for the cost of necessary changes made by the telephone company.**
3. **A telephone company cannot recover for loss sustained from induction on account of parallel wires of an electric railway company where a provision of the statute authorizing the construction of the telephone line prohibits its obstructing the ordinary use of the street.**
4. **The destruction of the use of a telephone plant with a ground circuit which made no injurious disturbance of natural electric conditions anywhere, caused by conduction resulting from the operation of a single trolley street-car line which charged the earth for half a mile on each side with powerful currents of electricity, makes the street railway company liable for the cost of return wires for the telephone line as a substitute for the ground circuit.**

(*Waller and Bright, JJ., dissent from propositions 1 and 2.*)

(*Caldwell and Snodgrass, JJ., dissent from proposition 4.*)

(*Snodgrass, J., dissents from proposition 2.*)

(March 10, 1894.)

A PPEAL by complainant from a judgment of the Circuit Court for Davidson County, in favor of defendant in a suit to recover damages inflicted upon complainant by the construction and operation of defendant's electric railway system. *Reversed in part.*

NOTE.—The above case is in some particular one of first impression. The new and difficult questions raised by conflicting electric currents have been decided in other cases in favor of the electric railway companies as against a telephone company; thus, the New York case of Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 17 L. R. A. 975; Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assn. (Ohio) 12 L. R. A. 584, and Cumberland Teleph. & Teleg. Co. v. United Electric Railway (U. S. C. C. M. D. Tenn.) 12 L. R. A. 544. These strong authorities are distinguished in the present case as being all cases for injunction against the operation of a street railway, while the

The facts are stated in the opinions.

Messrs. Vertrees & Vertrees for appellants.

Mr. J. C. Bradford, for appellees:

The rights acquired by the plaintiff under the Act of 1885, chapter 66, do not rest on contract with the state, but are privileges voluntarily conceded by it. The relation between the plaintiff and the state is not contractual.

East Saginaw Salt Mfg. Co. v. East Saginaw, 80 U. S. 18 Wall. 873, 378, 20 L. ed. 611, 614; *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 300, 16 L. ed. 602; *American Rapid Teleg. Co. v. Hess*, 18 L. R. A. 454, 125 N. Y. 641.

The plaintiff therefore, as a foreign corporation, admitted to do business in the state on such terms as the state saw fit to prescribe, is not possessed of franchises granted by irrevocable contract, but is a mere licensee, which has availed itself of privileges conferred by the state.

2 Morawetz, Priv. Corp. § 991; *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 148; *Moore v. Chicago, St. P. M. & O. R. Co.* 21 Fed. Rep. 817; *Wilkinson v. Delaware, L. & W. R. Co.* 23 Fed. Rep. 353.

There are two grants from the same sovereignty, both conferring rights and franchises affected by a public use, the operation of the latter of which injuriously affects the former.

A junior grantee of franchises, to be used for the public benefit, is not precluded from their exercise and enjoyment, because, to some extent, franchises previously granted are interfered with.

The right of the plaintiff to the exclusive or even prior use of the streets of Nashville cannot be inferred or implied, but must be expressly given; and unless it can put its finger upon some direct and unequivocal grant of such right, it does not exist.

Booth, Street Railways, § 5, p. 6.

It is for the legislature to determine which shall yield, and to what extent, and whether wholly or in part only, to the other.

Com. v. Essex Co. 13 Gray, 239; *Atty-Gen. v. New York & L. E. R. Co.* 24 N. J. Eq. 49.

The present case simply claims damages for the loss caused by the interference. Great interest attaches to the present case by reason of the distinction made therein, especially that between the damages from induction currents by reason of parallel wires in the street, and the damages from conduction which is not confined to the ground within the street line and so held to be unaffected by a prohibition against the obstruction by the telephone company of the ordinary use of the street. The case, differing as it does so strongly from the other cases mentioned, makes a notable addition to the subject.

The controversy between the electric railway and the telephone could not be narrowed to a question of the invasion, by the electricity of the railroad, of the private ground of the telephone company.

Hudson River Teleph. Co. v. Waterliet Turnp. & R. Co. 17 L. R. A. 674, 185 N. Y. 393.

There was no taking of defendant's property in a constitutional sense.

Iron Mountain R. Co. v. Bingham, 4 L. R. A. 623, 87 Tenn. 522; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 836.

A street railroad authorized by statute to construct and operate a railway in the streets of a city is an agency of the state.

New York & N. E. R. Co's App. 58 Conn. 532; *Northern Transp. of Ohio v. Chicago*, 99 U. S. 640, 25 L. ed. 837; 2 Dill. Mun. Corp. §§ 656, 722; *Taggart v. Newport Street R. Co.* 7 L. R. A. 205, 16 R. I. 668.

A street railway operated by electricity has been held to be simply an improved mode of travel, and, therefore, within the purpose of the original dedication of the street for public travel.

Taggart v. Newport Street R. Co. supra; *Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn.* 12 L. R. A. 534, 48 Ohio St. 390; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 393.

No action lies for the reasonable use of a lawful trade in a convenient and proper place.

Hale v. Barlow, 4 C. B. N. S. 384; *Ponton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lassala v. Holbrook*, 4 Paige, 169, 8 L. ed. 890, 25 Am. Dec. 524; *McCormick v. Horan*, 81 N. Y. 86, 87 Am. Rep. 479; *Burke v. Louisville & N. R. Co.* 7 Heisk. 462, 19 Am. Rep. 618; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 331, 27 L. ed. 739, 744.

Where the grant is specific, certain, and definite, and confers rights in an easement held by the state in trust for the public, and for the public convenience, the incidental inconvenience suffered must be borne for the public accommodation.

Heerman v. Beef Slough Mfg. Boom. Log Driving & Transp. Co. 8 Biss. 534; *Atty. Gen. v. New York & L. B. R. Co.* 24 N. J. Eq. 49; *Cumberland Teleph. & Teleg. Co. v. United Electric Railway*, 12 L. R. A. 544, 42 Fed. Rep. 273; *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. ed. 77, 84.

It was the duty of the telephone company to readjust its methods to meet the condition created by the introduction of the electromotor on the street railway, at its own expense.

Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn. supra; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

All, or nearly all, the courts have resolved the controversy in favor of the street railroads.

Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn. supra; Booth, Street Railways, pp. 195, 218; Keasbey, Electric Wires, pp. 143-153.

Electric railways are not additional servitudes.

Mt. Adams & Eden Park Inclined R. Co. v. Winslow, 3 Ohio Ct. Rep. 425; *Pelton v. East* 37 L. R. A.

Cleveland R. Co. 22 Ohio L. J. 67; *Detroit City R. Co. v. Mills*, 85 Mich. 684; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 15 Ky. L. Rep. 417; *Lockhart v. Craig Street R. Co.* 139 Pa. 419.

The occupation of the streets by the telephone company is an unusual use and an additional servitude.

Lewis, Em. Dom. § 131, and note 1 citing cases; *Western U. Teleg. Co. v. Williams*, 8 L. R. A. 429, 86 Va. 696.

Meurs. East & Fogg also for appellees.

G. W. Pickle, Special Judge, delivered the opinion of the court:

This is a suit by a telephone company against an electric street-railway company to recover damages inflicted upon the telephone plant by the contiguous railway plant. The plaintiff has appealed from an adverse judgment, and assigned errors. The facts are practically undisputed, and, so far as they are material or pertinent to the questions to be determined, are as follows:

The plaintiff, a Kentucky corporation, had, prior to 1889, established in the city of Nashville a telephone plant upon the "single-wire" plan or system. The earth, under this system, is used as the return conductor to complete the electrical circuit, and the overhead single wire must have earth connections at both ends, at the exchange, and at the subscribers. These earth connections of plaintiff's wires were effected upon private property at both ends, upon the company's property at the exchange, and upon the subscriber's property, by his consent, at the other end. The poles upon which plaintiff's wires were stretched were planted in the public streets by permission of the city council, and by authority of a general statute of this state, which empowers telephone and other like companies, both foreign and domestic, to construct, operate, and maintain, upon consideration of certain benefits conceded to the state and general government, their lines along and over the public highways and streets of the cities and towns of this state, provided that the ordinary use of such public highways, streets, etc., be not thereby obstructed. Acts 1885, chap. 66. In telegraphy, of which telephony is but another form, it has been universal practice for half a century to use the earth as the return circuit. The plaintiff plant was constructed in accordance with an approved system, and the one chiefly used in all the large cities of the United States. The electric currents required and used in the operation of plaintiff's plant cause no hurtful disturbance anywhere of natural electric conditions. The plaintiff's plant, thus constructed, was in perfect condition and successful operation, rendering satisfactory service to its patrons, when, in 1889, the defendant, a domestic corporation, having obtained control of the street railways of Nashville, which had, with one unimportant exception, been operated by horse power, constructed and put into operation thereon a single-trolley overhead electric railway system. Defendant's action in this particular was authorized by general public statutes of the state, which

provided that street-railway companies that had hitherto used animal power for the operation of their cars might, with the consent of the city authorities, adopt electricity as a motive power. Acts 1887, chap. 65; Acts 1889, chap. 40. The required consent of the city authorities was obtained by defendant. While there are two systems of electric railways, the single-trolley system and the double-trolley system, the former is the more approved and satisfactory, and the one in general use. It is better adapted than the double-trolley system to single-track railways like defendant's. It is likewise cheaper. The defendant's plant was properly constructed and equipped according to the single-trolley system. The earth is used as a return circuit in the operation of street-railways constructed upon the single-trolley plan, but not for those operated upon the double-trolley plan. The defendant, in the operation of its plant, generates or collects electricity in such unusual quantities, and applies and uses it in such violent, turbulent, and varying currents, as to produce a non-natural and disturbed condition electrically, not only within the streets, but for the distance of half a mile on either side. The plaintiff's entire plant was for a time paralyzed, and its utility destroyed, by the construction and operation of defendant's plant or system. The injuries, so fatal to plaintiff's franchise and plant, resulted by several methods that it is important to describe.

First. Injury resulting from what is known as "conduction" or "leakage." Currents of electricity of great strength and force are generated and applied by defendant in the propulsion of its cars. These abnormal currents of the electrical fluid are poured out or permitted to escape into the streets. They overflow the streets and invade private property for half a mile on either side, and, finding the earth connections of the telephone wires at the exchange, and at the subscribers, pass up into those wires and the telephone instruments, and by reason of their great force and volume substantially destroy the utility of the telephone plant. This interference can be obviated in only one way, viz., by a metallic return circuit for one of the plants. The only metallic return circuit for a railway yet discovered is that known as the "double-trolley" system. The double-trolley system is more expensive than the single-trolley system, and inferior in other respects for the operation of single-track railways. A recent invention, known as the "McLeuer Device," has been proved by experience to be an effective remedy for the disturbances caused by conduction. This McLeuer device consists of a large copper wire, supported on poles, with which the outgoing telephone wires are connected at both ends, and which serves as a return circuit instead of the earth. The McLeuer device is the most effective and least expensive remedy that has been discovered for the disturbances caused by conduction. The plaintiff was compelled, in order to reclaim its plant, to put in this McLeuer device at a cost of \$3,660.58.

27 L. R. A.

Second. Injury resulting from what is called "induction" or "parallelism." The wires of the telephone company and of the railway company are parallel upon some of the streets. It is a physical fact of much importance in electric mechanism that when two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other, in the opposite direction, a current of electricity of similar variation. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of the electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, wherever the telephone wire is parallel with the trolley wire and feed wire, there is induced upon the telephone wire a current whose variation corresponds with the variations of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable. But one practicable remedy has been discovered for the disturbances caused by induction; that is, to destroy the parallelism of the wires of the two circuits. This remedy is practicable for the telephone company alone. The expense incurred by plaintiff on this account was \$856.80.

Third. The plaintiff expended \$816 in putting up higher poles on Main street, in consequence of conflict produced by the erection of defendant's poles and wires. The plaintiff's poles occupied one side of Main street, and defendant's poles were put up on both sides of said street, and conflicted with plaintiff's poles and wires, so as to render it necessary for plaintiff to put in new and higher poles. The majority of the court think the defendant could have reasonably avoided this conflict by supporting its wires upon a single line of poles with arms, erected through the middle of the street, or upon the opposite side from the telephone poles and wires. Judge Snodgrass and the writer of this opinion do not concur in this finding of fact. The contention of the parties will be stated and disposed of in order, and so much of the court's charge as may be deemed material will be stated in the proper connections. The fact that plaintiff sustained loss in consequence of the construction and operation of defendant's plant is admitted by defendant. The amount of that loss is accurately ascertained, and is not a matter of controversy. The sole question for determination is defendant's liability for that loss. The loss by conduction is distinct from that resulting from induction and from conflict of the poles and wires of the two systems. The two items last named—loss by induction and by conflict of poles and wires—may be conveniently considered together as involving the same or similar questions. But loss by conduction will be considered apart from other matters.

1. Is defendant liable for loss that plaintiff sustained from induction and from conflict of the poles and wires of the two systems? This loss, unlike that caused by conduction, occurs upon and within the streets, and is a direct and immediate result of plaintiff's occupation and use of the streets simultaneously with defendant, and would be obviated or remedied by the withdrawal of either party from the streets. It is important to ascertain the exact status and relative rights of these companies as regards their use and occupation of the public streets. Both are quasi public corporations of the same general character. Both serve important public ends and needs, and are equal candidates for public favor. Both derive their rights and franchises from the same source,—a public general statute,—and exercise them by permission of the same city authorities. The legislature intended that both should continue to exist under conditions favorable to the accomplishment of the purposes of their creation. No purpose to sacrifice one for the benefit of the other is apparent. It is therefore not quite accurate to say that defendant has the dominant and plaintiff a subservient use of the streets. Their respective rights to occupy and use the streets are co-ordinate. Each, within its own sphere, is independent of the other. The defendant's right is to use the streets for the erection and operation of an electric railway. Acts 1887, chap. 65; Acts 1889, chap. 40. And this, it is insisted, is a strictly legitimate and ordinary street use. The plaintiff's right is to use the streets incidentally in the erection and operation of a telephone plant, with the proviso that the ordinary use of the streets be not thereby obstructed. It is perfectly clear that no conflict can occur between these companies in the use of the public streets if each shall remain within its proper sphere, and exercise its power with that careful and prudent regard for the rights of the other which the law enjoins. The defendant must exercise care and prudence to avoid injury to plaintiff, and plaintiff must not obstruct defendant's use of the streets if that be an "ordinary use."

Is an electric street railway an ordinary use of the streets? There can be no substantial distinction between an ordinary and a strictly legitimate use of the streets. With rare unanimity the courts have concurred in holding that an electric street railway, operated by means of an overhead trolley wire, supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee, but a legitimate use of the streets, within the original general purpose of their dedication. *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 880; *Mt. Adams & Eden Park Inclined R. Co. v. Winslow*, 8 Ohio C. Ct. Rep. 425; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assn.* 48 Ohio St. 390, 12 L. R. A. 534; *Lockhart v. Craig Street R. Co.* 139 Pa. 419; *Rafferty v. Central Traction Co.* 147 Pa. 579. 37 L. R. A.

Streets were designed to afford facilities for the intercommunication of the multitudes of people assembled within cities and towns. New and improved methods of travel, devised to meet the growing demands of increased population and suburban life, are within the original general purpose for which streets were created. Electric street railways, constructed and operated as stated, are but a modern and improved use of the streets as public ways, affording, without considerable public inconvenience or obstruction of other proper use of the streets, the facilities for cheap, rapid, cleanly, and convenient transportation, so essential to the population of large cities and their suburban additions. The growth and extension of cities must have been contemplated when the streets were established. Such use of the streets, whether new or old, as would best accommodate the increased population, must have been likewise contemplated. The objections urged against the electric railway would exclude the horse car and the cable car, and the result would be to magnify the abutters' insignificant interest in the fee into an importance and value never contemplated by either party, and to subject the public to the burden and inconvenience of making new condemnations of the fee upon the introduction of any new and improved method of using the streets. We hold the electric street railway a legitimate use of the streets within the original general purpose of dedication, and therefore an ordinary use. This seems to have been the common understanding hitherto of the legislature, the street-railway companies, the general public, and the legal profession. We do not hold, and must not be understood as holding, that the electric railway companies may, without making compensation, accompany such ordinary use of the streets with such extraordinary incidents as impose new or additional burdens upon properties outside the streets that were not and could not have been contemplated and compensated for in the original taking. The difference between a dummy line and an electric street railway are so palpable as to require no enumeration. *Judges Wilkes and Bright* do not concur in the conclusion that electric street railways are an ordinary use of the streets.

By whose negligence or fault has plaintiff sustained the loss under consideration? Clearly, upon the facts as found by the majority the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was defendant's duty to do so. The conflict was the result of defendant's unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create. The objection that induction is not an obstruction of the streets "sticks in the bark." True, it did not arrest the construc-

tion and operation of defendant's plant, but that results, not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it. A child upon defendant's track, in front of its moving car, is not, in a strict sense, an obstruction; but who will say that the fact does not seriously interfere with defendant's free and unembarrassed use of the street? The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car, or incur serious liability. It is in vain to say that induction is not an obstruction if defendant shall be held for the unavoidable damage caused by it. It is true, induction implies no physical contact of the two plants, but it is a direct and immediate result of plaintiff's use and occupation of the streets. The presence of plaintiff's poles and wires upon the streets causes induction, and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induction. It results from its unlawful obstruction of defendant's use of the streets. The consideration of other questions is irrelevant in this connection.

2. Is defendant liable for loss sustained by plaintiff from the effects of conduction? The loss by conduction, unlike that caused by induction, does not result from plaintiff's obstruction of defendant's use of the streets for an ordinary purpose. This interference would occur, and cause precisely the same loss to plaintiff, and in precisely the same manner, if plaintiff had no poles or wires upon the streets. Loss by conduction does not result in the slightest degree from the presence of plaintiff's poles and wires upon the streets, and would not be to any extent remedied by their removal. The contact between the two plants, caused by conduction and the consequent injury, does not occur upon or within the streets or through the medium of plaintiff's poles and wires located upon the streets, but upon plaintiff's private property, and that of its subscribers, lying outside of the streets, and within half a mile on either side. The fact of plaintiff's occupation and use of the streets—a controlling factor in determining defendant's liability for loss by induction—is irrelevant in the consideration of the question of defendant's liability for loss by conduction. This question must be determined as if the plaintiff had no poles or wires upon the streets. The proviso in the Statute of 1885, forbidding plaintiff, by its use of the streets, to obstruct their ordinary use, has no application to the question under consideration. That statute limits plaintiff's use of the streets, but it does not abridge its right to private property outside the streets, and wholly detached from their use. That statute confers upon plaintiff the use of the streets, and limits that use. It does not confer upon plaintiff any rights of private property outside the streets, and does not undertake to abridge any such rights. The proviso pertains wholly and exclusively to the use of the streets. The defendant's claim to the dominant use of the streets, if conceded, has

no place in the consideration of this question, involving the rights of the parties outside the streets.

Another contention of a kindred nature, made on behalf of defendant, may be conveniently disposed of in this connection. It is insisted that plaintiff's corporate franchise was revoked or modified as an effect of the legislation permitting street-railway companies to use electricity in the propulsion of their cars; at least so far as to render it subordinate to defendant's junior franchise. To state it in another form, the insistence is that the Act of 1885 for the benefit of telephone companies has been repealed or modified by implication by the Acts of 1887 and 1889 for the benefit of electric street-railway companies. Repeals of statutes by implication are not favored. Repugnancy between statutes must be plain and unavoidable, or a later statute will not operate to repeal an earlier one by implication. Again, no intention on the part of the legislature to abridge the granted rights of one corporation by a new grant to another will be recognized by the courts, unless such intention plainly appears in the law. And especially should this rule prevail when both corporations are, as in this case, useful public servants, equally indispensable to public convenience, and the one enjoying the elder grant has acquired property and expended money upon the faith of it, which would be destroyed by the revocation of its franchise. It may be conceded that under our Constitution of 1870 corporate franchises are revocable at the will of the legislature. The legislature has undoubted power to exclude a foreign corporation from the state. In neither instance would the corporation have just cause to complain. But this power does not extend to the confiscation of the property of the corporation thus denied the exercise of its franchise. But in the case under consideration, the plaintiff's rights and franchise have not been abridged or revoked by any subsequent legislation in favor of street-railway companies. Had a result so extraordinary been intended as the revocation, without compensation, of the telephone franchises for the benefit of the street railways, it would have found expression by positive enactment. It cannot be admitted by implication upon this record. There is no necessary conflict between the rights and franchises of these companies. There is not any unavoidable repugnancy between the statutes upon which they rely respectively. The electric railway plants can be operated, under proper limitations as to distance and apparatus, without causing injury to telephone plants by conduction. This fulfills defendant's grant without trenching upon the pre-existing rights of plaintiff. If defendant seeks to have a more beneficial use of its plant by an evasion or use of plaintiff's property, it is just that compensation should be made. Our conclusion is that plaintiff's rights have not been abridged or revoked by the Acts of 1887 and 1889, but remain precisely as they were before the passage of these statutes. It should be observed in this connection that the injury caused by conduction is not such

necessary incident to the ordinary use of the streets as to have been contemplated and compensated for in the original taking for street uses. It is not necessarily, or even ordinarily, inflicted upon abutters, but extends to many properties on either side that have not been taken or subjected to any burden for street uses.

This brings us to the consideration of a novel and very important question. It is insisted by defendant that plaintiff cannot recover the damages caused by conduction except upon the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's use for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one for the exclusive use of electricity upon its own premises, in an authorized and harmless manner, without injurious disturbance from nonnatural electric conditions, caused by the defendant's acts. To recall the pertinent facts: The plaintiff had, by public authority and permission, erected and equipped its telephone plant upon an improved plan, and put it into successful operation, grounding its wires upon the property of itself and subscribers, and using the earth as a return circuit, in accordance with the universal practice of half a century in like enterprises. Afterwards defendant, by like permission, began the operation of a single-trolley electric railway plant, using the earth as its return circuit. The defendant's plant was placed in such proximity to plaintiff's pre-existing plant as to cause injury to the latter by conduction. The operation of plaintiff's plant caused no injurious disturbance of natural electric conditions anywhere. In the operation of defendant's plant large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left the streets and overflowed private property for half a mile on either side. It was upon the private property of plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires, and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party. We think, upon these facts, that plaintiff has the right to the protection of the courts in the enjoyment of its property. Franchises, easements, and the ability to use property, though intangible, have value, and are, equally with tangible property, entitled to the recognition and protection of the courts. If the plaintiff's claim, that contemplates no more than a lawful and harmless use of its own property, shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use, not only of the streets, but of private property for half a mile on either side? The plaintiff's request is: "Let me alone in that use or application of electricity upon my own premises that causes no

harm or disturbance to any one anywhere." The defendant's command is, "Get out of my way!" to all feeble electrical enterprises that may have the misfortune to come within the range of its power.

The plaintiff proposes an adjustment of conflicting claims with defendant by the rule embodied in the enlightened maxim, "*sic utere*," etc., while defendant insists upon the application of that ruder maxim, "might makes right." If defendant could succeed in its construction, there can be little doubt that the unjust rule thus established would some day "return to plague the inventor." What protection has this defendant in the enjoyment of its vast properties, if it can be deprived of the power to operate them by some younger, but more robust, child of invention, that shall hereafter obtain mastery in the electric world? Is not the noninjurious use of electricity the only safe and just basis for the adjustment of the conflicting claims of electrical inventions and enterprises? What different basis than this can be arbitrarily established? Where shall the line be drawn between those electrical enterprises that must take care of the artificial currents of electricity generated by them and those that shall not be required to do so? To concede defendant's claim is to give to it an injurious use of plaintiff's property, and at the same time to deny plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and therefore appropriating a common right to its exclusive use, because "plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth," is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water, and the air. How, if this argument be sound, can any one insist that the air and water, that by the operation of natural law visit his premises and support life, shall not be rendered noisome and impure by the injurious acts of his neighbor? It is impossible that this portion of the air and water can, in advance, be "isolated and separated from the balance." Is not the right to the use of air and water as "common" as that to use electricity? If the right to the harmless use upon one's own premises without injurious disturbance from others of air or water or electricity is made to depend upon his ability to isolate and separate in advance his portion of these elements from the "balance," that right resolves itself into an "airy nothing." The suggestion that plaintiff, in using the earth as its return circuit, appropriates and uses electrically the properties intervening between its exchange and its subscribers' stations in any other than a rightful manner, is, as we think, based upon a misconception. The plaintiff's use of electricity causes no disturbance electrically upon these intervening properties or elsewhere, and affords no inducing cause, there or elsewhere, for the invasion of its property by defendant's artificial electrical currents. The plaintiff uses the intervening or other outside properties for electrical purposes in no other sense than it uses abutting

lands, as part of the framework of the earth, to support its own, or uses the channel of the stream upon adjoining lands that conveys the water by natural flow to its own, or uses the law of gravitation that causes the water to flow towards its land instead of in an opposite direction. The plaintiff does not assert the right to an injurious use of electricity, even upon its own premises. The doctrine that reason sanctions and justice approves, as it appears to us, is that the lawful, harmless, and accustomed use upon one's land alike of water, air, or electricity, cannot be lawfully obstructed or impaired by the injurious act of another, attended with such disturbance of natural and existing conditions and consequent loss as that caused by conduction in this case, especially when the party performing the injurious act had the power to obviate and remedy the injury or loss without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction. It is not material that the injurious act is done upon the premises of one other than the injured party, as if the channel of a stream is cut upon adjoining lands, and the water diverted, or the waters on them arrested in their regular flow, and then turned loose in flooding quantities.

To sustain plaintiff's claim accords with the analogies of the law, as will appear from the following cases: A manufacturer of cocoa matting used a delicate chemical to bleach his matting, which was then hung out on his own land, in the air, to dry. Another manufacturer made sulphate of ammonia, and the vapors escaping in the air combined with the bleacher's chemicals, and blacked his mats. It was shown that if the cocoa-mat maker had used another chemical, just as good or better, his mats would not have been affected. But it was held that he had the right to use any chemical he pleased, which would not hurt anybody else, and that he had the right to have the air come to his lands pure and untainted. *Cooke v. Forbes*, L. R. 5 Eq. 166. A manufacturer discharged the refuse from his works into a surface stream. It corroded the boilers of another factory below, which used water from the stream for steam purposes. The upper manufacturer was enjoined. *Merrifield v. Lombard*, 18 Allen, 16, 90 Am. Dec. 172. A manufactory of copper in one case, and of lead in another, gave off vapors which were carried by the winds upon the lands of another, and injured growing crops, fruit trees, and flowers. They had to close down. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Pennsylvania Lead Co's App.* 96 Pa. 116, 42 Am. Rep. 594. A brewer bored a deep well, and got water for use in making his ale. There was no running stream below. His neighbor had a similar well, but used it as a sink. The sewage percolated the brewer's lands, and polluted the water so it could not be used in making ale. The brewer was protected in the use of his well. *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115. The Standard Oil Company stored oil in its warehouse. The oil barrels leaked. This leakage soaking into the earth, percolated Mr. Kinnaird's land, and ruined his

spring. It was held the company had no right to thus use its property. *Kinnaird v. Standard Oil Co.* 89 Ky. 468, 7 L. R. A. 451. A silk maker required water of great softness and purity to wash and dye his silk. He got it out of the Charnot. A public water company built a reservoir above, and so collected the water that when it was discharged the purity of the water was affected. The company had to quit. *Cloves v. Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. 126; *Gould, Waters, & 219; Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 872.

Although the precise question determined in this case has not hitherto been necessarily involved in the decision of any case, it has, nevertheless, been considered by some of the courts. In *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.*, 135 N. Y. 898, 17 L. R. A. 674 (decided in 1892), the court of appeals of the state of New York expressed its views as follows: "The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act, unaffected by any interferences on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person even in the prosecution of a lawful trade or business upon its own land, can gather there by artificial means a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force, and to such an extent, as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption for liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current, in such a manner, and with such intensity, as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property, and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands, and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the

aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form; but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects, for pleasure or profit, the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon it or him the same duty which is exacted of the owner of the accumulated water power,—that of providing artificial conduit for the artificial product, if necessary to prevent injury to others." The opinion of the supreme court of New York was to the same effect. An English judge, in a recent case, has thus stated his views: "But, after reflecting much on the merits of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth, beyond his control, is not as responsible for damages which that current does to his neighbor, as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but, when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it find its way onto his neighbor's land, and then damages the neighbor, the latter has a cause of action." *National Teleph. Co. v. Baker* [1893] 2 Ch. 201. The same doctrine is maintained by Judge Taft, then judge of the superior court of Cincinnati, and now a justice of the federal circuit court of appeals, in the case of *City & Suburban Teleg. Assn. v. Cincinnati Inclined Plane R. Co.*

The injury by conduction constitutes such invasion or taking of plaintiff's property as renders defendant liable for the damage done. It is a direct and immediate result of defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid. The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen, should bear the burdens imposed upon private property for the public benefit. That defendant's act may have been authorized and lawful can make no difference. The legislature has not the power (except perhaps as to corporate franchises) to authorize, and in this case it has not undertaken to authorize, the taking of private property for a pub-

lic use without compensation. Says Mr. Taylor on Corporations: "To constitute a taking of property, it is not necessary that any material thing be actually taken; it is enough if any right of the owner respecting the thing owned be impaired, so that he cannot apply the thing to all the uses of which it was formerly capable. The legislature cannot authorize either a direct or a consequential taking or injury to property without compensation; and if a corporation voluntarily, for its own benefit, so constructs a work as necessarily to injure the property (i. e. the thing owned) of an individual, or deprive him of any right he may possess regarding the thing which he owns, or his rights therein, it will be bound to compensate him for his damages, even though the work be properly and lawfully constructed." Sections 173, 478, and numerous cases cited. Mr. Lewis, in his late exhaustive work on Eminent Domain, sums up the doctrine in these words: "What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track, or a gas house, and invading it by an agency that operates as an actual abridgement of its beneficial use, and possibly a complete and practical ouster?" Section 152. "An act which authorized a particular business at a particular place, which necessarily deflected the air so as to create a nuisance, would be void, unless it was for public use, and if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation." Id.; and see sections 55, 57, 149. Says Mr. Wood, in his work on Nuisances: "Wherever the exercise of the right (asserted) operates to destroy an easement incident to real property, or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, this is a taking of property." Section 762. And further: "The legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others that amounts to an actual taking of property for public purposes so as to exempt such corporation from liability for all damages that result from the exercise of their franchise that, in law, amounts to a taking of property." Id. § 759. See also *Gray v. Knoxville*, 85 Tenn. 99; *East End Street R. Co. v. Doyle*, 88 Tenn. 747, 9 L. R. A. 100; *Myers v. St. Louis*, 83 Mo. 878; *Abendroth v. Manhattan R. Co.* 123 N. Y. 1, 11 L. R. A. 684. The injury by conduction does not belong to that class of "consequential injuries" or "inconveniences" which, it is said, must be borne in ordinary cases without compensation, as the penalty and price of living in cities and enjoying the conveniences and comforts of civilized life. These are usually of such character as to affect the community generally, and are, therefore, in a sense, borne by the public. The damages thereby inflicted are, moreover, not of easy and satisfactory computation. Here the injury is the direct result of an injurious act, and of a graver character than a mere inconvenience. It affects a single per-

son seriously, and the community only incidentally. The loss inflicted is definite in amount.

We respectfully dissent from the view expressed by Judge Brown, in the injunction case between these companies, where he classes this injury with the inconveniences that result from "the smoke that fills our lungs and soils our garments, the dust that enters our dwellings and stores and damages our furniture, the noxious odors that assault our nostrils, the impure water we are sometimes compelled to drink," which he says "are the necessary penalties we pay for living in cities, but in ordinary cases there is no legal remedy for the evil." *Cumberland Teleph. & Telegr. Co. v. United Electric R. Co.* 42 Fed. Rep. 279, 12 L. R. A. 544. This is not, in our opinion, an ordinary case, in which compensation should be denied, even if it is classed as an "inconvenience" or "consequential injury."

It has been suggested that the electric railway companies may be subjected to multiplicity of suits under this decision. That may be inconvenient and expensive for the railway companies, but it constitutes no defense to their liability for the value of private property taken for their use. Besides, the inconvenience is not all on one side. It might prove equally inconvenient for the citizen to have his right to maintain a telephone at his home or place of business placed at the mercy of the electric railway companies.

One question remains: Was it plaintiff's legal duty, upon the institution of defendant's electric system, to protect itself from the injurious consequences by making, at its own ultimate cost, such changes in its pre-existing plant as would obviate the effects of conduction,—*e. g.* by putting in the McLeuer device? We answer this question in the negative. The defendant must take care of the natural and reasonable consequences of its own act. The plaintiff, being in the lawful possession and enjoyment of its own property, was under no obligation to take notice of defendant's approach or to get out of its path. Judge Brown says, in his opinion in the injunction case: "If in the case under consideration it were shown that the double trolley would obviate the injury to complainant without exposing the defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction." This is correct as regards the application for an injunction, but if it is to be understood as holding that defendant would not be liable for the loss by conduction if plaintiff could apply the cheaper remedy, then we dissent from the view expressed. The plaintiff can only recover such loss as necessarily resulted to it from defendant's act. It must use due diligence to prevent unnecessary loss. The fact that plaintiff could apply the cheaper remedy would affect the amount of its recovery, but not the fact of defendant's liability. The right of the owner to compensation for 27 L. R. A.

his property taken for public use does not depend upon any consideration of this sort.

We have been referred to some cases that maintain views in apparent conflict with those expressed herein. It is sufficient to say of these cases that the New York and Ohio cases were decided chiefly upon consideration of particular statutes. *Cincinnati Inclined Plane R. Co. v. City & Suburban Telegr. Assn.* 48 Ohio St. 890, 12 L. R. A. 534. They were, without exception, injunction cases, in which the telephone companies appeared at great disadvantage, as seeking to obstruct the path of progress, and to debar the public of a great convenience. In that contest the telephone companies sought to take the lives of the electric railway companies. Here the question is one of liability for a sum that would impose no serious hardship upon either party to bear. In none of the cases was the question here decided necessarily involved. It was discussed, however, by some of the courts. It was perfectly clear in the injunction cases that the telephone companies were not threatened with irreparable injury. They had an adequate remedy by suit at law for damages. On the other hand, to have enjoined the railway companies would have inflicted irreparable injury upon them and the public.

As the result upon the whole case, *the judgment below is affirmed as to the loss by induction, and reversed in all other respects.* And upon the written stipulation of the parties that final judgment shall be entered here there will be entered in this court judgment in favor of plaintiff and against defendant for \$3,660.58 for loss by conduction, and \$816 for loss by conflict of poles and wires, with interest from date when expended, and all costs of this cause.

Judge Caldwell concurs in the result of this opinion on the question of conflict of poles and wires and on the question of induction, but does not agree on the question of conduction.

Wilkes, J., dissenting:

I concur in the opinion of the majority as to the liability of the electric railway company for damages for the interference of the poles and wires of the railway company with those of the telephone company on Main street, East Nashville, upon the ground upon which it is placed by the majority. I also concur with the majority as to the liability of the railway company for all damages caused by conduction, and think the conclusion can properly be arrived at upon the grounds taken by the majority. But I am unable to concur with the majority that the use of the streets by an electric railway company is an ordinary use of the streets in the sense of the statute and charter provision. The use of a street, in its broad sense, is the purpose or object of the street. This is simply to furnish a highway or passageway from one portion of the city to another, and from one man's premises to another. But this highway may be used for this purpose in many different modes. It may be used

by foot passengers, by horses, by carriages, by wagons, or by street-cars drawn by animal power. These are all ordinary or common uses, and have been from time immemorial. What is, then, the ordinary or legitimate use of the street? We would say, in the words of Mr. Lewis in *Rafferty v. Central Traction Co.* 147 Pa. 579: First. The right of passage,—the right of each member of the community to use the street for travel on foot, with animals, or in vehicles drawn by animals, including the right to such new modes of conveyance as are adapted to the ordinary surface of the highway, and are free to be employed by any member of the community. Second. The right to improve the street for the purpose of facilitating the right of passage, as by grading, paving, draining, lighting, etc. Third. The right, sanctioned by long usage and acquiescence, and by frequent judicial recognition, to lay sewers, gas pipes, and water pipes beneath the surface, for use, not only in connection with the right of passage, but also in connection with the abutting property. Fourth. The right, possibly, to use the space beneath the surface to a limited extent for pipes or other appliances to distribute any article of convenience or necessity to the occupiers of abutting property, such as steam, petroleum, hot water, electricity, and the like. Fifth. The right, upheld by very numerous decisions, of laying down a street railroad so as to correspond with the surface of the street, and to be operated by animal power. Beyond this the authorities do not compel us to go, and reason and justice forbid. It has been uniformly held, and it is conceded, that an ordinary horse railway is an ordinary use of the streets. It is virtually the same as a carriage or omnibus line, except the simple fact that the street-car is confined to a single track, while other vehicles may pass at will over other parts of the street between the pavements. 2 Dill. Mun. Corp. 722; *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205. This court has held that a dummy line is a new use and an additional servitude. *East End Street R. Co. v. Doyle*, 89 Tenn. 751, 9 L. R. A. 100. It has likewise been held that a cable-car line is an additional servitude. *People v. Newton*, 112 N. Y. 896, 8 L. R. A. 174. That an elevated railway is a new use has also been held, and is generally conceded. Thus the law stands as to the several improvements upon the ordinary street railroad.

Now, at the time the electric car system was inaugurated, "an electric street-car was neither usual nor common. It was not even lawful. Not until several years after the telephone was in operation was it lawful to use such power to propel street railways. A network of wires, double rows of poles, cross wires, and long wires charged with dangerous currents of electricity, constant and dazzling flashes beneath the wheels, cars running swiftly without any visible means of propulsion (the most alarming form of locomotion to horses), and flashing fire all the while, noisy machinery, and all unknown to former ages, and now allowable only by special statute, can hardly be called the

usual and common or 'ordinary' use of a public street." We think the practicable test to determine whether the use is new or an ordinary use is the character and kind of the motive power used. There are valid and permanent distinctions between different sorts of traffic, between a railroad which conforms to the surface of a street and one which does not, between a railroad with a superstructure and one without a superstructure, between a railroad operated by animal power and one operated by other power. The march of invention cannot obliterate these distinctions, nor can improvements and variations in railroad construction and operation. All of these distinctions can be applied to the horse railroad, and it is capable of a logical and permanent distinction from all other railroads. The one particular which distinguishes it from all other railroads is the motive power. Other railroads may be operated upon the same sort of track; other railroads may be operated without a superstructure, or may be confined to street-passenger traffic; but animal power is animal power for all time, and no other form of power can be confounded with it. In all the early horse-railroad decisions the identity of the motive power with that applied to ordinary vehicles was especially relied upon. The moment this basis of distinction is cast aside, that moment the whole subject is thrown into inextricable confusion. If the steam motor is allowed, then there is no resting place between the smallest motor and the largest locomotive. While I think the reason of the rule is that the electric car line is a new use and additional servitude, I do not consider that the question is settled to the contrary by the authorities. I recognize the number of authorities cited by the majority opinion. Only two of them are decisions of courts of last resort,—*Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assn.* 48 Ohio St. 890, 12 L. R. A. 584; *Hudson River Teleg. Co. v. Waterliet Turnp. & R. Co.* 135 N. Y. 898, 17 L. R. A. 674,—and these were upon statutes and charters different from ours, and having peculiar provisions. Moreover, all the cases were applications in equity for an injunction by the telephone company, on which it was necessary to show, not only that the telephones were wrongfully interfered with and injured, but also that the remedy at law was inadequate, and the injury not susceptible of being righted by an action at law for damages. The actions being brought by the telephone companies, the result was that in most cases the injunctions were refused. But the text-writers agree that the question as between the telephones and railways is still open and unsettled, and they incline to the view that the electric car system is a new use and additional servitude. *Keasbey, Electric Wires*, 153; *Thompson, Electricity*, 64; *Booth, Street Railways*, § 185; *Rafferty v. Central Traction Co.* 147 Pa. 579; 2 Dill. Mun. Corp. 2d ed. 892; *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205. In this case for the first time the naked question of law is presented untrammelled by the considerations which applications for injunctions in ad-

vance involve. The present case is one at law, to recover damages which have been sustained, and the cases cited and relied on by the majority are not conclusive.

Holding to this view, I am of opinion the electric company is liable for all the damages caused to the telephone plant, and the judgment of the court below should be reversed, and judgment given here for the several amounts claimed.

Bright, Special Judge: I concur in this opinion.

Snodgrass, J., dissenting:

I cannot agree with the majority of the court as to liability of defendant for injury by conflict of poles on the streets, and my disagreement is based upon the ground that defendant's use of the street, being the dominant use for a proper street purpose, and the city having in fact authorized and directed the erection of the electric railway poles where placed, the telephone company, whose occupation of the street, while a lawful and permissive one, was nevertheless not a street use proper, cannot complain because the poles of the electric railway company were placed on one side of the street, when, in fact, they might have been placed on the other. The telephone company can no more complain of this than could any other property holder on that side of the street complain because poles were not located on the other. If so, when such poles are placed in front of buildings constructed on one side of the street, opposite which there are none, the owners of the buildings may then rightfully complain that the poles should have been placed on the other side, and in front of the vacant property,—a clearly inadmissible claim. It being clear that the telephone company is on the streets merely by permission, and that their occupancy is subordinate to any street use to which the city might wish to devote the streets, when the city has undertaken to use them for electric railway purposes it cannot be hindered in doing so, nor can the telephone company claim damages for such use, authorized and directed by the city. The concession or determination that the electric railroad use is a proper street use is conclusive of that question, and neither the city nor the company can be made by the telephone company to select one side rather than another of the street for placing the poles, or pay damages if it does not do so. On this theory alone, too, is based the other conclusion of the majority that the defendant is not liable for damages caused by induction. If not liable for one, it is not for the other. Properly considered, the two conclusions are necessarily in conflict.

It will not do to say the city can let the electric railway company run its wires parallel with the wires of the telephone company on the streets, so as to destroy the use of the latter wires, and not be liable, and cannot let it erect street-railway poles and wires in contact with them without being liable. The right to permit the erection of poles includes the right to permit it anywhere the poles can be properly erected, at the discretion of the city. It cannot be made, directly

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or indirectly, by imposition of penalty in damages on its grantee, to choose a particular side of the street. The railway use being a street use, the telephone company's rights, granted in subserviency thereto, must yield to the claim of the city and its grantee for street service. In this connection it must not be forgotten that though, under the Act of 1885, it was permitted to telephone companies to construct their lines along and over the public highways and streets, it was not intended thereby to recognize such use as a proper roadway or street use, for it was in the same act provided that this permission was granted upon the condition that the ordinary use of such public highways, streets, etc., be not thereby obstructed. It is, of course, too clear for argument that it is not a necessity, for the operation of a telephone line, that it be erected in the streets. It is a convenience to it, of course, and the permission it obtained through legislation was a very desirable one; but it did not obtain it upon any theory that it was a street use, nor can any such claim be made for it. With or without the act, therefore, it is a subordinate use, permissive only for convenience, and must yield to any claim of the public for legitimate street uses, of which the electric railway is one.

On the main point in controversy—the right of damages for injuries inflicted by conduction—I also disagree with the majority. The majority opinion is founded and can be founded alone on the idea that the complainant has the natural right to the use of the earth as a return circuit, for the complainant does not profess to own the intervening earth between points where its wires on the premises of its several subscribers are buried and its plant. It is only in consequence of this use of the earth, and its natural right to use it, that the telephone company's intersecting locations at various places are of value. Disconnect these from the right to use the adjacent earth owned by others than itself intervening between these points and its exchange, and it has no valuable property in its buried wires on the premises of subscribers. So that, in order to deny the defendant the right to use the earth for a return circuit, this very right must be conceded to complainant. And it must logically be conceded that, having first taken possession, it has acquired a monopoly of the earth. The position destroys itself, for it must, to be true, assume the existence of a right in one which has to be taken for granted in order to disprove that the same right exists in another. It is no answer to this to say that complainant has a natural current, not disturbing electrical conditions, or a harmless current. It is not a natural current, but an artificial one, depending for its existence on the generation and specific direction of increased electric fluid, and along an artificial channel. It is not harmless any more than the other, except that it is not powerful enough to overcome or practically interfere with the other, and in the sense that, in this contact, it produces no obviously injurious results. But it is unnatural, and the hurtful or harmless character, as compared

to the other, is different in degree merely, and not in kind, as both are alike artificial and powerful. No scientist has yet been able to show how or where the injurious contact first occurs. Whether it originates on the land where the wires are buried, or elsewhere on the circuit, and pursues its entire round, is a matter of speculation merely. The hurtful overflow or disturbance may, in fact, originate at a point entirely away from the telephone wire's intersection with the earth, and on land which the telephone company does not claim; but, assuming the contact and disturbance to commence there, then it could not work an injury, unless, in connection with that particular land, the complainant had undertaken to use the earth away from it as a circuit; and so the injury is not to the specific property, but to the circuit of the earth thus sought to be appropriated and monopolized. Complainant's use of the earth as a return circuit was, of course, on the theory we are treating it, a rightful appropriation by complainant, because that of a property of the earth for such as is common to all. But it cannot, for that very reason, be an exclusive or monopolistic appropriation. If a right at all, it can only be a natural, common right, and cannot be asserted against the exercise of a like right which may impair it, because it cannot be exclusive property; for such use of the earth as may be made exclusive by monopolizing can never be recognized as property.

Principles deduced from cases of poisoned air, polluted water, obstructed light, etc., are inapplicable, as drawn from plausible, but faulty, analogies. These are injuries resulting in specific places to persons having the right to the free and exclusive enjoyment of so much of these elements as are their own, or necessary to their own use. But such rights cannot be enlarged, and these cases made applicable to the case of a claim to use the earth for a special benefit from point of contact of a wire (part of an artificial circuit), on one's own property to any other remote point through lands not so owned, and through which the claimant could acquire right of way only by natural inheritance, in common with all mankind, or by purchase. If the right exists as a natural right, it must be common, and cannot be exclusive. It is not pretended by complainant that it has been acquired by purchase, and therefore it does not, as claimed by complainant, exist at all. That complainant's private property is not affected, independently of its claim to the use of the earth as a circuit, is manifest, for no electric fluid could affect such property in the form of land leased or owned by complainant, unless the circuit—the artificial circuit—was established.

The effect of this holding of the majority is to make the railroad company liable for injury to all property within the influence of its escaping electric current, for it is assumed that the value for telephonic use of all property within the influence of this current is impaired. If this be true, it is immaterial whether such property is now being so used or not. The destruction of its capa-

bility for such use would necessarily give the right to damages. It must follow, therefore, upon this theory, that all land within the range of the electric influence of defendant's circuit is impaired in value, though not a foot of it has any such value without connecting it with an artificial circuit. This injury, it appears to me, cannot, in fact, result, but it must be held to result on the theory of the majority. The assumption that complainant has the same right to the use of the electric circuit established over adjacent lands as it has to the support of adjacent land, use of surrounding air, or of water distantly flowing and finally passing through its property, is obviously fallacious, because all these are natural elements in natural condition, ultimately naturally brought, without artificial means or special appropriation thereby, for complainant's use. But complainant's claim to a special artificial use of the earth throughout that portion claimed by it, as well as by others, if it is a special artificial use, is not helped by reference to natural conditions, under which its right to the enjoyment of natural elements is conceded; for, if treated as a natural right, complainant's claim to the earth as a circuit cannot exist to the exclusion or hindrance of an equal natural right in another. The proposition is clear that, if it is an artificial right, complainant would have to show its claim to so much of the earth as it uses for a circuit as an owner, before, in any event, it could be exclusive. This it does not pretend to do, and, on this account, its claim must fail. If asserted as a natural right, it must be because it is common, and not exclusive. It must fail as such, because, if sustained at all, it must be sustained as exclusive. Complainant has, therefore, no real claim of ownership or superior common right, and, on this ground, its claim for damages should be denied.

I have discussed the questions involved only upon principle, but my conclusions on both propositions are sustained by authority. The first proposition is directly adjudged by the courts of last resort in New York and Ohio, and my conclusion as to the second seems to have the approval of the greater number of courts which have considered it, though not all together in theory. In the case of *Hudson River Teleph. Co. v. Water-ollet Turnp. & R. Co.* (decided by the court of appeals in 1892), 185 N. Y. 898, 17 L. R. A. 674, and reversing the decree of the supreme court of New York, cited by the majority, it was held that, the telephone company's use of the street being a subordinate one, it could not complain of injuries inflicted by the overflowing electric current of the railway company, because its right was subordinate to that of the railway company. To the same effect is the case of *Cincinnati Inclined Plane R. Co. v. City & Suburban Telegr. Assn.*, 48 Ohio St. 890, 12 L. R. A. 584, decided by the supreme court of Ohio in 1891. It is proper to say, too, that the supreme court of Ohio in this case, which reversed his decree therein below, has not adopted the views of Judge Taft, elaborately quoted in the majority opinion in this case;

nor do the conclusions of the supreme court of Ohio and court of appeals of New York, differing from those of *Judge Taft* and the supreme court of New York, depend upon statutes, or the form of the action, as might be inferred from the majority opinion. It is true that these cases were injunction cases, as was that also between these same parties to this case, reported in 43 Fed. Rep. 279, cited by the majority, but the questions determined in them adverse to the conclusions of the majority in this case were not settled, so far as questions we are discussing are concerned, upon construction of statutes, nor

dependent upon form of action; and these states, therefore, by decisions of their courts of last resort, have ranged themselves on the other side of the question than that taken by the majority of this court. The weight of authority is against the holding of the majority in this case. I have not, however, attached much importance to the preponderance of decided cases. The question is practically a new one. The cases on it are few, the reasons for each often different from the others, and none absolutely conclusive. I have preferred to rest this dissent upon its own reasoning.

KANSAS SUPREME COURT.

J. M. ANDERSON, *Plff. in Err.*,

v.

S. H. RODGERS.

(58 Kan. 542.)

*1. The payee of a check, who fails to

*Headnotes by ALLEN, J.

make presentment within a reasonable time, assumes the risk of loss occasioned by the insolvency of the drawee occurring in the meantime.

2. It is negligence in the holder of a check to send it directly to the drawee, residing in a distant place, for payment; and the holder is responsible for any loss occasioned by adopting such course.

NOTE.—*Sending check directly to drawee bank.*

The decision in the above case holding it to be negligence in the holder of a check to send it directly to the drawee by mail for payment is an important one considering the frequency with which this practice is followed by banks, and especially in view of some difference in the authorities on the subject. The American cases, however, outside of New York state, are unanimous in support of the doctrine of the present case. Yet it is unquestionably a frequent practice in spite of these decisions, and as the cases on the subject are not at all numerous it may be that many bankers are not aware of them.

The earliest decision in this country which we have found is that of *Farwell v. Curtis* (1876) 7 Biss. 160, in which the court was of the opinion that sending a check by mail to the drawee would be at the risk of the sender; and where a draft was received in return four days after the check had been received the sender was held liable for the loss on failure to collect the draft. But in this case it was found that there was laches also in presenting the draft, and therefore the question of negligence in sending the check by mail to the drawee was not necessarily the basis of the decision.

But a direct decision to the effect that the collecting bank which sends a check directly to the drawee by mail is liable in case the draft which was received in return proves uncollectible when the check would have been paid if duly sent for presentment at the counter, is made in *Merchants' Nat. Bank of Philadelphia v. Goodman* (1885) 109 Pa. 422, 58 Am. Rep. 728, and this was also decided in *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.* (1896) 117 Ill. 100, 57 Am. Rep. 855.

Both of these cases also decided that a custom cannot be successfully set up as a justification for sending a check directly to the drawee bank by mail.

The same doctrine is recognized as sound in the case of *Hazlett v. Commercial Nat. Bank of Philadelphia* (1890) 132 Pa. 118. But in that case it was found that with due diligence loss would have been avoided notwithstanding the sending of the check by mail to the drawee, and that the owner of the

check had ratified the act by asking to have the check held for a few days.

The correctness of this doctrine was also conceded in the case of *Harvey v. Girard Nat. Bank* (1888) 119 Pa. 212, in which a sight draft was sent by mail to the bank at which it was payable, but as the drawee took up the draft after the failure of the bank at which it was made payable, although he did so under protest, he was held to have no right of action to recover back the money which he had paid.

So a bank receiving for deposit a certificate of deposit issued by another bank and transmitting it by mail to the latter was held liable for the failure to obtain payment thereon when it would have been paid if duly sent for presentation. *German Nat. Bank of Denver v. Burns* (1890) 12 Colo. 539.

Again where a certificate of deposit was sent by a collecting bank the same rule was applied. But only nominal damages were allowed to the bank which sent it for collection where it was found to be in fault for the failure to collect it by reason of its long-continued failure to object after being notified of the sending, or to make any reply when requested to take steps to aid in collection. *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville* (1893) 56 Fed. Rep. 937.

The doctrine of the above cases is directly denied in the New York case of *McIntosh v. Tyler* (1883) 47 Hun, 99, which decided that the fact of sending a check by mail through a collecting bank to the drawee for payment resulting in its dishonor, when it would have been paid if duly presented at the counter, does not constitute payment of the check or release the drawer from liability on the original indebtedness for which the check was given.

This is a decision of the general term of the supreme court relying on *Indig v. National City Bank of Brooklyn* (1890) 80 N. Y. 100, and *Briggs v. Central Nat. Bank* (1892) 89 N. Y. 182, 42 Am. Rep. 285, and refusing to follow the decisions of other states on the question. But the court of appeals in neither of the cases thus relied upon as authority really decided that exact question.

In the case of *Briggs v. Central Nat. Bank*, *supra*, the court recites the decision in the case of *Indig*

3. The Bank of H., as the agent of plaintiff, sent a check drawn by the defendant on the Bank of R., distant about fifty-five miles, to the Bank of R. by mail, with the request that it remit the amount in Kansas City exchange. The check was received by the Bank of R. on the evening of December 12. The Bank of H. continued to do business during all of the following day, receiving deposits and paying checks. On the evening of that day, after business hours, it deposited a letter enclosing the check, with the statement "No funds in bank," addressed to the Bank of H., which was received by the Bank of H. on the evening of the next day. The defendant had more than funds enough on deposit to pay the check. The bank did not open for business thereafter, and has never paid

anything to either party. *Held*, that the loss must fall on the plaintiff.

(June 9, 1894.)

ERROR to the District Court for Hamilton County to review a judgment in favor of plaintiff in an action brought to recover the amount of a check drawn by plaintiff in favor of defendant which failed of collection because of the suspension of the bank upon which it was drawn. *Reversed*.

Statement by **Allen, J.:**

This action was brought on a check, of which the following is a copy: "Richfield,

v. National City Bank of Brooklyn, *supra*, as being to the effect that a collecting bank mailing a check or draft to the drawee does not constitute the drawee its agent to receive the proceeds or guarantee the drawee's solvency. But although the same judge wrote the opinion in both cases and ought to know what was decided in the Indig Case it did not in fact decide just that proposition. It did decide that where a note was sent by mail to the bank at which it was made payable and that bank returned a New York draft when it was in good credit, but failed before the draft was dishonored, the sender of the note was not liable. The court said: "This appears to be the ordinary mode of transacting such business and the defendant was bound only to adopt the ordinary mode," but that, however that might be, no injury appeared to have resulted from this mode of presentment. Furthermore it should be noticed that this was not a case of sending an instrument to the drawee or party liable to pay the instrument, but merely to the bank at which a note was made payable. And it may well be doubted that the mere fact that a note is made payable at a bank places the bank in the same position in reference to its collection thereof as if the bank was itself the debtor, although it is said in the Indig Case to make the note equivalent to a check drawn by the maker upon that bank.

In the case of *Briggs v. Central Nat. Bank of New York*, *supra*, the decision actually made was that an arrangement with the drawee bank by the collecting bank for the crediting of all collections in an account to be settled once a week, and the sending of a check drawn on this correspondent itself which was credited in accordance with this arrangement, made the collecting bank the debtor and discharged the drawer of the check on the insolvency of the drawee.

Careful analysis of these New York cases therefore shows that there is no direct decision of the court of last resort upholding the practice of mailing checks directly to the drawee. On the contrary there is a mere expression not necessary to the decision in the Indig Case approving the practice of mailing a note to the bank at which it is payable, and a recital of this decision in the case of *Briggs v. Central Nat. Bank* (1882) 89 N. Y. 152, 42 Am. Rep. 255, as if it were the case of a check mailed to the drawee. Therefore the decision of the general term of the supreme court denying the doctrine of the other states in reliance on the authority of these two cases is in itself the only direct authority in New York state to that effect. This decision itself is weakened by the fact that it is based on cases which do not exactly support it.

In the case of *Shipsey v. Bowery Nat. Bank* (1875) 59 N. Y. 466, a check held for collection was mailed in the ordinary course of business to the drawee bank and was lost in the mails. But the decision

turned on the question of negligence in respect to giving notice to the owner of the check, and on account of such negligence the sending bank was held liable for the resulting loss consequent on the subsequent insolvency of the drawee.

In the case of *People v. Merchants & Mechanics Bank of Troy* (1879) 78 N. Y. 269, 34 Am. Rep. 582, a bank which sent checks by mail to the drawee when there were deposits to meet them and received in return a draft which proved worthless, was denied the right to recover from the receiver of the drawee bank on a claim that the deposit was thereby impressed with a trust. There is no discussion in the case as to the liability of the sending bank to the owner of the checks or on the question whether or not it was itself the owner.

In England the cases have not much discussed the question, but in several the practice of sending checks by mail to the drawee bank through the country clearing-house has been recognized, but the real question in controversy in nearly all of these cases has been the question of time of presentment. This was the fact in *Hare v. Henty* (1861) 10 C. B. N. S. 65, 30 L. J. C. P. 302, 7 Jur. N. S. 523, 4 L. T. N. S. 363, 9 Week. Rep. 738; *Bailey v. Bodenham* (1864) 16 C. B. N. S. 238, 10 L. T. N. S. 422, 33 L. J. C. P. 252, 10 Jur. N. S. 821, 12 Week. Rep. 865; *Prideaux v. Criddle* (1890) L. R. 4 Q. B. 455, 58 L. J. Q. B. 232, 20 L. T. N. S. 695, 10 Best & S. 515; *Heywood v. Pickering* (1874) L. R. 9 Q. B. 423, 49 L. J. Q. B. 145.

In *Bailey v. Bodenham*, *supra*, while the question was not decided, *Erie, J.*, said he was inclined to think presentment by mail to the drawee was a good presentment. And in *Prideaux v. Criddle*, *supra*, while this point seems to have been but slightly insisted upon, if in fact it was made at all by counsel, the court refers to this statement of *Erie, J.*, in the preceding case, and says: "A presentment through the postoffice is a reasonable mode of presentment; it is a very common mode, and having regard to the commercial business of the country it may be said to be a proper mode of presentment." The English cases, however, stand on a somewhat different footing from the American cases by reason of the recognized custom in respect to the country clearing-house in which the country banks are represented by London correspondents.

The result of the American decisions is entire unanimity in holding that it is not proper to send a check by mail directly to the drawee for payment, except in New York state, where, as shown above, the decision to the contrary cites as authority two other cases which do not exactly decide the question. Considering the great importance of New York decisions on commercial questions, it is unfortunate for the clearness of the law on this question that the New York cases are in any degree at variance with other American cases. B. A. R.

Kansas, Dec. 9th, 1889. Bank of Richfield pay to S. H. Rodgers, or order, two hundred and fifty dollars, to apply on lumber bill Morton county court-house. \$250.00. J. M. Anderson." The case was tried on an agreed statement of facts, which is as follows: "That on the 9th day of December, 1889, defendant was indebted to plaintiff in the sum of two hundred and fifty dollars. That on said 9th day of December, 1889, defendant executed the check, a copy of which is set forth in the petition, and delivered the same to the plaintiff through the mail. That said check was executed and delivered and received in the ordinary course of business, with reference to said indebtedness; but no special agreement was entered into as to whether it should be received as payment, or otherwise. That said check was received by plaintiff at Syracuse, in Hamilton county, Kan. That the Bank of Richfield, upon which said check was drawn, was situate at Richfield, in Morton county, a distance of about fifty-five miles from Syracuse, and that there was a daily mail between the two places, leaving each place at 7 o'clock in the morning, and arriving at about 7 o'clock in the evening. That, at the time of the transaction herein set forth, there was at Richfield another bank, doing a regular banking business, known as the Morton County Bank. That on the 11th day of December, 1889, plaintiff indorsed said check by writing upon the back of the same, to wit 'S. H. Rodgers,' and deposited the same for collection and credit of his account, when collected, with the Hamilton County Bank, a banking institution, doing a general banking business in Syracuse, with which said bank said plaintiff did his regular banking business. That on the 11th day of December, 1889, said Hamilton County Bank indorsed said check as follows: 'Pay Bank of Richfield, cashier or order, for account of Hamilton County Bank, Syracuse, Kansas. Frank Bentley, Cashier,'—and deposited the same in the mail in an inclosure directed to the Bank of Richfield, at Richfield, with a request that the said Bank of Richfield remit the amount of said check to said Hamilton County Bank, by mail, in exchange on Kansas City, less charge for exchange. That said check reached Richfield on the 12th day of December, 1889, after business hours. That on the 18th day of December, 1889, the Bank of Richfield inclosed said check in a letter addressed to the Hamilton Bank of Syracuse, and inclosed therewith a paper, on which were written the words following: 'No funds in bank,'—said check being deposited in the mail by the bank after banking hours. That said check was received at Syracuse on the 14th day of December, 1889, after business hours; and on the 15th day of December, 1889, plaintiff was notified of the nonpayment of said check. That on the 16th day of December, 1889, plaintiff verbally notified defendant of the nonpayment of said check, and demanded the amount thereof from defendant, and defendant refused to pay the same, or any part thereof. That plaintiff has never received the amount of said check, or any part of the same. That, at the times herein set forth, defendant had the sum of two hundred

and ninety-five dollars to his credit with the Bank of Richfield, subject to check. That on the 14th day of December, 1889, said bank of Richfield made an assignment for benefit of its creditors, and never opened for business after the 18th day of December, 1889. That said check was never charged to defendant by the Bank of Richfield, and the amount thereof was never deducted from his credit on the books of said bank, nor was any credit given to S. H. Rodgers nor the Hamilton County Bank by the said Bank of Richfield; and, at the time of the failure of the Bank of Richfield, the full amount of two hundred and ninety-five dollars was to the credit of said defendant on the books of said Bank of Richfield. That the said sum of two hundred and ninety-five dollars to his credit with said Bank of Richfield was entirely lost to defendant, and he has never received any part of the same. That said Bank of Richfield was open, doing general business, receiving deposits, and paying money upon checks during its regular banking hours, on the 18th day of December, 1889."

The court thereupon rendered judgment in favor of the plaintiff for the amount of the check.

Mr. H. R. Boyd for plaintiff in error.

Mr. George E. Morgan for defendant in error.

Allen, J., delivered the opinion of the court:

The only question we deem it necessary to consider is whether the negligence of Rodgers and his agent, the Hamilton County Bank, in sending the check directly to the drawee, operates, under the facts agreed upon, to discharge Anderson from liability. It is true, as was said by this court in *Gregg v. George*, 16 Kan. 546, that, "in order to charge the drawee of a check, the same strict rule of diligence in making demand and giving notice of nonpayment does not obtain as in cases of ordinary bills of exchange. As a general rule, he is not discharged unless he suffers some loss in consequence of the delay of the holder." If the drawee of a check has no funds on deposit to meet it, or if, having funds in the bank at the time, he afterwards withdraws them, and the check is not paid on that account, the drawee, having suffered no injury by reason of delay in its presentment, will not be discharged from liability; but when a person, having funds on deposit in a bank, draws a check against them, the holder of the check, if he delays its presentment, assumes the risk of the failure of the bank. It is said in *Daniel on Negotiable Instruments* (sec. 1586): "The fact that the check is presumed to be drawn against deposited funds makes it of even greater importance than, in the case of a bill, that a check should be presented, and that the drawer should be notified of nonpayment, in order that he may speedily inquire into the causes of refusal, and be placed in a position to secure his funds which were deposited in the bank." The rule, however, as to the time allowed the holder for presentment of a check, in order to relieve him from the risk of loss

by failure of the drawer, is definitely fixed by the authorities: (1) Where the payee to whom the check is delivered receives it in the place where the bank on which it is drawn is located, he must present it by the close of banking hours on the next business day. (2) Where the check, as in this case, is drawn on a bank located at a place distant from that in which it was received by the payee, it must be sent for presentment for payment by mail on the next secular day after it is received, and presented on the next day after its receipt. 2 Dan. Neg. Inst. § 1592, and cases cited.

In this case the check seems to have been forwarded for payment in due time, but it was sent directly to the drawee by mail, with the request that the bank of Richfield remit the amount by mail in exchange on Kansas City. The Hamilton County Bank therefore selected the drawee of the check as its agent for collection. That this was negligence is well settled by the authorities. It is said in *Daniel on Negotiable Instruments* (vol. 1, § 323a): "For the purposes of collection, the collecting bank must employ a suitable sub-agent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself." This proposition is sustained by abundant authorities. *Drovers' Nat. Bank v. Angle American Packing & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855; *German Nat. Bank of Denver v. Burns*, 12 Colo. 539; *Merchants Nat. Bank of Philadelphia v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville*, 6 C. C. A. 183, 56 Fed. Rep. 967; *Farwell v. Curtis*, 7 Biss. 160, Fed. Cas. No. 4,690.

It is insisted that inasmuch as the check was forwarded in due time, and came into the hands of the drawee, which refused payment, and returned the check with the statement "No funds in bank," the defendant was not injured by the mode of presentment; that an answer of "No funds," sent by mail, is as effectual a refusal to pay as though made across the counter at the bank. Where due presentment is not made, the burden of proof is upon the holder of the check to show that the drawer has not suffered injury. *Little v. Phenix Bank*, 2 Hill, 425; *Ford v. McClung*, 5 W. Va. 166; 2 Parsons, Bills & Notes, 71; 2 Dan. Neg. Inst. § 1588; *Daniels v. Kyle*, 1 Ga. 304. From the agreed statement, it appears that the check reached Richfield on the 12th of December, 1889, after business hours; that the bank on which it was drawn was open, doing

a general business, receiving deposits, and paying money on checks during its regular banking hours on the 13th. During that day a letter was written, addressed to the Hamilton Bank, with which was inclosed the check, and the statement "No funds in bank." This letter was deposited in the post-office after banking hours, and received at Syracuse after business hours on the 14th. The refusal to pay was therefore not communicated to any one until the 14th. Can it be presumed that, if the check had been regularly presented over the counter to the Richfield bank on the 13th, a false answer would have been given, as was in fact given by letter, and payment refused? It is admitted that the defendant had more than money enough to his credit to meet the check. Had presentment been made by another agent of the plaintiff, and payment refused, steps might have been taken immediately to protect the drawer's rights; but, the check being in the hands of the drawee, of course no effort would be made by it to prosecute itself, and the fact that payment was refused was not communicated to the Hamilton County Bank until the night of the day following the last one on which the Richfield bank was open for business. It might be that the answer "No funds in bank" was literally true, and that the Richfield bank had not the money with which to make payment at any time during the day of the 13th; but we are not at liberty to indulge in any presumption of that kind, the agreed facts showing that it received deposits and paid checks during the whole of that business day. This case must be decided in accordance with established principles; and the fact that the Richfield Bank was a small concern in a very sparsely peopled part of the state, and perhaps never had any large amount of funds in its possession, cannot be made a pretext for breaking down those wholesome rules of business which have been built up and defined with so much care and precision. The request in this case by letter was not an ordinary demand of payment, calling for current funds, but was a request for Kansas City Exchange, which the drawee would of course be at perfect liberty to refuse. In cases of this kind, a hardship necessarily results to one party or another. Courts, in their decisions, must be guided by fixed rules. The plaintiff, having trusted in the good faith of the Richfield bank by sending the check to it, must bear the burden of the loss occasioned by its failure occurring after the day on which regular presentment should have been made.

The judgment is reversed, and the case remanded, with directions to enter judgment on the agreed statement of facts in favor of defendant, Anderson, for costs.

All the Justices concur.

NEBRASKA SUPREME COURT.

Lydia BUTLER *et al.*

v.

John FITZGERALD *et al.*, *Appts.*

(.....Neb.....)

- *1. The statute of this state, prescribing in what real estate of the husband a wife shall be entitled to dower, is but declaratory of the common law.
2. When lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches, in the nature of a charge or incumbrance upon the real estate of the husband; and when such right has once attached, it remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law, and is consummate upon the death of the husband.
3. The rule of caveat emptor applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance made in pursuance thereof conveys no greater estate than would a quitclaim deed for the real estate, executed by the execution debtor.
4. The sale of the real estate of the husband under execution, on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower right of the wife in such real estate, and upon the death of the husband the wife is entitled to have her dower assigned out of such real estate.
5. Real estate which has been sold under execution on a judgment against the husband alone—such sale followed by judicial confirmation and conveyance—is real estate aliened by the husband, within the meaning of section 7, chapter 23, Comp. Stat. 1893.
6. The phrase "enhanced in value," found in section 7, chapter 23, Comp. Stat. 1893, is limited in its meaning to appreciation in the value of real estate by reason of improvements put thereon by the alienor.
7. In estimating the value of real estate aliened by the husband during his marriage, for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it is at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienor subsequent to the date of alienation.

(January 2, 1895.)

APPEAL by defendants from a judgment of the District Court of Lancaster County in favor of plaintiff in an action brought to recover dower in land which defendants had procured under a judgment against plaintiff's husband during his lifetime. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. Deweese & Hall and Abbott, Selleck & Lane, for appellants:

*Headnotes by RAGAN, C.

NOTE.—That the above decision follows the stronger current of authorities, see note to *Flowers v. Flowers* (Ga.) 18 L. R. A. 75.
27 L. R. A.

A dower interest is the right of the widow to the use for the term of her natural life of one third of the real estate of which the husband was seised during marriage, and of which she had not been barred by voluntary release, conveyance, or operation of law.

Hurste v. Hotelling, 20 Neb. 178.

In estimating dower in lands aliened in the husband's lifetime the value must be determined at the time when so aliened, without any regard to any subsequent increase in value from whatever cause.

Guerin v. Moore, 25 Minn. 462; *Walker v. Schuyler*, 10 Wend. 480; *Dorchester v. Coventry*, 11 Johns. 510; *Humphrey v. Phinney*, 2 Johns. 484; *Allan v. Smith*, 1 Cow. 180; *Shaw v. White*, 18 Johns. 179; *Dolf v. Bassett*, 15 Johns. 21; *Marble v. Lewis*, 53 Barb. 432, 1 Am. Lead. Cas. Real Prop. 400, 401.

Messrs. Leese & Starling and Stewart & Munger, for appellees:

The title acquired in lands by a purchaser at a sale under an execution is that only of the person against whom the execution is issued.

Code Civ. Proc. §§. 499, 500; *Mansfield v. Gregory*, 8 Neb. 432; *Westheimer v. Reed*, 15 Neb. 662; *Dayton v. Corser*, 18 L. R. A. 80, 51 Minn. 406.

The sale of real estate under execution on a judgment against the husband alone does not extinguish the wife's right to dower.

Gould v. Luckett, 47 Miss. 116; *Cowan v. Lindsay*, 80 Wis. 587; *Parmenter v. Binkley*, 28 Ohio St. 32; *Dingman v. Dingman*, 39 Ohio St. 172; *Mandel v. McClave*, 5 L. R. A. 519; 46 Ohio St. 407; *Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225; *Rutherford v. Read*, 6 Humph. 423; 1 Scribner, Dower, p. 603; *Snyder v. Snyder*, 6 Mich. 472; *Den v. Fretz*, 22 Am. Dec. 710, 711, note; *Freem. Judgm.* § 361 a; *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711; *Shaeffer v. Weed*, 8 Ill. 511; *Hamilton v. Southern Nevada Gold & Silver Min. Co.* 83 Fed. Rep. 562; *Dayton v. Corser*, *supra*.

There is no reason or justice in the claim that by the Act of 1889 the valuable right of appellee was taken away from her and given to appellant.

Strong v. Clem, 12 Ind. 87, 74 Am. Dec. 200; *Harrow v. Myers*, 29 Ind. 469; *Bowen v. Preston*, 48 Ind. 876; *Moore v. Kent*, 37 Iowa 23, 18 Am. Rep. 1; *Re Rausch's Will*, 35 Minn. 291.

The law in force at the date of the alienation controls the rights of the widow as to dower.

Wade, *Retrospective Laws*, §§ 179-183; *Moore v. Kent*, *supra*; *Peirce v. O'Brien*, 29 Fed. Rep. 402; *Kennerly v. Missouri Ins. Co.* 11 Mo. 204.

In determining the value of appellee's interest, the value of the property, exclusive of improvements, at the date of the husband's death, should be taken.

Maxwell, Code Pl. 164; *People v. Williams*, 64 Cal. 87; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Davis v. Kobe*, 36 Minn. 214; *Worcester Nat. Bank v. Cheney*, 94 Ill. 430; 1 Rice, Ev. 30; *Thompson v. Morrow*, 5 Serg. & R. 289, 9 Am. Dec. 353; 1 Am. Lead. Cas. Real Prop. 291; *Johnston v. Vandyke*, 6 McLean, 422; *Shirts v. Shirts*, 5 Watts, 255; *Powell v. Mon-*

son & B. Mfg. Co. 8 Mason, 347; *Mosher v. Mosher*, 15 Me. 371; *Allen v. McCoy*, 8 Ohio, 418; *Smith v. Addleman*, 5 Blackf. 406; *Wall v. Hill*, 7 Dana, 172; *Ravilins v. Buttel*, 1 Houst. (Del.) 224; *Wooldridge v. Wilkins*, 8 How. (Miss.) 360; *Dunseath v. Bank of United States*, 6 Ohio, 76; *Green v. Tennant*, 3 Harr. (Del.) 336; *Bowie v. Berry*, 1 Md. Ch. 452; *Summers v. Babb*, 13 Ill. 483; *Fritz v. Tudor*, 1 Bush, 28; *Boyd v. Carlton*, 69 Me. 200, 81 Am. Rep. 263; *Price v. Hobbs*, 47 Md. 359; *Manning v. Labores*, 33 Me. 343; *Hobbs v. Harvey*, 16 Me. 60; 5 Am. & Eng. Encyclop. Law, p. 929, note 11.

The statute in our state is in accordance with the rule of the common law, and the words used therein, "the lands have been enhanced in value since the alienation," mean improvements put upon the land by the tenant or his grantor.

Thornburn v. Docher, 32 Fed. Rep. 810; *Allen v. McCoy*, *Powell v. Monson & B. Mfg. Co.* and *Dunseath v. Bank of United States*, *supra*.

The purpose of section 7 of our Statute is to settle and establish the common-law rule as to the right of the widow to dower in improvements made by the alienor of the husband.

Doce v. Guinnell, 1 Q. B. 683; 2 Scribner, Dower, 2d ed. 604-606; 2 Scribner, Dower, Park & Perkins' ed.; p. 607; *Humphrey v. Phinney*, 2 Johns. 484; *Fritz v. Tudor*, and *Thornburn v. Docher*, *supra*; *Cowan v. Lindsay*, 30 Wis. 587; *Westbrook v. Vanderburgh*, 31 Mich. 30; *Allen v. McCoy*, *Dunseath v. Bank of United States*, and *Powell v. Monson & B. Mfg. Co.* *supra*; *Baden v. McKenny*, 7 Mackey, 268; *Gore v. Brazier*, 3 Mass. 544, 3 Am. Dec. 182; *Thompson v. Morrow*, 5 Serg. & R. 289, 9 Am. Dec. 858; *Johnston v. Vandyke*, 6 McLean, 422; *Mosher v. Mosher*, 15 Me. 371; *Boyd v. Carlton*, 69 Me. 200, 81 Am. Rep. 268; *Price v. Hobbs*, 47 Md. 359; 5 Am. & Eng. Encyclop. Law, p. 929, note 11; 2 Scribner, Dower, §§ 35-39, p. 626.

A sale upon execution is not an alienation within the meaning of section 7.

*Broom & Hadley's Com. chaps. 21-23, *555; Jones v. Jones*, 71 Wis. 513.

Ragan, C., filed the following opinion:

It appears, from a stipulation of the parties to this suit in the record, that the material facts in this case are: That Lydia Butler and David Butler were husband and wife, and resided, as such, in this state from the year 1866 until David Butler's death, in May, 1891, and that Lydia Butler still resides in this state; that on the 6th of October, 1879, David Butler was the owner in fee simple of certain real estate, which on said day was levied upon by an execution issued on a judgment obtained against David Butler alone, and sold to satisfy such judgment; that John Fitzgerald became the purchaser of said real estate at said execution sale, and said sale was followed by a judicial confirmation and conveyance to him of said real estate. Lydia Butler brought this suit to the district court of Lancaster county against John Fitzgerald and others, to recover her dower in said real estate, which had been sold and conveyed under execution as aforesaid. She had judgment, and John Fitzgerald and

others interested in said real estate have appealed. The stipulation of facts referred to, and on which the case was tried in the court below, provides that, if the court shall find that Lydia Butler was entitled to dower in said real estate, the court shall ascertain the value of such dower interest, and render judgment therefor in her favor; that said Lydia Butler agrees to accept a gross sum of money in lieu of said dower.

The two important questions presented by this appeal are:

1. Does the sale of the real estate of a husband under execution, on a judgment against him alone,—followed by judicial confirmation and conveyance—extinguish the dower interest of the widow of said husband in said real estate? Blackstone defines "dower" at common law thus: "Tenant in dower" is where the husband of a woman is seised of an estate of inheritance and dies. In this case the wife shall have a third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold for herself for the term of her natural life." And he further says that the object of the common law in giving a widow dower in the estate of her husband was "to provide for the sustenance of the widow, and for the nurture and education of the younger children." Bl. Com. bk. 2, pp. 128, 129. Section 1, chap. 23, p. 401, Comp. Stat. 1893, provides: "The widow of every deceased person shall be entitled to dower or the use, during her natural life, of one-third part of all the lands whereof her husband was seised, of all (an) estate of inheritance at any time during the marriage unless she is lawfully barred thereof." It will be seen that our statute in the matter of a widow's dower follows the rule of the common law, or, more properly speaking, the statute is but declaratory of the common law. In Scribner on Dower (vol. 2, p. 2, § 2) it is said: "It will be observed that this estate [dower] arises solely by operation of law, and not by force of any contract, expressed or implied, between the parties. It is the silent effect of the relation entered into by them, not as in itself incidental to that relation or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the law." And it was expressly held in *Shearer v. Ranger*, 22 Pick. 447, that "an inchoate right of dower is an existing incumbrance on land, within the meaning of the covenant against incumbrances." However this may be, it is clear that, "when lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches, in the nature of a charge or incumbrance upon the real estate of the husband." Under certain conditions, unnecessary to notice here, the dower right may never attach; but when it has once attached it remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law, and is consummate upon the death of the husband, and in certain other contingencies not involved in this case, provided for by section 23 of chapter 25 of the Compiled Statutes, entitled "Divorce and All

mony." In this case none of the conditions existed which prevented the inchoate dower right of Lydia Butler from attaching the real estate of her husband owned by him at the time of his marriage to her, or acquired by him thereafter. The husband is dead; and we now proceed to inquire whether his widow, within the meaning of section 1, chapter 23, quoted above, has been or is "lawfully barred" of a dower interest in the real estate in controversy. The rule of the common law as to the effect of a husband's acts during the coverture, on the dower interest of his wife in his real estate, is thus stated by Scribner on Dower (vol. 1, p. 603, § 1): "After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right attaching in law, which, although it may never become absolute,—as if the wife died in the lifetime of the husband,—yet, from the moment that the facts of marriage and seisin concur, it is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act. The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee in the same manner as she would have recovered against the heir of the husband had the latter died seised."

In the case at bar the real estate in controversy was not "aliened" by the husband, as that phrase is ordinarily understood. He was deprived of the title to this real estate involuntarily, and we may presume that the only act of his which led to his being deprived of his real estate by the law was his voluntarily contracting the debt made the basis of the judgment under which the real estate was sold. The decisions of the courts of last resort of the states in construing statutes like our own, and the decisions of the courts of last resort of the states whose statutes do not define dower, but follow the common-law rule, sustain the proposition quoted above from Scribner, as to the inability of a husband, by any voluntary act of his, to bar his wife's right of dower to his real estate after such right has once attached, either directly or indirectly. In *Pifer v. Ward*, 8 Blackf. 252, it was held that "if a mechanic's lien accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien." And in *Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615, it was held that "the widow's right of dower extends to and includes a house erected on land of her husband, and her claim is superior to a mechanic's lien for which the property was sold under a decree against the husband to enforce the lien." The court said: "The wife's dower is a favorite of the law, not resting in contract or resulting from the marriage relation. Her's is the elder lien. The mechanic bestows his labor with a knowledge of her prior right to the real estate, and he knows that the house he is building, as

brick is added to brick and nail after nail is driven, becomes real estate. He may protect himself by security, or not venture. She is passive, and can do nothing. It is for this reason that she is declared to be a favorite of the law." See also *Mark v. Murphy*, 76 Ind. 534. In *Shaeffer v. Weid*, 8 U. S. 511, it was held that "a widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics," etc., "but she is entitled to dower of all the real estate of which her husband was seised during coverture, unless she had released it in the form prescribed by law." In *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711, it was held: "The enforcement of a mechanic's lien for improvements made by the husband in his lifetime will not cut off his wife's right of dower, even to the extent of the value of such improvements." See also *Dingman v. Dingman*, 39 Ohio St. 172. In *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 676, William Grady owned certain lands, and agreed with his son Leonard that, if the latter would go on the lands and improve them, he would convey the same to him by way of advancement, and charge him with their value. Leonard took possession of the lands, and made improvements on them, and occupied the lands until his death. William Grady died, not having conveyed the lands to Leonard. The widow and heirs of Leonard Grady brought a suit against the widow and heirs of William Grady for specific performance of William Grady's contract, and the court decreed a specific performance of the contract. The widow of William Grady was a party to this suit, and served with process, but made no appearance. After this the widow of William Grady brought suit for her dower interest in the lands, and the court held: "The alienation of real estate by the husband, whether voluntary, as by deed or will, or involuntary, as by proceedings against him or otherwise, will confer no title on the alienee, as against the wife, in respect to her dower;" and that the suit for specific performance of the contract made by the widow's husband, and the decree enforcing such contract, did not bar the widow's dower rights, as they were not drawn in question in the specific performance suit; that the decree in that case had the same effect, and no more, than a deed would have had executed by William Grady alone at the time the decree was rendered, had he then been living. Section 3, chapter 46, Minn. Gen. Stat. 1878, provides that a surviving husband or wife shall be entitled to and shall hold in fee simple an undivided one-third of all lands of which the deceased was at any time during the marriage seised or possessed. A wife owned certain real estate. A judgment was obtained against the wife, and her lands levied upon and sold to satisfy the judgment. The wife then died, and the husband brought suit against the purchasers of the real estate at the execution sale to recover his rights in said real estate; and in *Dayton v. Corser*, 51 Minn. 406, 18 L. R. A. 80, the supreme court of Minnesota held that "the inchoate contingent interest of a husband or wife in real estate owned by the other, fixed [by the statute just quoted], and commonly

called the 'dower right,' is not divested by a transfer of title from the owner of the property to a purchaser at an execution sale founded upon a judgment against such owner." The court said: "It hardly seems necessary to cite authorities to the proposition that at common law a wife could not be deprived of her dower rights in the real estate of her husband through a sale upon execution on a judgment obtained against him subsequently to the marriage." See also *Barker v. Parker*, 17 Mass. 564.

It is to be remembered that the language of our statute is that the widow shall have dower in all the real estate of which her husband was seised during the marriage, "unless she is lawfully barred thereof." Keeping in view the nature of a dower interest as defined by the common law, and the reason and spirit of the common law on the subject, and the authorities just cited, we would feel safe in saying that the dower rights of the appellee in this case were not extinguished or barred by the sale on execution of her husband's real estate during his life, on a judgment rendered against him. But our statute has not remitted the courts for guidance entirely to the common law, and common-law decisions in respect of dower, for determining in what manner a wife or widow may be lawfully barred of her dower rights. Sections 12, 13, 15, chapter 23, Comp. Stat. 1893, provide in what manner a married woman may bar her dower rights in the real estate of her husband. Substantially, these provisions provide that a married woman shall be deemed to have released or waived her rights to dower in her husband's real estate only by her voluntary act or contract. And section 48, chapter 73, Comp. Stat. 1893, provides that a married woman, "to convey her right of dower she must execute a deed with or without her husband." And section 7 of said chapter 23 provides that "when a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime . . . that such lands shall be estimated in setting out the widow's dower according to their value at the time when they were so aliened." This statute is of itself a legislative recognition of the inability of a husband to deprive his wife of her dower rights in his real estate by a direct or indirect alienation thereof; and section 477 of the Code of Civil Procedure provides that judgments shall be a lien upon the lands of a debtor; and section 491a of the Code provides that, when an execution shall be levied upon real estate, the sheriff shall cause the interest of the execution debtor in such real estate to be appraised at its real value; and by sections 499 and 500 of the Code it is provided, in substance, that the sale of a debtor's real estate on execution, and the conveyance of such real estate to the purchaser thereof at such sale, shall vest in such purchaser the interest which the execution debtor had in said real estate at the time the judgment under which it was sold became a lien thereon. In the case at bar, David Butler had the title to the real estate in controversy at and before the time it was sold on execution, but that title was incumbered or burdened with the in-

choate dower interest of his wife, the appellee; and when the judgment was rendered against David Butler it became a lien upon the interest of David Butler in said real estate, but that lien was subject to the inchoate dower interest of the wife therein. When this real estate was sold, and the sale confirmed, and the sheriff executed a deed in pursuance thereof, he conveyed to Fitzgerald all the interest that David Butler had in this real estate; and such purchaser took the title to this real estate charged with the same burdens and incumbrances thereon that it was charged with while the title rested in David Butler,—the wife's inchoate dower right. The rule of *cestui emptor* applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance made to such a purchaser by the sheriff has no greater effect and conveys no greater estate than would a quitclaim deed for the premises executed by the execution debtor. *Norton v. Nebraska Loan & T. Co.* 85 Neb. 466, and 40 Neb. 394; *Hamilton v. Southern Nevada Gold & Silver Min. Co.* 83 Fed. Rep. 562. What the law does not permit a husband to do directly he may not do by indirection, and as we have seen it was not in the power of David Butler, by voluntarily alienating his real estate during his marriage, to deprive his wife of her dower rights therein, it logically follows that the sale of David Butler's real estate on execution, on a judgment rendered against him alone, did not bar or extinguish the dower right of his wife or widow therein and it is immaterial whether the debt on which such judgment was rendered was contracted voluntarily or otherwise by the husband. We accordingly hold and decide that the sale of the real estate of a husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower of the wife in such real estate, and that upon the death of the husband the widow is entitled to have her dower assigned out of such real estate.

2. The second question is, in estimating the value of the real estate in controversy for the purpose of assigning the widow her dower therein, whether its value at the date of the judicial conveyance made thereof in pursuance of its sale on execution, or its value at the date of the husband's death, shall be adopted. At common law the rule was, if a husband died seised of real estate, in estimating its value, for assigning his widow dower therein, its value at the date of the assignment of dower was adopted. 2 Scribner, *Dower*, § 80, p. 595. The present English rule is that, where the title to real estate is in an alien of the husband, in estimating the value of such real estate, for the purpose of assigning the husband's widow dower therein, the value of the real estate at the time of the husband's death is taken; and, if improvements have taken place between the time of the husband's death and the time of the assignment of dower, then the value must be taken at the date of the assignment. The common-law rule for estimating the value of real estate out of which dower is to be assigned to a widow, the title to which real

estate is at the time in an alienor or a grantee of an alienor of the husband, is stated in some old English cases found in Scribner on Dower (vol. 2, p. 605) as follows: "If a man be seised of land in fee, and take a wife, and enfeof a stranger of the land, and the feoffee builds thereupon a castle or mansion house, or other buildings, or otherwise improves it, so that it is worth more by the year than when it was in the possession of the husband, the wife shall not have her dower but according to the value it was of in the time of her husband." "E., who was the wife of R., demands one-third part of three acres of land, with the appurtenances, in E., as her dower, against W.; and W. comes and says that he bought the land of her husband, naked and unbuilt upon, and he built upon it, and he willingly allows to her her third part, saving the buildings to himself; and therefore she had her seisin, saving to the said W. the houses built by him," etc., "because he had, without the buildings, where she might have her land," etc. In *Humphrey v. Phinney*, 2 Johns. 484, Chief Justice Kent, who delivered the opinion in that case, cited the old English cases just quoted, and declared that "such was the law as understood and declared in the most ancient decisions of which we have any record." The American rule follows the rule of the common law. 2 Scribner, Dower, p. 612. See the rule stated, and the authorities collated in support thereof, in 5 Am. & Eng. Encyclop. Law, p. 929, note 2. Section 7, chapter 23, Comp. Stat. 1893, provides: "When a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime, and such lands shall have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower, according to their value at the time when they were so aliened." This statute is declaratory of and follows the common-law rule. But the real estate in this controversy was sold under execution on a judgment rendered against the husband alone. Was the judicial sale of this real estate, and the confirmation and conveyance made in pursuance thereof, an "alienation" of such real estate by the husband, within the meaning of this statute? It would seem that the alienation mentioned in the statute meant some voluntary act of the husband. The word "alienate" means, "To transfer property to another; to make a thing another man's. In common law, to alienate realty is voluntarily to part with ownership in it, by bargain and sale, conveyance, gift, or will." "Alienation" means, "An act whereby one man transfers the property and possession of lands, tenements, or other things to another." Anderson, Law Dict. But in *Ayer v. Spring*, 9 Mass. 8, it was held that, "where land was taken by execution from a husband, the wife was held to be dowable in the land, as it existed at the time of the extent of the execution, and not in the erection or improvements afterwards made." And in *McClanahan v. Porter*, 10 Mo. 746, it was held that "a purchaser of lands under execution against the husband occupies the same position as the alienor of the husband." To the same effect, see *Price v. Hobbs*, 47 Md. 359;

Wood v. Morgan, 56 Ala. 397. These authorities are quoted with approval, or rather without dissent, in 2 Scribner on Dower, p. 612. We feel constrained, therefore, to hold that real estate which has been sold under execution on a judgment against the husband alone, such sale confirmed, and a conveyance made in pursuance thereof, is real estate aliened by the husband, within the meaning of said section 7 of said chapter 23.

It appears from the stipulation of facts in this case that the real estate in controversy at the date of the judicial conveyance made thereof, in pursuance of its sale on execution, was of a certain value; and that the value of the real estate at the date of David Butler's death, exclusive of improvements thereon, was of a different value. The contention of the appellants is that, in estimating the value of this real estate for the purpose of assigning Mrs. Butler dower therein, its value at the date of the judicial conveyance thereof made in pursuance of its sale on execution should be taken; while the appellee contends that the real estate as it existed at the date of David Butler's death, excluding improvements made thereon since the date of the sheriff's deed, should be the one adopted. The statute (said section 7 of said chapter 23) provides that, in estimating the value of the real estate for the purpose of the widow's dower therein, its value at the time it was aliened shall be taken, when such real estate shall have been enhanced in value after the alienation. We are thus brought to the consideration of the question, What is the meaning of "enhanced in value" in the statute? Does it mean an appreciation and increase in value from any and all causes, or is it limited in its meaning to appreciation in the value of the real estate by reason of improvements put thereon by the alienor? In *Thornburn v. Doecher*, 32 Fed. Rep. 810, the precise question arose, and the court held that, "in estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon." In *Allen v. McCoy*, 8 Ohio, 418, it is said: "In making assignment of dower, the rule of value is to be taken at the time of assignment, but all increased value from actual improvements on the ground is to be excluded." In *McClanahan v. Porter*, 10 Mo. 746, it was held that, "where lands have increased in value from extrinsic causes not connected with the labor or expenditures of the alienor, the widow takes according to the value at the time of the assignment." In *Summers v. Babb*, 13 Ill. 483, it was held that "a widow is only entitled to take her dower according to the valuation of the land at the time of the alienation. She is not dowable of improvements put upon the land, but is entitled to the benefit of its increased value, arising from other causes than the labor and expenditure of the alienor." In *Thompson v. Morrow*, 5 Serg. & R. 289, 9 Am. Dec. 353, Tilghman, Ch. J., discussing the point under consideration, said: "So far as concerns improvements made by the alienor, it is agreed that the

tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate which may arise either from public misfortune or the negligence, or even the voluntary act, of the alienee; for, although he destroy the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one third of the land as she finds it at the death of her husband." And in *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 847, Fed. Cas. No. 11,356, *Mr. Justice Story*, referring to the opinion in *Thompson v. Morrow*, *supra*, said: "This doctrine appears to me to stand upon solid principles and the general analogies of the law. If the land has in the intermediate period risen in value, she receives the benefit; if it has depreciated, she sustains the loss. If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For

practical purposes, it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land, and those which operate upon the whole. Upon the whole, my judgment is that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees, leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements." We think the reasoning of these cases is unanswerable, and we therefore conclude that, in estimating the value of real estate aliened by the husband during his marriage for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it stood at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienees after the date of the alienation.

The judgment of the District Court is affirmed.

Rehearing denied.

NORTH DAKOTA SUPREME COURT.

J. F. BINGHAM, *Respt.*,

v.

E. Ashley MEARS *et al.*, *Appts.*

(.....N. Dak.)

*1. It is no defense to an action against sureties on an appeal undertaking that the plaintiff holds security amply sufficient to pay the claim for which the sureties have become bound, and that plaintiff has refused on demand to resort to such security for payment, there being no proof that the sureties were prejudiced by such refusal.

*2. Whether a surety may not, under exceptional circumstances, compel a creditor to exhaust collateral security before suing him, not decided.

(November 12, 1894.)

APPEAL by defendants from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to enforce the liability of defendants as sureties on an appeal bond. *Affirmed.*

The facts are stated in the opinion.

Mr. E. A. Mears, with *Mr. A. S. Drake*, for appellants:

The sureties are favored debtors in the eyes of the law.

The Roman law gave the sureties the power

*Headnotes by COLLIS, J.

NOTE.—Without attempting any annotation to the above case, attention is called to the valuable review of the authorities in the briefs and the opinion of the court on the effect of refusal to resort to security held by the creditor affecting a surety's liability.

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to compel the creditors to sue the principal debtor, before having recourse to the sureties.

Hayes v. Ward, 4 Johns. Ch. 123, 1 L. ed. 786, 8 Am. Dec. 554; *DeColyar, Guaranties, Principal & Sureties*, p. 143.

New York followed the Roman law as early as 1816.

Story, Eq. Jur. 827, 494, 639; *Dan. Neg. Inst.* 1339; *Black River Bank v. Page*, 44 N. Y. 457; *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519; *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369; *King v. Baldwin*, 2 Johns. Ch. 554, 1 L. ed. 487, overruling *Pain v. Packard*, which was of itself (in 17 Johns. 384, 8 Am. Dec. 415) reversed.

The creditor is under an equitable obligation to collect his debt from the principal in the first instance if he can.

Remsen v. Beckman, 25 N. Y. 556; *Colgrove v. Tallman*, 67 N. Y. 99, 23 Am. Rep. 90; *Wood v. Jefferson County Bank*, 9 Cow. 206; *Pardee v. Van Auken*, 3 Barb. 540, approved in *Smith v. Rice*, 27 Mo. 505, 72 Am. Dec. 282; *Brown v. Williams*, 4 Wend. 367; *King v. Baldwin*, *supra*.

A surety has a right to have his principal's property first applied to the payment of the debt.

Delaware, L. & W. R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151; *Watson v. Sutherland*, 1 Tenn. Ch. 208.

A principal is bound by every rule of moral and legal obligation to protect his surety from the payment of the debt for which he is surety.

Rinconour v. Mathews, 42 Ind. 7; *McNeri v. Aldridge*, 25 W. Va. 118; *Bedwell v. Gephart*,

67 Iowa, 44; Brandt, Suretyship, § 205; *Kennedy v. Falde*, 4 Dak. 319; *Meriden Silver Plate Co. v. Flory*, 44 Ohio St. 430; *Richards v. Osceola Bank*, 79 Iowa, 707; *Shenandoah Nat. Bank v. Ayres*, 87 Iowa, 526; *Martin v. Orr*, 96 Ind. 491; *Smith v. McKean*, 99 Ind. 101; *Armstrong v. Farmers Nat. Bank of Frankfort*, 130 Ind. 506.

All the surety has to do in order to protect his property from being levied upon is to point out property belonging to the principal debtor.

Barnes v. Cavanagh, 53 Iowa, 27; *Bedwell v. Gephart*, *supra*; *Church v. Simmons*, 88 N. Y. 264; *Toles v. Adee*, 84 N. Y. 224.

A notice from a surety to bring suit, if in writing, is sufficient. Even a verbal notice is sufficient.

Jackson v. Huey, 10 Lea, 184, 43 Am. Rep. 301; *Petty v. Douglass*, 76 Mo. 70; *Cole v. Fox*, 88 N. C. 468.

Notice to the creditor, after which the creditor fails to act, will release sureties.

Barnes v. Sammons, 128 Ind. 596; *Barnes v. Mowry*, 129 Ind. 568; *Medley v. Tandy*, 85 Ky. 566; *Toles v. Adee*, 91 N. Y. 562.

The law, previous to any code enactment, was that notice by the surety, if not acted on promptly, would release.

Kauffman v. Com. (Pa.) March 14, 1887; *Reiner v. Rodgers*, 2 W. N. C. 16; *Manufacturers & M. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335, 42 Am. Dec. 240; *Pott v. Nathans*, 1 Watts & S. 155, 37 Am. Dec. 456; *Storms v. Thorn*, 3 Barb. 314; *Bangs v. Strong*, 4 N. Y. 315; *La Farge v. Herter*, 9 N. Y. 241; 2 Story, Eq. Jur. 1227; *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 1 L. ed. 190, 7 Am. Dec. 494; *King v. Baldwin*, 2 Johns. Ch. 554, 1 L. ed. 487; *Hayes v. Ward*, 4 Johns. Ch. 123, 1 L. ed. 786, 8 Am. Dec. 554.

This rule is embodied in our Civil Code, section 1713.

Irick v. Black, 17 N. J. Eq. 189.

The complaint shows on its face that defendants were sureties or bail. The judgment entered was in direct contravention of the express words of the statutes.

Shooley v. Fletcher, 45 Ind. 86; *Johnson v. Harris*, 69 Ind. 305; *Smith v. McKean*, 99 Ind. 101; *Womack v. Paxton*, 84 Va. 9.

Messrs. Newman, Spalding & Phelps, for respondent:

The obligation of defendants is statutory and not common law.

Thompson v. Blanchard, 3 N. Y. 335; *Doolittle v. Dininny*, 81 N. Y. 350.

An undertaking on appeal is an absolute independent contract on the part of the sureties, in the nature of a guarantee of payment.

Curtis v. Richards, 9 Cal. 84; *Sacramento City & County v. Dunlap*, 14 Cal. 421; *Murdock v. Brooks*, 88 Cal. 596; *Heebner v. Townsend*, 8 Abb. Pr. 284; *Robinson v. Plimpton*, 25 N. Y. 487; *Doolittle v. Dininny*, *supra*; *Staples v. Gokey*, 34 Hun, 289.

The breach of the undertaking is complete upon the affirmance of the judgment and failure to pay, and plaintiff is not bound to exhaust his remedies against the Mortgage Bank & Investment Company, or resort to collateral.

Heebner v. Townsend, and *Murdock v. Brooks*, 27 L. R. A.

supra; Laws 1891, chap. 120, § 22; *Wallerstein v. American Surety Co.* 40 N. Y. S. R. 508.

Corliss, J., delivered the opinion of the court:

The defendants were sureties on an undertaking given on appeal to this court from a judgment. Their only defense to this action against them on the undertaking is that the principal on whose behalf they signed the undertaking assigned to the plaintiff, as collateral to the claim on which such judgment was rendered, certain promissory notes secured by real-estate mortgages, and that such collateral security is sufficient to pay such judgment and all expenses; that they have notified the plaintiff that he must resort to such collateral to collect his claim, but that he has failed to do so. Under the circumstances of this case, these facts do not constitute a defense. The general rule is that the surety has no right to insist that the creditor shall first proceed against the principal debtor, or any security which such debtor may have given him. Upon default the surety may at once be sued. 1 Brandt, Suretyship, § 97. It is true that in cases characterized by exceptional features, equity may compel the creditor to resort first to the property of the principal debtor where this will occasion no inconvenience or delay to the creditor. See *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519. But the facts of this litigation do not call for the application of this rule. There is no claim that the principal debtor is insolvent, or that these collateral securities will not be available to the sureties in their hands for their indemnity after they have become by payment subrogated to all the rights of the plaintiff therein. There is also another rule which appears to be well supported, but this case is not brought within its scope. There is authority for the doctrine that upon indemnifying the creditor against the expenses of the proceedings the surety may, in equity, compel him to first exhaust his remedies against the principal debtor. Brandt, Suretyship, § 238. But in this case no offer of indemnity appears to have been made. This is a simple action at law upon a contract. The right of the sureties with respect to this collateral security is to resort to it themselves on paying the debt, and not to compel the creditor to resort to it. It is because of this right of a surety to look to such security for indemnity after he has paid the debt that the release of such security by the creditor will discharge the surety. When the surety is sued, he cannot, in an ordinary case at least, defend on the ground that the principal should have been first sued, and all efforts to collect the debt from him exhausted. On the same principle, the surety cannot insist that the creditor must first essay to collect his claim out of the collaterals the principal debtor has given him, except in the case mentioned in section 4310. This statute is inapplicable to this action. Another section of our statutes clearly contemplates that the mere failure, after request, to sue the principal debtor, or to proceed

against collateral security, will not defeat an action against the surety. The latter may nevertheless be sued, and is liable for every dollar of the debt, except to the extent that he is prejudiced by the refusal of the creditor to proceed as requested. Comp. Laws, § 4305. The fact that the principal debtor has not been sued, or that collateral security has not been exhausted, is never a defense of itself. It is not a defense, even when a request of the surety is shown that the creditor sue the principal or resort to his collateral, unless the surety is prejudiced by the failure of the creditor to act as requested; and then only to the extent of such prejudice. To have made out a defense because of the failure to resort to this collateral security, defendants should have proved that they had been prejudiced thereby.

Another section of our statute leads us to the same conclusion. Section 4310, Comp. Laws, provides that "whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." Here is a single instance in which the surety may insist that collateral held by the creditor shall be first exhausted. It follows that in no other case does this right exist, unless the right was well established under the decision prior to the enactment of this statutory law. So far from finding such a rule to have been settled at the time our code was adopted, we have been unable to discover a single authority sustaining such a doctrine where the facts were not exceptional. All the adjudications support the contrary rule. *Fuller v. Loring*, 43 Me. 481; *Thorn v. Pinkham*, 84 Me. 101; *Morrison v. Citizens Nat. Bank of Tilton*, 65 N. H. 258, 9 L. R. A. 282; *Abercrombie v. Knox*, 8 Ala. 728, 87 Am. Dec. 721; *Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 93; *Brick v. Freehold Nat. Bkg. Co.* 87 N. J. L. 307; 1 Brandt, Suretyship, §§ 97, 287; *Buck v. Sanders*, 1 Dana, 187; *Day v. Elmore*, 4 Wis. 190-198; *Penn v. Ingles*, 83 Va. 65; *Davis v. Patrick*, 6 C. C. A. 632, 57 Fed. Rep. 909; *Callahan v. Mitchell*, 29 Ind. 419; *Aultman v. Smith*, 52 Mo. App. 851.

The judgment of the District Court is affirmed.

All concur.

A petition for rehearing was subsequently filed in response to which on January 2, 1895, the following opinion was handed down:

The earnestness with which counsel for defendants have pressed upon us their application for rehearing constrains us to go more fully into the discussion of the exceedingly interesting question presented on this appeal. In their main features, the English common law and the Roman civil law differed radically from each other touching the right of the surety to require the creditor to proceed against the principal debtor or the security the debtor had given the creditor before coercing payment by the surety. In the earlier period of Roman jurisprudence the right

of the surety to compel the creditors to resort first to the principal to collect his demand appears to have been well established; but the rule was gradually departed from, Justinian, however, restored it, and from his time the doctrine was universally recognized throughout the empire. It has been incorporated in the jurisprudence of many of the nations of Europe. Burge, Suretyship, pp. 829-841; *Hayes v. Ward*, 4 Johns. Ch. 123-133, 1 L. ed. 786, 790, 8 Am. Dec. 554. But it never secured a footing in England. There the contrary doctrine has prevailed from the earliest times. The common-law rule is that the surety must pay and seek reimbursement from the principal or out of the securities the latter has given the creditor. This was always the rule in courts of law. But in equity and in bankruptcy proceedings a rule somewhat analogous to that of the civil law grew up. This rule, however, was less sweeping in its effects upon the creditor than the rule promulgated by Justinian. It more carefully guarded his rights from prejudice. The English law regarded the promise of the surety as an absolute promise, unless it was in terms conditional. The surety was under the same obligation as the principal to pay the debt. The courts of law therefore ignored the equities between the principal and the surety when the creditor was seeking to collect his claim of the latter. In equity, also, the promise of the surety was looked upon as an unconditional promise; but equity, unlike the law, would not, under all circumstances, refuse to consider the rights of the surety in his relation to the principal; and whenever a case arose, special in its character, calling for the aid of equity to protect the surety from injury, that court, true to its traditions and its fundamental principles, extended relief to the surety, whenever it could do so without, on the other hand, affecting the right of the creditor to the payment of his debt according to the terms of his contract. But in all such cases equity required that the creditor should be saved from delay, from expense, and from all risk. 1 Brandt, Suretyship, § 238; 24 Am. & Eng. Encyclop. Law, p. 799, and cases. When the object of the surety's appeal to equity was to compel the creditor to exhaust the collaterals in his hands before proceeding against the surety, the foundation of equitable relief was the inability of the surety himself to enforce such collateral after paying the debt, or the possibility that the creditor by some act had impaired its value or destroyed its legality. The mere fact that the creditor held security for the debt did not entitle the surety to appeal to equity for a decree that the creditor look first to such security for his pay. In such a case the surety could protect himself by paying the claim, and by being subrogated to the creditor's rights to the security. But if, after payment by him, he could not enforce such security, or if grave doubt existed as to its legality because of some act of the creditor with respect to it, then a special case was presented, necessitating the interference of equity to prevent injustice to the surety; but even in such cases equity

never interposed its aid without exacting the most ample protecting of the creditor against all damages because of delay, and all expenses of other proceedings than those against the surety, and the most complete indemnity against all loss because of the creditor's right of recovery against the surety being postponed. Mr. Burge, in his work on Suretyship, after referring to the civil law which permits the surety to compel the creditors to first sue the principal and exhaust collaterals, says, at pages 841 and 842: "The jurisprudence of England and of those colonies which adopt it does not, in that part of it which administers strict law as distinguished from equity, give this privilege to the surety. But in the administration of that part which is called equity and in the administration of the bankrupt laws a relief similar in its effect is afforded to him. It treats the creditor, however, as entitled to avail himself of all his securities in order to obtain the full payment of his demand. Thus, if the creditor have both a personal remedy against the surety for his demand, and also a fund to which he may resort for payment, and to which fund the surety even, when he has paid the creditor what is owing to him, cannot resort, a court of equity will, when it is satisfied that the creditor has the clear means of making his demand effectual against the fund, and upon the surety's indemnifying the creditor against the consequences of all risk, delay, and expense, compel the creditor to make the fund available towards the satisfaction of his debt, before he proceeds personally against the surety." Said the chancellor in *Hayes v. Ward*, 4 Johns. Ch. 123, 181, 1 L. ed. 786, 789, 8 Am. Dec. 554: "I am not aware that there is any general rule in chancery that the creditor must look to the principal debtor, and exhaust his remedy against him, before he can be permitted to resort to the surety. The general language in the books and the practice have been otherwise, and the surety has been considered (without any formal adjudication upon the point, and perhaps without any examination of it upon principle) as amenable in ordinary cases to the creditor in the first instance, though the creditor may have taken ample security. The creditor has usually called on the surety at his election, and left him to resort to the principal debtor for his indemnity after he has paid the debt, and after he has been clothed by substitution with all the rights and securities of the creditors. 'The holder of the security, therefore, in general cases,' says Lord Eldon in *Wright v. Simpson*, 6 Ves. Jr. 784, 'may lay hold of the surety; and, till very lately, even in circumstances under which the surety would not have had the same benefit that the creditor would have had.' But in late cases, and under particular circumstances, Lord Eldon admits that the surety has a right to call upon the creditor to do the most he can for his benefit." Referring to these cases holding that this may be done, the chancellor says of them: "But all the instances to which I have alluded may be considered as cases of a special nature. They do not appear to establish any such general rule as

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that derived from the civil law requiring the principal debtor to be first sued, which rule prevails in all those countries where the civil law is an essential part of the municipal law of the land." The chancellor granted relief to the surety in this case upon the ground that there was reason to believe that the creditor, by tainting his security with usury by subsequent dealings therewith, had rendered it void; thus placing the surety in a position where he could not have the benefit of it upon paying the debt. On this question the chancellor said: "I put this case entirely upon the ground of the allegation, to which no answer has been given, that the mortgage is infected with usury, and would be useless and void if placed by substitution in the hands of the surety. If this should happen to be the case, the plaintiff, on paying, might be deprived of all indemnity from his principal by reason of the conduct of the creditor." Said the court in *Newcomb v. Hale*, 90 N. Y. 327, at page 330, 43 Am. Rep. 173: "Spencer, Ch. J., in his opinion in *King v. Baldwin*, 17 Johns. 886, 8 Am. Dec. 415, seems to assume that a surety may always proceed in a court of equity, after the debt becomes due, to compel the creditors to collect of the principal debtor. But the authorities do not sustain the broad proposition assumed by the learned judge. There must be some specific equity beyond the mere relation of surety and creditor to entitle the surety to this relief." In a recent case in the circuit court of appeals that court rendered a decision directly in point. *Davis v. Patrick*, 6 C. C. A. 682, 57 Fed. Rep. 909. In the course of the opinion the court said: "Some cases have been cited by the learned counsel for the plaintiffs in error, the authority of which we do not dispute, that under certain circumstances a court of equity, at the instance of the surety, will coerce a creditor to proceed with the collection of his claim against the principal debtor. But these are cases where, by the delays and forbearance of the creditor, the surety is liable to sustain loss, or where the creditor has access to a fund for the payment of his debt, which the sureties cannot make available. The principle has never been extended to a case like the one at bar, where the creditor has merely exercised his right of election as between two remedies for the collection of a debt, and where the securities held by the creditor may be made immediately available to the surety by his paying the debt and seeking subrogation." In *Irick v. Black*, 17 N. J. Eq. 189-195, the court said: "If the court is asked to interfere on behalf of the surety before judgment is recovered against him, he must present some special ground of equitable relief." See also *London, Paris, & American Bank, Limited v. Smith*, 101 Cal. 415; *First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 407, 411, 412, 27 Am. Rep. 66; *Abercrombie v. Knox*, 8 Ala. 728, 87 Am. Dec. 721.

The general rule that some peculiar equity must exist in favor of the surety—that the case must be an exceptional one to entitle the surety to relief—applies as fully when the surety is seeking to compel the creditor

to first sue the principal as when he is insisting that the creditor shall first exhaust the security he holds. These rules of the common law constitute the law of this state, so far as they have not been changed by statute. We will shortly come to that subject. Now, it is obvious that defendants' answer discloses no special equity in their favor. The security which they ask the court to compel the creditor to exhaust they can secure absolute control of by themselves paying the claim they owe. As between the creditor to whom a debt is owing and the surety who owes it, equity very properly declares that the creditor ought not to be compelled to enforce, for the benefit of the surety, the security he holds, but that the surety himself should pay the debt, and enforce such security for his own benefit. But we are referred to several statutes as having radically changed the common law. They have already been mentioned in the original opinion. Among them the first we will consider is section 4305, Comp. Laws. This section declares that: "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced." This provision has a history. It is the statutory embodiment of the rule established in the state of New York in the early days of that state. That rule was first announced by the supreme court of that state in *Pain v. Packard*, 18 Johns. 174, 7 Am. Dec. 369, and was finally settled by the court of errors in *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415, by the casting vote of the president of the court, a layman who was *ex officio* president of the court by virtue of holding the office of lieutenant governor of the state. It was an anomaly in the law. It rested upon the doctrine that equity would, in special cases, require the creditor to first proceed against the principal debtor or collateral security held by the former. But this doctrine did not warrant such a rule so broad as to apply to all cases, whether any special equity existed or not. See *Newcomb v. Hale*, 90 N. Y. 327-330, 48 Am. Rep. 173. The court might have deduced from this doctrine that equity would, under peculiar circumstances, compel the creditor to first look to other sources than the surety for his pay, under the rule that in such cases, and in such cases only, this duty might be cast upon him by a notice to him from the surety to proceed against the principal, or to exhaust collaterals; and that in such cases, and in only such cases, the creditor's failure to do so would exonerate the surety to the extent that it caused him injury. But the court, in *King v. Baldwin*, ignored this limitation, and laid down the rule in language whose legal effect is the same as that of the section of our statute above quoted (i. e. section 4305). The New York decisions furnish a clue to the meaning of this provision. The spirit of it is, not to prevent suit against the surety after the creditor has been notified to proceed against the

principal, but to place the hazard of the subsequent insolvency of the principal or the subsequent impairment of the security wholly upon the shoulders of the creditor. If the contention of the counsel for defendants that this statute introduces the civil-law rule that the surety may always require the creditor to first sue the principal or exhaust the collateral he holds, is sound, it is remarkable that the courts of the state which first declared the rule embodied in that section have since that time been called upon, as has been frequently the case, to apply the doctrine that a surety is subrogated to the rights of the creditor on paying the debt. Sureties would have invoked this civil-law rule had it been introduced by the New York doctrine in that state; and, instead of paying and exercising the right of subrogation, they would in every case have compelled the creditor to resort to the principal or to collaterals in the first instance. That the rule enunciated in section 4305 does not carry with it the other rule contended for by counsel for defendants—the civil-law rule—is apparent from the fact that in New York, where the former rule has existed for more than one-half a century, we find the courts steadily refusing to recognize the civil-law rule, except to the extent that it has been recognized in England. In New York, equity will interfere in only exceptional cases, where special equities in favor of the surety exist. *Newcomb v. Hale*, 90 N. Y. 327, 330, 48 Am. Rep. 173; *London, Paris, & American Bank, Limited v. Smith*, 101 Cal. 415; *First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 407, 411, 412, 27 Am. Rep. 66; *Hayes v. Ward*, 4 Johns. Ch. 123, 131, 133, 134, 1 L. ed. 786, 789, 790, 8 Am. Dec. 554; *Warner v. Beardsley*, 8 Wend. 199, 200. We therefore discover no reason for holding that section 4305 has wrought the radical change in the common law which counsel for defendants contend that it has.

We are referred to two other sections of our statute as favoring the views of defendants' counsel. They are sections 4310 and 5166, Comp. Laws. They provide as follows:

"Whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." Section 4310.

"In all cases where judgment is rendered upon any instrument in writing, in which two or more persons are severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his codefendant, the court must, in entering judgment thereon, state which of the defendants is principal debtor, and which are sureties or bail. And execution issued on such judgment must command the sheriff or other officer to cause the money to be made of the personal property and real property of the principal debtor, but, for want of sufficient property of the principal debtor to make the same, to cause the same to be made of the personal and real property of the surety or bail. In all cases, the prop-

erty, both personal and real, of the principal debtor, within the jurisdiction of the court, must be exhausted before any of the property of the surety or bail shall be taken in execution." Section 5166.

These statutes are merely declaratory of settled rules. When both principal and surety have, by the same instrument, mortgaged their property for the debt of the principal, no delay or loss or risk can result to the surety from so enforcing the mortgage that the property of the principal shall be first sold. Nor is an additional action necessary as the principal and the surety, and the property of both, are all before the court in the one action to foreclose the mortgage. In such a case, equity, to prevent a multiplicity of actions, and to protect the surety with slightest injury to the creditor, will direct that the principal's property be first sold. The courts had established this rule before it found its way into our code. 1 Brandt, Suretyship, § 287, and cases cited; *Weil v. Thomas*, 114 N. C. 197; *Wheat v. McBrayer*, 16 Ky. L. Rep. 195. The case of *Richards v. Osceola Bank*, 79 Iowa, 707, on which counsel for defendants lay so much stress, belongs to this class. So does *Philadelphia & E. R. Co. v. Little*, 41 N. J. Eq. 519. And yet the existence of this rule has never been regarded as involving as a necessary consequence the establishment of the broad rule of the civil law that in every case the surety can compel the creditor to first seek elsewhere for his pay. This is true of the rule laid down in section 5166. It is, in terms, restricted in its application to cases in which judgment is rendered against both principal and surety. It does not apply when the surety is sued alone. When both of the debtors are before the court no delay or injury can result to the creditor from being obliged to sell the property of the principal first. His right to a judgment against the surety is not thereby postponed. This is very different from delaying the creditor until he has obtained judgment against the principal, or has exhausted collaterals, when he has sued the surety alone, as he has a perfect right to do, unless the obligation is joint. While these two statutes, and also section 4805, are steps in the direction of the policy of the civil law,—steps which the courts had taken under the common law without statutory authority,—yet it is indefensible to declare that these provisions, limited in their scope, should be construed as being so sweeping in their effect as to revolutionize the common law on this subject. The doctrine announced in *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415, has been regarded as an unwarranted innovation upon the common law in most of the states, and their courts have refused to adopt it. See 1 Brandt, Suretyship, § 242. And even in the state in which it originated it has never been extended, but the whole drift of the adjudications there is to strictly limit its operation. *Trimble v. Thorne*, 16 Johns. 152, 8 Am. Dec. 302; *Newcomb v. Hale*, 90 N. Y. 827-829, 48 Am. Rep. 173; *Wells v. Mann*, 45 N. Y. 327, 6 Am. Rep. 98; *Converse v. Cook*, 25 Hun, 44; *Hunt v. Purdy*, 82 N. Y. 486, 37 27 L. R. A.

Am. Rep. 587; *Lawson v. Buckley*, 49 Hun, 829; *Goodwin v. Simonson*, 74 N. Y. 133; *Warner v. Beardsley*, 8 Wend. 194, 198, 199. Certainly it is not a legitimate inference to deduce from the statutory adoption by this state of this special doctrine a purpose to introduce the whole policy of the civil law with respect to the rights of sureties against the creditors into our system of jurisprudence. The implication is the other way, and this implication is very much strengthened by the fact that, while our code expressly confers upon the surety the right to compel by judicial proceedings the principal to pay the debt (a right recognized by the common law), it nowhere declares that the surety may by action compel the creditor to first sue the principal, or exhaust the collaterals he holds. See Comp. Laws, § 4806. The decision in *Davis v. Patrick*, 6 C. C. A. 682, 57 Fed. Rep. 909, is directly in point. There an action was brought upon a supersedeas bond, given on appeal from a judgment. The sureties contended that the creditor could not proceed against them until he had exhausted his remedy against real estate of the principal debt or nearly sufficient in value to pay his claim, which he had attached in the action in which the judgment appealed from had been rendered. The court decided against the sureties, and in refusing to sustain their contentions the court used the language which we have already quoted. Nor was the decision in that case placed upon the ground that in the federal courts no equitable defense to an action at law can be interposed. On this point the court said: "It is to be observed that the plea last mentioned merely asserts an alleged equitable right or defense, and it is doubtful, to say the least, whether such alleged equity could, in any event, be pleaded as a defense to a suit at law in the federal courts when the distinction between legal and equitable defenses is still fully preserved. But we do not care to dwell on the latter suggestion. It is obvious, we think, that the plea did not disclose a right on the part of the sureties to have the lien discharged, or the attached lands sold, before a suit was maintained on the supersedeas bond, which a court of equity would recognize and enforce even on a bill filed for that purpose." We have assumed throughout the course of this opinion that the surety may, under our system of procedure, secure by answer the relief which formerly he could obtain only by filing a bill. It has been urged by counsel for plaintiff that the sureties upon an undertaking on appeal are not within the scope of the equitable principles to which we have referred. We have been unable to assent to his view. It is true that their obligation is as unconditional as that of the principal. So is the obligation of the surety upon a promissory note signed by himself and the principal debtor. But he is none the less a surety, and entitled to all the rights of a surety. Unless made in terms conditional, the promise of a surety is always as absolute as that of the principal. 1 Brandt, Suretyship, § 1; *Harris v. Newell*, 42 Wis. 691; *Warner v. Beardsley*, 8 Wend. 199. The

equitable right of a surety to compel the creditor, under certain peculiar circumstances, to proceed first against the principal or collateral security, does not rest upon the terms or nature of the contract on which he is surety, but upon the broad equitable principle that, as between himself and the principal debtor, the latter ought to pay the debt. *Harris v. Newell*, 42 Wis. 692. When, coupled with this equity, special facts, which take the case out of the ordinary category, are found to exist, the right exists irrespective of the terms or nature of the contract, provided, of course, that the right is not waived by the language of the contract. The cases cited by counsel for plaintiff do not hold to the contrary. They merely hold that the surety upon such an undertaking is liable absolutely, and no execution against the principal upon the judgment appealed from is necessary before suing the surety. The decision in *Davis v. Patrick*, 6 C. C. A. 682, 57 Fed. Rep. 909, is directly against the contention of the plaintiff's counsel in this respect. See also, *Wood v. Flak*, 63 N. Y. 245, 20 Am. Rep. 528. The authorities cited by counsel for defendants are cases in which the court had both parties before it, or the property of both which had been pledged for the debt, or in which, by reason of the peculiar nature of the litigation, it was possible to protect the surety's equity without in the least degree interfering with the right of the creditor to enforce the contract without delay. *Paxton v. Rich*, 85 Va. 378, 1 L. R. A. 639; *Beckham v. Duncan*, 18 Va. L. J. 523; *Richards v. Osceola Bank*, 79 Iowa, 707; *Hoppes v. Hoppes*, 123 Ind. 397; *Weil v. Thomas*, 114 N. C. 197; *Wheat v. McBrayer*, 16 Ky. L. Rep. 195; *Neimcewicz v.*

Gahn, 3 Paige, 614, 3 L. ed. 295; *Blackman v. Joiner*, 81 Ala. 344; *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519. The whole trend of the common-law decisions is in the direction of regarding the right of the creditor to compel the surety to at once perform his contract as superior to the equity of the surety that, as between himself and the principal, the latter ought to pay the debt.

It is urged that the plaintiff should have issued execution on the judgment affirmed on the appeal before suing the sureties. The statute is a complete answer to this contention. It provides that a breach of the undertaking is established by neglect to pay the judgment affirmed within thirty days after such affirmance. Laws 1891, chap. 120, § 22. The complaint contains an averment that more than thirty days had elapsed since the affirmance of the judgment by the supreme court. This allegation is not denied. In the absence of such a provision, the sureties would be liable at once upon the affirmance of the judgment. No case can be found holding that the issue of an execution upon the judgment affirmed is a condition precedent to liability on the part of the surety, in the absence of a statute making such act a condition precedent. On the contrary, the decisions are all the other way. *Davis v. Patrick*, 6 C. C. A. 682, 57 Fed. Rep. 909; *Babbatt v. Fynn*, 101 U. S. 7-18, 25 L. ed. 820, 821; *Murdoch v. Brooks*, 38 Cal. 596-604; *Smith v. Ramsey*, 6 Serg. & R. 576; *Anderson v. Sloan*, 1 Colo. 484; *Wallenstein v. American Surety Co.* 40 N. Y. S. R. 508.

The rehearing is denied. The judgment is affirmed.

All concur.

ALABAMA SUPREME COURT.

BIRMINGHAM MINERAL R. CO., Appt.,
v.
A. F. PARSONS.

(..... Ala.)

1. A statute requiring railroads to build cattle-guards whenever demand for them is made by the owners of land through which the road runs is not unconstitutional on the ground that the landowner is made the sole judge or the necessity for them, since the statute might require the company to construct them in every case.
2. A statute cannot impose an absolute liability on railroad companies for damages caused by its trains in killing stock irrespective of the railroad company's negligence or fulfillment of the requirements of the statutes, but may impose a liability for negligence or failure to construct cattle-guards required by statute.
3. The stock gaps required by the statute, where a railroad company runs through the

premises of an individual, are not designed to be closed; and there can be no negligence charged because of leaving them open.

(July 22, 1906.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County, in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's crops because of defendant's neglect to maintain proper cattle-guards. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Hewitt, Walker & Porter* for appellant.

Messrs. W. R. Houghton, Francis D. Nabors, and Kennedy & Hickman, for appellee:

The police power of a state is a most important power, essential to its very existence and embraces the lives, health, and property of her citizens, and the legislature cannot by any contract divest itself of the power to provide for these objects.

NOTE.—As to constitutionality of statutes attempting to make railroad companies absolutely liable for all stock killed by trains, see note to *Matthews v. St. Louis & S. F. R. Co. (Mo.)* 26 L. R. A. 161. For imposition on railroad companies of cost of 27 L. R. A.

abolishing grade crossings, see note to *Kelly v. Minneapolis (Minn.)* 26 L. R. A. 92.

As to duty to keep cattle-guards clear of ice and snow, see *Graham v. Chicago, St. P. & K. C. R. Co. (Iowa)* 5 L. R. A. 812, and note.

American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Hackett v. State*, 105 Ind. 250, 55 Am. Rep. 201; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400; *Lake View v. Ross Hill Cemetery Asso.* 70 Ill. 191, 22 Am. Rep. 71.

In every well-ordered state, property is held subject to the tacit condition that it shall not be so used as to injure the equal right of others.

Dorman v. State, 84 Ala. 216.

The fact that a cattle-guard is constructed in the usual customary manner is no defense to the company if it does not meet the requirements of the statute.

U. S. Gen. Dig. vol. 4, p. 1597, §§ 90, 91; *Boran v. Taylor, B. & H. R. Co.* (Tex.) 1889.

A statute imposing liability for fires caused by operating railroads is constitutional.

Union Pac. R. Co. v. DeBusk, 3 L. R. A. 850, 12 Colo. 294.

There are provisions of the act clearly constitutional which can be separated from the rest and the court will uphold these.

Powell v. State, 69 Ala. 10; *Bogan v. State*, 84 Ala. 449; *Lovendes County v. Hunter*, 49 Ala. 507.

Every person while violating an express statute is a wrongdoer and as such is *ex necessitate* negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor.

Grey v. Mobile Trade Co. 55 Ala. 387, 28 Am. Rep. 729.

And where a duty is required and no remedy is provided for redress for a breach of that duty the remedy is by common-law procedure.

Autauga County v. Davis, 82 Ala. 708; *Lovendes County v. Hunter*, *supra*.

Generally when a statute is assailed on constitutional grounds the court will adopt, if possible, such construction as will bring it within range of the powers of the legislature.

Wilburn v. McCalley, 68 Ala. 486.

A law requiring railroads to fence and to pay value of cattle killed, has been enforced in several states.

Ohio & M. R. Co. v. Otutter, 82 Ill. 128; *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 388; *Cleveland, O. C. & I. R. Co. v. Newbrander*, 40 Ohio St. 15; *Heskett v. Wabash, St. L. & P. R. Co.* 61 Iowa, 467; *Texas & St. L. R. Co. v. Young*, 60 Tex. 201; *Chicago, M. & St. P. R. Co. v. Dumaer*, 109 Ill. 402; *McCall v. Chamberlain*, 13 Wis. 687; *Blair v. Milwaukee & P. du Ch. R. Co.* 20 Wis. 262; *Gorman v. Pacific R. Co.* 26 Mo. 441, 72 Am. Dec. 220; *Nall v. St. Louis, K. C. & N. R. Co.* 59 Mo. 112; *Trice v. Hannibal & St. J. R. Co.* 49 Mo. 488; *Speelman v. Missouri Pac. R. Co.* 71 Mo. 484; *Wilder v. Maine Cent. R. Co.* 65 Me. 382, 20 Am. Rep. 698.

Haralson, J., delivered the opinion of the court:

The demurrer to the complaint, which was overruled, presents a single question for our consideration,—that of the constitutionality of the Act of the legislature approved December 11, 1886 (Acts 1886-87, p. 163). It is entitled "An act requiring railroads to build, and keep cattle and stock guards in

order, upon their respective lines of roads." Its first section is: "That all railroads within the territorial limits of the state of Alabama shall be required to put in cattle or stock guards, upon their respective lines of roads, and keep the same in order, whenever the demand is made upon them, or their agents or employes, by the owners of the land through which said road passes, that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms." The second section provides that on and after the passage and approval of the act, as to all stock passing over or through cattle guards upon any line of railroads in this state, and committing depredations and damages to the owners of the land, the company shall be liable for the full amount of damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages, which damages can be recovered by suit in the justice or circuit courts of Alabama, where such damages were committed; provided, that the railroad company can only be required to construct cattle-guards whenever said company's road enters the field or upon the premises of any person, or where the premises, or any portion of the same, are exposed by reason of said road entering upon them, or running through them.

1. It is well understood that railroad companies are not bound, by any principle of the common law, to fence their roads, make cattle-guards, or erect any other barrier or stay against the intrusion of stock upon their roads or right of way, and are not liable for injuries happening merely for want of such erections. 7 Am. & Eng. Encyclop. Law, pp. 906, 912; 1 Rorer, Railroads, 614; *Memphis & C. R. Co. v. Lyon*, 62 Ala. 74. Whenever a company is under obligation to fence its right of way, or erect cattle-guards, it is by virtue of a contract or statute. On the other hand, it is equally well settled that acts of incorporation of railroad companies are subordinate to the general police regulation of the state, and that the requirement to fence their rights of way, and erect and maintain cattle-guards, falls legitimately within legislative authority. As is well said in *American U. Teleg. Co. v. Western U. Teleg. Co.*, 67 Ala. 32, 42 Am. Rep. 90: "The police power of a state is a most important power, essential to its very existence, and has been declared by the supreme judicial interpreter of the Federal Constitution to embrace 'the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of good morals;' and the legislature cannot, by any contract, divest itself of the power to provide for these objects." *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Louisville & N. R. Co. v. Baldwin* 85 Ala. 619; 7 Am. & Eng. Encyclop. Law, 907.

The unconstitutionality of the act we consider is insisted on, "first, because it requires the railroad to erect cattle-guards whenever demand is made upon it, by the owners, that the cattle or stock guard is necessary to pre-

vent the depredation of stock upon their farms, thus making the landowner the sole judge of the necessity, and from whose decision the railroad has no appeal." This objection relates especially to the first section of the act. The criticism cannot be sanctioned. This is a mere option which the statute gives the owner of the land. The guard—if, and when, constructed—is for his benefit alone. The public has no interest in it, further than the general interest every good citizen feels that every other person shall be protected in his rights of property; and of what detriment can it be to the railroad that the owner is permitted to exempt it from a duty which, without his exemption, would be absolute, whether the owner needed or desired the cattle-guard or not? If the statute had simply required the companies to erect and maintain these guards, in all instances, whenever they entered the field or premises of a party, there could, under the authorities, be no objection raised to the validity of the law. Why, then, should the statute, if, in its enactment, it would lighten the burden, if any, of the corporations, without injury to the persons whom it was designed to benefit, by bestowing this option on them, incur judicial displeasure? The point of this suggestion becomes more pertinent when it is remembered that when the duty to fence or build cattle-guards is made absolute, without reference to an option on the part of the owner of the land, the owner may release the obligation, as seems to be well settled. 7 Am. & Eng. Encyclop. Law, p. 907; 1 Thomp. Neg. p. 526, § 26. The case of *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 11 L. R. A. 265, is opposed to this view, and holds that this power of police regulation cannot be delegated to the citizen. No authority upon which the decision is based is given. The constitution of this state certainly contains nothing against the bestowment of such an option on the landowner, in connection with the exercise of this police jurisdiction and authority, and we are at a loss to see on what principle it can be denied. The states delegate this power, without question, in their creations of municipal governments, railroad commissions, medical and examining boards, quarantine commissions, the bestowment of the authority for the creation by the people of counties and parts of counties, of agricultural districts in which fences may be dispensed with, and stock not allowed to run at large, and in other instances, perhaps, which might be named; and it can be readily seen that this police authority may be more safely and beneficially exercised, often, in leaving its exercise to the option of others, within prescribed and proper limitations, than without.

2. There can hardly be any question but that this second section imposes an absolute liability on railroad companies "for the full amount of the damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages," whether they have failed, or not, according to the requirements of the law, "to put in cattle or stock guards upon their respective

lines of roads and keep the same in order." Indeed, this liability is clearly stated in the words of the section itself. There are many conflicting authorities on this question, which we will not review, or attempt to reconcile. In 7 Am. & Eng. Encyclop. Law, p. 907, it is stated that "statutes have been passed in England, and many of the states, requiring railway companies to fence their tracks [which includes cattle-guards, Id. 913], and holding them liable for all injuries occasioned by a failure to do so, irrespective of whether or not they have been guilty of negligence "in operating their trains; and many authorities bearing more or less intimately on the question are cited as supporting the text. Id. 927. Counsel for appellant, in their elaborate argument on the question (reviewing many of the authorities), conclude: "We concede that if the Act of 1886 had imposed absolute liability in cases where the railroad fails to erect gaps at all, in compliance with the statute, this would have been a valid police regulation, because a penalty imposed for a violation of the act. But the Act of 1886 goes further, and imposes such absolute liability on the railroad, though it may have fully complied with the act, in erecting and keeping in order its gaps, provided stock get over them, and commit depredations. It is therefore manifestly unconstitutional, because it attempts to impose absolute liability, when the requirements of the act may have been fully complied with, and no negligence exists. This is not a valid police regulation." This question is not a new one in this court. In *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an act which provided: "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this state, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotive or railroad cars." It was there said of that statute, that it dispenses with all proof of the wrong it seeks to redress. "It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employes,—an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. . . . We can perceive of no reason, in law or morals, for holding them [railroad companies] to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident, or accidents which no human prudence can foresee or avert." This case, in these utterances, has been many times approved by us, and other courts. *Wilburn v. McCulley*, 68 Ala. 443; *Mead v. Larkin*, 66 Ala. 88; *Davis v. State*, 68 Ala. 68, 44 Am. Rep. 128; *Green v. State*, 73 Ala. 32; *Nashville, C. & St. L. R. Co. v. Hembrée*, 85 Ala. 485. Under the influence of these decisions, we are con-

strained to hold that the second section of said Act, in that it imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right. The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies "to put in cattle or stock guards upon their respective lines of roads and keep the same in order," and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the state. It may be maintained as such, separate from the second section. 3 Brick. Dig. p. 128, § 28; *Ex parte Covert*, 92 Ala. 97. And "every person, while violating an express statute, is a wrongdoer, and as such is, *ex necessitate*, negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor;" and when a duty is required, and no remedy provided for its breach, the remedy is by common-law procedure. *Grey v. Mobile Trade Co.* 55 Ala. 403, 28 Am. Rep. 729; *Loundes*

County v. Hunter, 49 Ala. 507; *Autauga County v. Davis*, 32 Ala. 703.

8. The demurrers to the first and third counts in the complaint were properly overruled. The second count bases a recovery on the allegation that the defendant "so negligently and carelessly left open their stock gaps on that part of its said road which runs through the said land of the plaintiff that," etc., specifying the damages suffered. We are not certain of what is meant by leaving stock gaps open, and what negligence is attributed to defendant in so doing. Consulting our knowledge of such barriers against stock, we would suppose they were never designed to be closed, but always open. The duty prescribed by the statute is to put in cattle-guards, and keep them in order, and not to keep them closed. It would seem, therefore, that defendant violated no duty to plaintiff in keeping the gaps open, and the demurrer to the second count, for this reason, should have been sustained.

For this error the judgment of the court below is reversed, and the cause remanded.

Rehearing denied.

MICHIGAN SUPREME COURT.

Joseph BEESLEY

v.

F. W. WHEELER & CO., *Pliffs. in Err.*

(.....Mich.....)

1. The duty of a master to provide a safe place for workmen does not make a shipbuilder liable for negligence of carpenters in preparing a scaffold for other workmen engaged in constructing a ship.
2. A riveter and carpenters under the same superintendent engaged in ship building are fellow servants, so as to preclude recovery by the riveter for injuries caused by negligence of the carpenters in constructing a scaffold on which he works.

(December 22, 1894.)

ERROR to the Circuit Court for Bay County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries caused by the fall of a scaffold on which plaintiff was working and for the maintenance of which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. McDonnell & Hall, with *Messrs. Moore & Moore*, for plaintiffs in error:

The scaffold was a temporary structure made necessary by and used only in this particular piece of work.

NOTE.—In connection with the extensive review of the authorities found in the above case on the subject of scaffolds as places for work within the duty of the master to furnish a reasonably safe place, see the case of *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 843, holding that a mine is not such a place.

27 L. R. A.

The carpenters, fitters, bolters, chippers, and drillers, riveters and searchers who successively used it were fellow servants engaged in a common enterprise, to wit, that of building a ship, and if the carpenters were negligent in selecting the material it was the negligence of a fellow servant, and the plaintiff could not recover.

Hoar v. Merritt, 62 Mich. 386; *Quincy Min. Co. v. Kitts*, 42 Mich. 40; *Devey v. Parke*, 76 Mich. 631; *Baron v. Detroit & C. Steam Nav. Co.* 91 Mich. 585; *Rawley v. Colliau*, 90 Mich. 81; *Kehos v. Allen*, 92 Mich. 464; *Pickett v. Atlas S. S. Co.* 12 Daly, 441; *Butler v. Townsend*, 126 N. Y. 105; *Killea v. Paxon*, 125 Mass. 485; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *National Tube Works Co. v. Bedell*, 96 Pa. 175; *Hogan v. Central Pac. R. Co.* 49 Cal. 128; *Keith v. Walker Iron & Coal Co.* 81 Ga. 49; *Somer v. Harrison* (Pa.) April 4, 1887; *Hefferen v. Northern Pac. R. Co.* 45 Minn. 471; *Ross v. Walker*, 189 Pa. 42.

Messrs. Shepard & Lyon, for defendant in error:

The scaffold built by defendant for its employes to go upon to perform their work was an appliance and structure of such a character as to bring the defendant within the rule requiring it to use reasonable care in providing a place reasonably safe upon which its employes were to perform their work.

Brown v. Gilchrist, 80 Mich. 56; *Arkerson v. Dennison*, 117 Mass. 407; *Haworth v. Seavers Mfg. Co.* 87 Iowa, 765.

It was the duty of the master to exercise reasonable care in the erection of the scaffold, and if it or its agents to whom it entrusted this duty were guilty of negligence in the performance of the work, and the plaintiff was

injured by reason of such negligence, the defendant is liable for the damage sustained.

Johnson v. Spear, 76 Mich. 139; *Van Dusen v. Letellier*, 78 Mich. 492; *Brown v. Gilchrist*, 80 Mich. 56; *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 428; *Eddy v. Aurora Iron Min. Co.* 81 Mich. 548; *Sadowski v. Michigan Car Co.* 84 Mich. 100; *Tangney v. J. B. Wilson & Co.* 87 Mich. 458; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 571; *Kelly v. Erie Teleg. & Teleph. Co.* 54 Minn. 321; *Haworth v. Secovers Mfg. Co.* *supra*; *Arkerson v. Donnison*, 117 Mass. 407; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Manning v. Hogan*, 78 N. Y. 615; *Benzing v. Steinway & Sons*, 101 N. Y. 547; *Krans v. Long Island R. Co.* 123 N. Y. 1; *Bowen v. Chicago, B. & K. C. R. Co.* 95 Mo. 277; *Sims v. American Steel Barge Co.* (Minn.) Jan. 2, 1894.

Hooker, J., delivered the opinion of the court:

The defendant is engaged in building steel vessels, in the construction of which scaffolds are necessary at various stages of the work. It employs about 300 men, of various trades, including fitters, bolters, chippers, drillers, riveters, searchers, and carpenters. These men are continuously employed, and all are subject to the control of the superintendent. The labor is divided among the artisans, and to the carpenters is apportioned the building of scaffolds, though they are sometimes assisted by others. The plaintiff, a searcher, *i. e.*, one who goes over the work, and supplies omitted rivets, after the riveters of the plates of the vessels are through, was injured by the breaking of a weak putlog, selected and used by the carpenters who built the scaffold; and his right to recover hinges upon the question of whether or not he and the carpenter were fellow servants in such a sense as to prevent the application of the rule that it was the duty of the master to provide a reasonably safe place for the plaintiff to work. The doctrine which relieves the master from liability for injuries caused by the negligence of fellow servants is of wide application. It originated in cases where servants were engaged in a common enterprise, wherein, by reason of the negligence of one, another was hurt. It modified the doctrine that the principal is liable for the negligent acts of his agent, upon the theory that the servant assumed the ordinary dangers incident to the employment, and that "an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself will not be implied." Chief Justice Shaw, in the case of *Farwell v. Boston & W. R. Corp.*, 4 Met. 49, 38 Am. Dec. 389, after discussing the liability of common carriers to their patrons, says: "They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it." He continues: "We are of the opinion that these considerations apply strongly to the case in question. Where several parties are

employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer." This rule is of such general application that the citation of authorities to support it is unnecessary. Much difficulty has been found in discovering a true test of its application, and the decisions are consequently somewhat inharmonious. The rule that the master is bound to provide his servant with reasonably safe machinery, and a proper and reasonably safe place to work, has sometimes been invoked or overlooked when perhaps it should not have been, and the two rules, running parallel in close proximity, have led to improper applications of both. There are some courts which have held that, in order to constitute servants of the same master fellow servants, it is not enough that they were engaged in doing parts of some work not requiring co-operation, nor bringing the servants together or into such personal relations that they could have exercised an influence, one upon the other, promotive of proper precaution, in respect to their mutual safety. This doctrine finds its favorite fields where large enterprises result in systematic division of labor. Several of the states recognize it, and adjudicated cases from Illinois, Tennessee, Virginia, Kentucky, and Georgia should perhaps be read in the light of this limitation of the general rule. But it is not the prevailing doctrine, as will be seen from an investigation of cases from most of the states, including our own; and it can be maintained only by overthrowing the rule that the implied contract of the master ends with indemnity against his own negligence, and does not extend to that of coemployees engaged in the same enterprise. For a discussion of the subject, see *Farwell v. Boston & W. R. Corp.* *supra*; *Brodeur v. Valley Falls Co.* 16 R. I. 445. See also *Hoar v. Merritt*, 62 Mich. 386; *Quincy Min. Co. v. Kitts*, 42 Mich. 84; *Dewey v. Parks*, 76 Mich. 631; *Baron v. Detroit & C. Steam Nav. Co.* 91 Mich. 585.

Another attack upon the rule is made by the superior servant, as contradistinguished from the *alter ego*, or vice-principal, limitation. As might be expected from their adherence to the "division of labor doctrine," hereinbefore mentioned, the courts of Illinois, Tennessee, Virginia, Kentucky, and Georgia have adopted the "superior servant" rule. Similar cases can also be found in Ohio, North Carolina, West Virginia, Kan-

sas, Nebraska, Missouri, and the federal courts. On the contrary, New York, Maine, Pennsylvania, Massachusetts, Maryland, Indiana, Michigan, Minnesota, California, and Texas have repudiated the doctrine. The English courts also refuse to adopt it. These decisions hold that this doctrine ignores the true criterion of fellow service. The cases upholding the limitations of the rule in these particulars are frequently cited in accident cases, and in hard or doubtful ones may sometimes lead to departures from the true rule. Greater or less obscurity inevitably follows, and no end of trouble from the consequences, where they are irreconcilable with the other rule.

It must not be assumed that there is no limitation to the doctrine of immunity on the part of the master. The law clearly imposes duties upon the master, from the discharge of which he cannot shelter himself by the interposition of an agent or servant, or the "fellow servant" rule. He may assume liability for accidents suffered by his servant in the course of his employment, either expressly or by implication, where it is plain that it was the intention of other parties that he should, or where he is personally present, directing the negligent act. Again, where the rule that he must provide a reasonably safe place and machinery applies, the responsibility is his. In all of these cases he is held liable, because the negligence is his. As said by a text-writer: "The true test, it is believed, whether an employé occupies the position of a fellow servant to another employé, or is a representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant, by which another employé is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." McKinney, *Fellow Servants*, § 23; *Fluke v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516, 87 Am. Rep. 521; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Anderson v. Bennett*, 16 Or. 515. It would seem that this must be the governing principle, unless the limitations hereinbefore discussed are adopted, which, as stated, is not the case in this state. This discussion of the "superior servant" question must not be considered as necessarily involving that of "alter ego." If the liability of the master is in all cases to depend upon the rule above mentioned, it matters little whether the offender is called "alter ego" or "servant." It is only when the act is one which does not fall within a duty that the law imposes upon the master, or which he has taken upon himself, that it becomes important. In such cases the term is found an appropriate one, when it is sought to invoke the doctrine of *respondet superior*. How far the courts have gone in holding that a master is liable for such acts, committed by a person in full charge of his business, we find it unnecessary to investigate in this case, and express no opinion upon the question. Having, then, determined the rule, it must

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be the guide in all cases, and if, in some instances, doubts shall have arisen, which in the minds of some have led to greater or less departures from it, the rule, and not such cases, must be the magnetic pole towards which future adjudication must point, and discrepancies, if any exist, must be ascribed to differences of opinion in regard to the application of the rule, which all recognize.

As to the matter of application, each case necessarily rests upon its own facts. Scaffold cases have not been numerous, and the application of the rule has not been uniform. Indeed, we could hardly expect it, in view of the limitations mentioned by the courts of some states. We may properly eliminate all scaffold cases arising in the states mentioned as adhering to the "division of labor" rule. The case of *Scott v. Craig*, 34 Jur. 401, went off on the proposition that, as the master personally superintended the work, the negligence was his own. In New York, the cases of *Manning v. Hogan*, 78 N. Y. 615, and *Green v. Banta*, 16 Jones & S. 156, may seem to support plaintiff's contention. In the former, decided in 1879, the plaintiff's intestate was killed by the falling of a scaffold erected for the purpose of doing the plaster work on a public building in Central Park. One Mahoney was the contractor with the city, and, before the work was begun, he executed an assignment to the defendant, Hogan, of all moneys due or to grow due by virtue of the contract, and he was obliged to carry out the contract to protect himself. The deceased was at work on the scaffold at the time of the accident. It was proved that he had applied for work, and his name was on the pay roll for that half day. There was also evidence that it was a particular branch of mechanical construction to put up such scaffolds; that the persons employed to build were not of that occupation; and that it was built of insufficient material, both in quality and quantity. Held, "that the question of negligence in building the scaffold was for the jury; that it was not sufficient that there was enough of suitable material provided to build the scaffold; it needed that there should be skill and judgment in the use thereof." This was a memorandum case, which was not reported in full, and we have not the benefit of the discussion of these questions by the court, if there was any; but enough appears to indicate that no violence is done to the general rule. The case appears to have turned upon the failure of the master to employ competent fellow servants, which is one of his duties, to the extent of using reasonable care in the selection. See a criticism of this case in *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 361. Again, it is possible that the scaffold was erected by Mahoney, under his contract, before Hogan took charge of the work, in which case the scaffold builders and the deceased, who was shown to have worked but one half day, were not servants of the same master, and therefore were not fellow servants, within the rule. The case of *Green v. Banta*, *supra*, is from an inferior court, and cannot be said to settle the rule for New York. The plaintiff was

a hod carrier, engaged with others in dumping brick upon a scaffold. Defendant, Banta, was a contractor, and the case says that it was his duty to furnish a properly built scaffold. In the performance of this duty he employed a foreman. The court said: "Thereupon any negligence of the foreman was the negligence of the defendant, and not the negligence of a fellow workman; and the same proposition would be true of any workman, not called a foreman, who was directed by the master to build the scaffold." The court adds: "If, after the scaffold be built, the foreman use the scaffold with the workman afterwards injured, and the injury ensues from the negligence of the foreman, they hold the relation of fellow workmen, so called, and the master is not responsible." The decision is based upon *Crispin v. Babbitt*, *supra*, which holds that the liability of the master does not depend on the grade or rank of the negligent employé, but upon the character of the act; and that, if the act is one pertaining to the duty which the master owes to his servants, he is responsible, but, if the act is one pertaining only to the duty of an operative, such operative, whatever his rank or title, is a fellow servant, and the master is not liable. For the latter part of the proposition of the court, the case of *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627, is cited. Whatever we may think of its application, this case of *Green v. Banta* recognizes the rule, and at most bears upon the question whether an employer owed a duty, under the facts in that case, to furnish a safe scaffold. It asserts such duty, but it leaves us to conjecture whether such duty arose by express contract, by necessary implication from the peculiar facts, or upon the broad ground that a scaffold builder and a plasterer are under no circumstances fellow servants. The case of *Hogan v. Field*, 44 Hun, 72, was where a bridge riveter was injured by the fall of a scaffold. It was not the business of Hogan to build the staging, but, under the direction of the person in charge of the work, he, with others, undertook it. It was held that the negligence of such person was that of fellow servants, and he was not permitted to recover. These cases do not, therefore, weaken, but strengthen the rule mentioned as the criterion, and it does not clearly appear that such rule has been misapplied.

We will next consider the rule in Massachusetts, selecting only scaffold cases. In *Mulchev v. Methodist Religious Soc.*, 125 Mass. 487, a verdict for the plaintiff was sustained because the society expressly contracted to build and remove stagings for decorators. In *Arkerson v. Dennison*, 117 Mass. 407, the plaintiff, who was at work repairing a building, went upon a staging by defendant's direction. The staging was insecure by reason of its construction of unsuitable materials, or by neglect to securely fasten it. The staging was built before plaintiff's employment, by men who were afterwards his fellow workmen, and the defendant directed what lumber should be used. The staging was not built under the direct personal supervision of defendant, but there was evidence that he superintended the work generally. It was

held a proper question for the jury, and apparently turned upon the proposition that, "when the preparation of the appliances is neither intrusted to nor assumed by the employés, the master may be guilty of negligence if defective appliances are furnished, even though the workmen themselves are employed in the preparation of them; and that in that case, negligence appearing, it was a question for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen, or was the negligence of the master." There may be differences of opinion as to whether this case overstepped the rule or not, but that it was not so intended is inferable from the cases of *Zeigler v. Day*, 123 Mass. 152; *Colton v. Richards*, Id. 484; and *Killea v. Paxon*, 125 Mass. 485, two of which were scaffold cases. The latter case states the difficulty in these cases as follows: "On the one hand is the familiar rule that one who enters the service of another takes upon himself the risks incident to the employment, including the risk of the negligence of fellow servants employed in the same service. On the other hand is the equally well-settled rule that, if the master undertakes to furnish structures or instruments with which the servants have to work, the master is bound to use due care in providing them, and he is responsible if, through his negligence, or that of other servants employed to furnish them, they are unsuitable." The court adds: "We are of the opinion that this case falls within the first rule. There was no evidence which would justify the jury in finding that either of the defendants undertook to furnish a staging for the plaintiff, or to assume the risk of its safety. It was like the ordinary case where a man, in building or repairing a house, employs various servants in different departments of labor. Neither of the defendants retained any charge or direction of the work of putting up the staging, but intrusted it to Higgins. He and the plaintiff were fellow servants, employed in the same service, and each took the risk of the negligence of the other." It should be remarked that Higgins was a carpenter employed by the defendant to superintend the whole job. Plaintiff was a coppersmith hired by defendant to put up gutters upon the roof.

In Minnesota is a late case, viz., *Sims v. American Steel Barge Co.*, 57 N. W. Rep. 322, which is supposed to be nearly upon all fours with the present case; but it differs in this particular: that the building of scaffolds was intrusted to one Guiane and his crew, employed to build stagings, and to do nothing else. This may or may not have been considered an important reason for reaching the result in that case. To us it does not seem to be so unless by way of an implication of an undertaking to furnish stagings for employés, and at best we think it is bordering upon the division of labor rule, which we understand that Minnesota does not in terms indorse. For other cases sustaining the claim that the master is not liable in staging cases, see *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338; *Benn v. Null*, 65 Iowa, 407.

It remains to look at the case from the standpoint of Michigan authorities. The doctrine

of "fellow servant" has been so frequently discussed that it will not be necessary to elaborate some branches of the question. The cases show that the rule of *Priestly v. Fowler*, 3 Mees. & W. 1, exists, and that there has been no express recognition of the limitations as to "division of labor," or "superior servant." Michigan, as already stated, adheres to the rule that the master's liability depends upon the nature of the duty and the character of the contract; and, if this court has ever departed from the rule, it is only in its application, and about that minds may differ. The attack upon the general rule has usually been made, in this state, in the guise of a claim that the master was required to furnish a safe place or safe machinery. In *Van Dusen v. Letellier*, 78 Mich. 494, an employé was injured by the collapse of a dock, the supports to which became rotten, and gave way. Plaintiff was a laborer piling lumber. The owner lived in another county, and had a superintendent, who looked after the business in a general way, and who hired competent men to inspect the dock before the lumber was piled. The court held that "the duty of inspection, when required by the circumstances of the case, cannot be delegated by the master in such a manner as to avoid responsibility." The doctrine that it was the duty of the master to provide a safe place was applied, and upon this it was decided. In *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 380, 23 L. R. A. 292, reversing on rehearing 97 Mich. 343, 16 L. R. A. 342, the question of a safe place was again discussed, and the court refused to apply it to a case where an inspector permitted a car improperly loaded with lumber to be made a part of a train, whereby plaintiff was injured; holding that the inspector and plaintiff were servants of the same master, engaged in the same service, viz., running its train. The case contains a valuable discussion of these principles. In the cases of *Miller v. Chicago & G. T. R. Co.* 90 Mich. 230, and *La Pierre v. Chicago & G. T. R. Co.* 99 Mich. 212, unsuccessful attempts were made to assert the doctrine of a "safe place" where the fault was clearly that of a fellow servant. In none of these Michigan cases cited was a scaffold involved. In *Hoar v. Merritt*, 62 Mich. 386, the injury was occasioned by the fall of a scaffold. A dwelling was erected by the defendant, who hired a superintendent by the month, who had general charge under defendant's direction, hiring all the men but the painters, who were hired by the defendant personally. The scaffold was erected, by direction of the superintendent, for the building of the cornice. After this was done the painters used the scaffold, and plaintiff was hurt. Defendant furnished suitable material and competent workmen to build the scaffold, and the court held that they were fellow servants, and that the risk was incident to plaintiff's employment, which he assumed when he entered the master's service. The cases of *Brown v. Gilchrist*, 80 Mich. 56; *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, and *Hunn v. Michigan Cent. R. Co.* 78 Mich. 513, 7 L. R. A. 500, are cases where the negligence was that of a superior, for which, under the

facts in those cases, the master was held liable. Some may think them an innovation upon the doctrine that the grade of the servant is immaterial; but before reaching such conclusion we should examine the nature of the duty, in the performance of which the injury occurred. At all events, they seem to have raised different questions from that involved in this case.

Here the defendants were engaged in the enterprise of building a ship. Artisans of various kinds were employed to do their respective shares of the work. The building of stagings, the erection of derricks, and raising materials were parts of the necessary work, incident to and simultaneous with, and in fact a part of, the building of the ship. Stagings were for temporary use, and indispensable. All were under the charge of one superintendent, who directed the different gangs through their respective foremen. There is nothing to indicate a contract to provide a safe scaffold to work upon, or an assumption of that duty by the master, and the case seems to be clearly within the rule of *Killea v. Paxon*, which it closely resembles, and of *Hoar v. Merritt*. The duty was one which was left to those engaged in the construction of the ship. It is believed that this does no violence to the rule of safe place. The case is different from those where the master furnishes a permanent place to work, as in a ship or factory. A master's duty in such a case is to make and keep the place reasonably safe; but that rule would apply as to those working on, but not necessarily as to those constructing, the factory. The latter would not be fellow servants with each other, for the enterprises would not be the same. The service of one would be the erection of the completed factory; that of the other its use for the purpose for which it was designed. But here the scaffold builder and the riveter are engaged in the common service of building a ship. The work of both goes along together, and it seems to us that the case is clearly within the rule of *Priestly v. Fowler* and kindred cases. The court should have directed a verdict for the defendant.

Judgment reversed, and no new trial ordered.

Long and Grant, JJ., concurred with **Hooker, J.**

Montgomery, J., concurring:

The rule that it is the duty of the master to furnish a safe place for the servant to work is so universal and so thoroughly settled that no citation of authorities is necessary to sustain it. It is also settled in this state that this duty is one which cannot be delegated by the master so that the employé engaged to do the work of making the premises safe is to be treated as a fellow servant of those who are employed and engaged in the general work for which the premises are intended. *Van Dusen v. Letellier*, 78 Mich. 492; *Brown v. Gilchrist*, 80 Mich. 56; *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 607; *Morton v. Detroit, B. O. & A. R. Co.* 81 Mich. 428. On the other hand, I think it is equally clear that where the danger or injury results

from the operation, and the negligence is that of one who is engaged in the common employment, it cannot in any proper sense be said to be attributable to a fault in providing a safe place to work, or safe machinery or appliances. See *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 845, 16 L. R. A. 842, reversed on rehearing in '97 Mich. 829, 23 L. R. A. 292.

The question remains whether the construction of the scaffold, the defect in which caused the injury in this case, was a part of the work in which the plaintiff was, in common with others, engaged, or was in the line of the performance of the duty of the master to supply a safe place to work. I think this question is ruled by *Hoar v. Merritt*, 62 Mich. 886. In *Butler v. Townsend*, 126 N. Y. 110, Finch, J., in treating of this question in a case analogous to the present one, said: "It was a mistake to assume, as the duty violated, that of providing a safe place for the work of the servants. The staging was not, in the sense of the rule, the place in which the work was to be done, but

an appliance or instrumentality by means of, or through the aid of which, the calkers were to do their work. The distinction is sometimes very important for a place, in its broad sense, is never safe in which an accident happens, and accident always happens in some place, and so the master might almost become an insurer. Properly enough, an existing mine, or a railroad crossing, a cattle-guard, or the rooms in a factory, have been deemed places for work which the master was bound to make safe by the exercise of reasonable care; but a platform upon which the servant was directed to stand we have treated, not as a place, but as an instrument or appliance of his work. See also, as supporting the doctrine of *Hoar v. Merritt*, 62 Mich. 886; *Killea v. Faxon*, 125 Mass. 485, and *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 388. I concur in the conclusion reached by Mr. Justice Hooker.

McGrath, Ch. J., concurred with **Montgomery, J.**

MASSACHUSETTS SUPREME JUDICIAL COURT.

NEW ENGLAND TRUST CO.

v.

Samuel A. B. ABBOTT, Ex'r, etc., of Josiah Abbott, Deceased.

(162 Mass. 143.)

1. Even if a by-law of a corporation giving the board of directors the option to take the shares of any stockholder

who desires to sell them at a value appraised by themselves may be invalid, the subscriber is bound by his agreement which adopts the by-law.

2. An agreement between a subscriber and a corporation to the effect that the board of directors shall appraise the value of his shares and have the option to take them at that value in case of any transfer thereof is not against public policy.

3. An offer of stock for appraisal is not

NOTE.—Restrictions by by-law or articles of association on the right to sell shares of stock.

I. By by-law.

a. In general.

b. Of national banks.

II. By articles of association.

III. Exercise of power to approve or disapprove.

- I. By by-law.

a. In general.

That stockholders indisputably have the right to sell their shares at pleasure is declared by the court in *Trisconi v. Winship* (1891) 43 La. Ann. 45. This was said in finding the remedy of a stockholder against directors who under authority of a majority of the stockholders suspended the business of the association, and also against representatives of a trust who had bought the majority of the stock.

"We think it cannot be maintained that the right to the shares in the capital stock of this corporation cannot be transferred without a literal compliance with the by-laws,"—said the court in *Sargent v. Franklin Ins. Co.* (1829) 8 Pick. 90, 19 Am. Dec. 306, where a by-law required shares to be transferred at the office of the company, personally or by attorney and with the assent of the president, and his assent was not procured because of his absence from his office.

The validity of a by-law restricting a sale of stock is a question suggested but not decided in *Re David Jones Co.* (1893) 67 Hun. 360.

Without passing upon or raising any question as to the validity of a by-law prohibiting any private

sale of stock until it has been first offered in writing to the then existing stockholders who shall have the right of pre-emption at the selling price, the court in *American Nat. Bank v. Oriental Mills* (1891) 17 R. I. 551, held that even if the by-law was not complied with no one but the stockholders could take the objection, and they had power to waive it.

Without passing on the effect of a by-law requiring approval of a board of directors to a transfer of shares, a transferee was denied a mandamus to compel the transfer in *Queen v. Liverpool, M. & N. R. Co.* (1852) 21 L. J. Q. B. 284, on the ground that he did not take the transfer with the bona fide intention of becoming a shareholder.

That the power of regulating transfers of stock does not include authority to control its transferability by prescribing to whom the owner may sell and to whom not, or upon what terms, and that the mere power to regulate transfers does not authorize a refusal to allow a transfer of stock to an insolvent is decided in *Chouteau Spring Co. v. Harris* (1855) 20 Mo. 383.

A by-law prohibiting the alienation of shares of stock or imposing any restrictions on its exercise is declared to be in restraint of trade and against public policy and void, in *Moore v. Bank of Commerce* (1878) 52 Mo. 377, where the company was held estopped by a statement of an officer from claiming a forfeiture of stock for debts due.

In Wisconsin also it was held that a by-law prohibiting a transfer of stock without consent of all stockholders is against public policy and void. *Re Klaus* (1886) 67 Wis. 401.

necessary to permit the exercise of an option of the corporation to take the stock under an agreement making it the duty of an executor or other transferee to offer the shares for appraisal and to be taken at the election of the corporation.

4. **Specific performance** of an agreement to permit a corporation to take the stock of a deceased subscriber at the value appraised by the directors, if they so elect, will not be denied on the ground that the corporation has a remedy at law,—especially where its shares are all subject to its option to purchase and are not bought and sold in the market like most stocks, and it might be difficult to lay down a clear rule of damages.

(October 12, 1901.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to compel defendant to transfer to plaintiff certain shares of stock in the plaintiff company which had come to defendant's hands as executor and to enjoin defendant from prosecuting an action at law to recover dividends upon the stocks. *Judgment for complainant.*

The facts sufficiently appear in the opinion.

The court in the above case also considered that provisions of the statutes for inspection of books to see who were stockholders and similar provisions implied the right to sell stock.

A by-law prohibiting a transfer to one not already a stockholder without first offering the stock to the board of directors, followed by the refusal of each member to buy at the price offered by a third person, is void. *Brinkerhoff-Farriss Trust & Sav. Co. v. Home Lumber Co.* (1893) 118 Mo. 447.

Such a by-law is not binding even upon one who is the president and a director of the company.

Restrictions on the right to make a bona fide sale and transfer of corporation stock must be found in express legislative enactments or authorized by-laws. *Johnson v. Lafin* (1878) 5 Dill. 65, affirmed (1880) 103 U. S. 800, 23 L. ed. 532.

So far as the by-law prohibiting transfer of stock without assent of its directors implies an express agreement between the corporation and stockholders it is void as against public policy. *Feckheimer v. National Exch. Bank of Norfolk* (1884) 79 Va. 80.

A by-law prohibiting a transfer of stock on the books of the corporation until 80 per cent had been paid thereon was involved in the case of *Orr v. Bigelow* (1856) 14 N. Y. 556, although its validity was not questioned. It was held not to interfere with a sale of shares before 30 per cent had been paid upon them, but that the assignee was required to complete the payment of 80 per cent in order to obtain the transfer.

The validity of a contract for future sale of stock is not affected, although the fulfillment of the contract may be, by a by-law prohibiting the sale of such stock without first offering it to the corporation at par. *Price v. Minot* (1871) 107 Mass. 42.

A general power to pass by-laws does not embrace that of creating liens, and through the liens a forfeiture. *Rosenhack v. Salt Springs Nat. Bank* (1868) 53 Barb. 495.

A by-law prohibiting a transfer of stock while a stockholder is indebted to the company is not authorized by New York Laws 1888, chapter 230, section 19, declaring that shares shall be transferable on the books of the association, in such manner as may be agreed upon in the articles of association although the statutes also give power to make

Messrs. W. G. Russell and J. L. Stackpole, for complainant:

Effect will be given to a by-law as a contract where the party sought to be bound has so agreed, or has taken rights subject to it.

Amesbury v. Bouditch Mut. F. Ins. Co. 3 Gray, 596; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Davis v. Second Universalist Meeting House Proprs. in Lowell*, 8 Met. 321.

A contract to take stock, even if made before organization, would become binding after such organization.

Lechmere Bank v. Boynton, 11 Cush. 369; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Phillips Liverick Academy Trustees v. Davis*, 11 Mass. 113; *Perkins v. Union Button-Hole & Embroidery Mach. Co.* 12 Allen, 278; *Mirick v. French*, 2 Gray, 420; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82.

The agreement for the valuation of the shares is not invalidated by the interest of the directors who are appointed to value it.

Interest even in a juror or an arbitrator does not avoid a verdict or a submission if it is known to the party before trial and award.

Fox v. Hazleton, 10 Pick. 275; *Kent v. Charlestown*, 2 Gray, 281.

by-laws *inter alia* for transfer of stock. *Bank of Attica v. Manufacturers & Traders Bank* (1859) 20 N. Y. 501.

A by-law prohibiting transfer of stock by one indebted to the company without consent of the board of directors is void although the by-law is indorsed on the certificate of stock. *Feckheimer v. National Exch. Bank of Norfolk*, *supra*.

A by-law passed after the death of an insolvent stockholder indebted to the company, which prohibits a transfer of stock by a person thus indebted, is invalid as to a purchaser from the administratrix of the stockholder, who has no notice of the by-law. *Philadelphia S. S. Dook Co. v. Heron* (1896) 53 Pa. 28.

So in Iowa a by-law requiring approval and acceptance of a transfer of stock by a board of directors is invalid when not expressly authorized by statute. *Farmers & M. Bank of Linleville v. Wasson* (1879) 48 Iowa, 336, 30 Am. Rep. 388.

And in Louisiana a by-law prohibiting a transfer of stock by a person indebted to the corporation is void. *Byron v. Carter* (1870) 22 La. Ann. 98.

But under a charter authorizing by-laws not inconsistent with law as the directors deem necessary it is held in Missouri that a by-law prohibiting a transfer of stock from a person indebted to the company is valid. *Spurlock v. Pacific Railroad* (1875) 61 Mo. 326; *Mechanics Bank v. Merchants Bank* (1870) 45 Mo. 513, 100 Am. Dec. 388; *St. Louis Perpetual Ins. Co. v. Goodfellow* (1845) 9 Mo. 149.

Such a by-law was construed under a statute entitling a purchaser of stock to dividends not to prevent a transfer of stock merely because it was not all paid up if no calls were unpaid. *Kahn v. Bank of St. Joseph* (1879) 70 Mo. 282.

A by-law prohibiting a transfer by a stockholder while owing the corporation was set up in *Carroll v. Mullanphy Sav. Bank* (1880) 8 Mo. App. 249, but the court said there was a failure to prove a valid by-law as it was proved to be adopted merely by the directors and not by the corporation.

In *Carroll v. Mullanphy Sav. Bank*, *supra*, it is said: "At common law and independently of statutory provisions of the legislature granting or authorizing the exercise of the power a corporation cannot prohibit a transfer of its shares on account of the indebtedness of the shareholder to the corporation. Where the stock is personal property

Still less does interest in one appointed and agreed upon as an appraiser or valuer, in regard to whose action the rule is much less rigid than in case of strict arbitration.

Palmer v. Clark, 106 Mass. 373.

The fact that the party to whom such question is submitted is the agent of or under the employ of one of the parties was not regarded in that case, or in others, as in any way invalidating his finding if known to the other party.

Kihlberg v. United States, 97 U. S. 898, 24 L. ed. 1106; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255; *Lewis v. Chicago, S. F. & C. R. Co.* 49 Fed. Rep. 708; *Tullis v. Jackson* (1892) 3 Ch. 441.

It is very reasonable that those who are to have the care and custody of the moneys of the company should be trustworthy and respectable.

Queen v. Saddlers Co. 10 H. L. Cas. 404, 462.

The contract of a purchaser made at the time of purchase, that he will offer to sell to the vendor, at a price fixed or to be fixed, before selling to another, is reasonable and valid.

Kenerson v. Henry, 101 Mass. 152.

restrictions upon its transfer must have their source in legislative action and the corporation itself cannot create these impediments."

A by-law requiring the consent of directors to a transfer of shares by a debtor of the company was held not to make a transfer invalid when the usage of the company disregarded the by-law. *Chambersburg Ins. Co. v. Smith* (1849) 11 Pa. 120.

The general rule against limitation by by-laws applies with equal force against any action by directors to prevent transfers.

In the absence of any restrictions in the articles of association directors cannot prevent the transfer of shares under the English Companies Act of 1862, section 22, which provides that the company may determine the manner of transferring shares. *Weston's Case* (1868) L. R. 4 Ch. 20, 38 L. J. Ch. 49, 19 L. T. N. S. 337, 17 Week. Rep. 62.

The denial of the right of a majority stockholder on the ground that his stock was paid for by rival corporations will not be allowed to defeat his status and right to compel an election according to the by-laws whatever may be the remedy to limit an improper control of the company. *Camden & A. R. Co. v. Elkins* (1883) 37 N. J. Eq. 273.

b. Of national banks.

Even state legislation cannot limit or interfere with the transferable quality of national bank stock as that exists under statutes of the United States. *Doty v. First Nat. Bank of Larimore* (1892) 17 L. R. A. 259, 3 N. Dak. 9.

A by-law of a national bank prohibiting the transfer of its stock without assent of the directors is in contravention of the act of congress, and void. *Beckheimer v. National Exch. Bank of Norfolk* (1894) 79 Va. 80; *Bank of Attica v. Manufacturers & Traders Bank* (1899) 20 N. Y. 501.

To the same effect it is said in *Johnson v. Laffin* (1873) 5 Dill. 65, affirmed (1890) 103 U. S. 800, 26 L. ed. 432, that a national bank association cannot take away or defeat the right of a stockholder to make a bona fide transfer of his stock, which right is given him by U. S. Rev. Stat., section 5139.

II. By articles of association.

The main case of *NEW ENGLAND TRUST CO. v. ABBOTT* can hardly be reconciled with some of the cases following.

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The agreement is not invalid as an agreement to sell to a corporation its own shares.

Dupes v. Boston Water Power Co. 114 Mass. 87; *Com. v. Boston & A. R. Co.* 142 Mass. 146; *Cook, Stock & Stockholders*, § 311, note 4.

The by-law as a by-law or as a contract is not void as against public policy.

Restrictions may be created by a contract mutually agreed to by the stockholders, but cannot be imposed upon them by the majority of the stockholders, nor by the board of directors.

Cook, Stock & Stockholders, § 408.

In the English practice it is an ordinary provision that shares shall not be transferred without being first offered to the corporation or the association, this being secured by the articles of association as part of the organic law of its existence.

Bargate v. Shortridge, 5 H. L. Cas. 297; *Poole v. Middleton*, 29 Beav. 646; *Ex parte Penney*, L. R. 8 Ch. 446; *Moffatt v. Fairquhar*, L. R. 7 Ch. Div. 591; *Chappell's Case*, L. R. 6 Ch. 902.

To hold that parties receiving property shall not be at liberty to agree upon what tenure they shall hold it or upon what terms they will

Thus it is held in New York that an agreement by organizers of a corporation, who receive its stock, that their stock shall be put in trust and not drawn for six months without the written consent of all, is void as against public policy if construed to prevent a sale of stock within that time. *Williams v. Montgomery* (1898) 68 Hun. 416.

And again that an agreement between stockholders that they will not transfer their stock without consent of all parties is against public policy, as the right of alienation is incident to the property. *Fisher v. Bush* (1885) 35 Hun. 641.

On the other hand, a charter provision prohibiting transfer of stock except by execution or distress, or by administrators or executors, until it is finally paid up, was upheld against a contract to transfer shares when 50 per cent had been paid, and the contract was therefore denied enforcement. *Merrill v. Call* (1899) 15 Me. 423.

A provision in articles of association that fully paid up shares issued to an officer should be retained by him seven years was held to be for the benefit of the company, and a prohibited transfer was held not to defeat a valid action of the company at a meeting at which the transferee of such shares was necessarily counted to make a quorum. *London & W. Supply Asso. v. Griffith* (1883) 1 Cab. & El. 15.

The charter of a bank providing that shares should not be sold or transferred within one year from the date of the charter and a by-law creating a lien on stock for debts to the bank, were held not to prevent a valid assignment of shares within such year as against a claim of the bank to a lien for the debt of the original shareholder incurred after his assignment was known to the bank. *NeSmith v. Washington Bank* (1823) 6 Pick. 324.

A provision in the articles of association merely and not based on any statute prohibiting a person from holding more than \$10,000 of stock was held in *O'Brien v. Cummings* (1885) 18 Mo. App. 197, not to prevent him from taking title to more than that amount of stock, and that such a provision in the articles was not equivalent to a charter provision.

A provision in articles of association that directors can refuse to transfer shares on which calls are unpaid does not apply to a transfer lodged for registration before the call was made. *Gilbert's Case* (1870) L. R. 5 Ch. 559, 18 Week. Rep. 938.

retransfer it, would be to limit the right of contract with which, in the words of Sir George Jessel, it is the "paramount public policy" not to interfere.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 465; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *Bank of Attica v. Manufacturers & Traders Bank*, 20 N. Y. 504; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 806; *Fisher v. Essex Bank*, 5 Gray, 373; *Sargent v. Essex Marine R. Corp.* 9 Pick. 202; *Bond v. Mount Hope Iron Co.* 99 Mass. 505, 97 Am. Dec. 49; *Price v. Minot*, 107 Mass. 49; *Pool v. Middleton*, *supra*.

By-laws which have been overruled all contain one or the other of the following elements:

(1) That the by-laws had been adopted simply by a majority of the corporators, and had not received the assent of the stockholder, against whom it is sought to be enforced.

(2) That the by-law contained a restriction by which, if enforced by some third party, such as an officer of the corporation, or some other stockholder or stockholders, the transfer was completely prevented.

(3) That the by-law was in conflict with some positive statutory provision regarding the corporation enacting it.

(4) That the question did not involve the relation existing between the stockholder and the company, but turned on some extraneous circumstances.

Bank of Attica v. Manufacturers & Traders Bank, *supra*; *Fisher v. Bush*, 35 Hun, 641; *Farmers & M. Bank of Linville v. Wasson*, 48

Iowa, 336, 30 Am. Rep. 898; *Re Klaus*, 67 Wis. 401; *Moore v. Bank of Commerce*, 52 Mo. 377.

There is no ground for pronouncing the by-law invalid as *malum in se* or *malum prohibitum*.

"The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

Cranson v. Goss, 107 Mass. 440, 9 Am. Rep. 45.

The objection made arises solely from the claim that a private right to property is infringed. The person possessed of this right is certainly competent to waive it. *Quilibet potest renunciare juri pro se introducto*.

Long v. Billings, 9 Mass. 482; *Miles v. Boyden*, 3 Pick. 218; *Com. v. Daitley*, 12 Cush. 83.

It was not in the power of Mr. Abbot or of his executor to revoke the agreement that the directors should appraise the stock.

Palmer v. Clark, 106 Mass. 378; *Haley v. Bellamy*, 137 Mass. 357; *Sugden, Vend. & P. chap. 7, § 1, par. 37*; *Mores v. Merest*, 6 Madd. 26; *Pope v. Lord Duncannon*, 9 Sim. 177; *Harcourt v. Rambottom*, 1 Jac. & W. 511; *Richardson v. Smith*, L. R. 5 Ch. 650, *note*.

The evidence offered by the defendant that the directors erred in their judgment in their appraisal of the stock was rightly rejected.

Palmer v. Clark, *supra*; *Martinsburg & P. R. Co. v. Marsh*, 114 U. S. 549, 29 L. ed. 255; *Kihlberg v. United States*, 97 U. S. 898, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1058.

Instead of issuing shares of stock members of a reservoir corporation may lawfully agree in the absence of any restriction in their charter that rights in the joint or capital stock of the corporation shall pass with the mills, mill-dams, and mill privileges owed by such members, thus confining the ownership to persons directly interested in the maintenance of the dams. This is decided in holding that death of a member does not dissolve the corporation. *McGinty v. Athol Reservoir Co.* (1892) 155 Mass. 133.

A provision in articles of association of a partnership against the sale of shares without first offering them to the association was assumed to be valid but not directly decided in *Harper v. Raymond* (1858) 3 Bosw. 29.

Such provisions have not been uncommon in articles of partnerships which were organized in the form of joint-stock companies, but they do not seem to have been brought into adjudication. But in view of the general doctrine of *delectus personarum* applicable to partnership associations, such cases are plainly distinguishable from corporation cases.

III. Exercise of power to approve or disapprove.

Directors having the power to approve or disapprove of a transfer of shares cannot disapprove for a purely arbitrary reason or because an otherwise unobjectionable transferee would not vote in a proper manner. *Moffatt v. Farquhar* (1876) L. R. 7 Ch. Div. 591, 47 L. J. Ch. 355, 38 L. T. N. S. 13, 26 Week. Rep. 522.

So in *Chappell's Case* (1871) L. R. 6 Ch. 902, 20 Week. Rep. 9, 25 L. T. N. S. 438, it was held that directors cannot arbitrarily disapprove of a transferee and that "they are only to see if they can provide a substitute who will take the shares," where the deed of settlement provided that the

transferee should take the shares if the directors should not within fourteen days procure some other person to take them at the market price for the time.

Refusal by directors to make any transfer at all is not a reasonable exercise of power given them by a deed of settlement to approve or disapprove of a transfer of shares. *Robinson v. Chartered Mercantile Bank of India, London and China* (1885) L. R. 1 Eq. 53, 35 Beav. 79, 13 L. T. N. S. 454, 14 Week. Rep. 71.

But another case holds that it must appear that directors have acted from some improper motive, or arbitrarily, or capriciously in refusing to approve a transfer of shares, where the deed of settlement of the company requires their approval, in order that the court may interfere to compel them to give their approval. *Ex parte Penney* (1873) L. R. 8 Ch. 446, 42 L. J. Ch. 133, 23 L. T. N. S. 150, 21 Week. Rep. 186, reversing 21 Week. Rep. 96.

This is in effect adopting the presumption of due exercise of official duty until the contrary is proved. On the other hand, a Canadian case holds that a company has no power, under 27 & 28 Vict., chapter 23, to refuse to allow a transfer of shares without assigning a sufficient reason therefor. *Smith v. Canada Car Co.* 6 U. C. Pr. Rep. 107 (Rob. & J. Dig.).

The right which directors of a banking company may have to withhold approval of a transfer cannot be exercised for the purpose of obtaining priority of payment to the bank of a debt due from the shareholder. *Pinkett v. Wright* (1842) 2 Hare, 120, 13 L. J. Ch. 119, 6 Jur. 1103.

On the ground that the power of directors to disapprove a transfer cannot be arbitrarily exercised, they cannot refuse after receiving payment of a call from a transferee to approve the transfer to him on the ground that the transfer has not been

Notice to parties is not necessary for a valuation.

Palmer v. Clark, *supra*; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *Bedell v. Kennedy*, 109 N. Y. 153; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 129 Mass. 145; *Haley v. Bellamy*, 137 Mass. 359; *St. Paul & N. P. R. Co. v. Bradbury*, 42 Minn. 222; *Tullis v. Jackson* [1892] 8 Ch. 441; *Langdon v. Northfield*, 42 Minn. 464; *Lull v. Korf*, 84 Ill. 225; *Hudson v. McCartney*, 33 Wis. 331; *Hubbell v. Bissell*, 2 Allen, 196; *Boston Water Power Co. v. Gray*, 6 Met. 181; *Brown v. Bellows*, 4 Pick. 179; *Hoffman v. DeGraaf*, 109 N. Y. 638; *Brush v. Fisher*, 70 Mich. 469; *Baltimore & O. R. Co. v. Canton Co. of Baltimore*, 70 Md. 405; *Godard v. King*, 40 Minn. 164; *Belchier v. Reynolds*, 2 Kenyon, Ch. pt. 2, p. 87; *Collier v. Mason*, 25 Beav. 200; *Weeks v. Gallard*, 21 L. T. N. S. 655; *Underhill v. Van Corilandt*, 2 Johns. Ch. 339, 348, 349, 358, 1 L. ed. 400, 405, 406; *Parken v. Whitby*, Turn. & R. 366.

Inadequacy of consideration is not by itself a ground for refusing specific performance.

Western R. Corp. v. Babcock, 6 Met. 346; *Park v. Johnson*, 4 Allen, 259; *Lee v. Kirby*, 104 Mass. 420; *Coles v. Trecothick*, 9 Ves. Jr. 234; *Watson v. Doyle*, 130 Ill. 415.

Specific performance is the appropriate remedy where the stock is limited in amount, held in a few hands, and not easily to be obtained.

Adams v. Messinger, 147 Mass. 185; *Todd v. Taft*, 7 Allen, 371; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Chaffee v. Middlesex R. Co.* 146 Mass. 224; *Gloucester Isinglass & Glue*

Co. v. Russia Cement Co. 12 L. R. A. 563, 154 Mass. 92.

Messrs. L. S. Dabney and F. J. Stimson, for defendant:

The seventh by law is void:

(1) Because it is not expressly authorized by its charter, and not "consistent with law" within the meaning of Pub. Stat., chap. 105, § 4.

By common law of England:

Norris v. Staps, Hob. 2106; *Master & Co. of Framework Knitters v. Green*, 1 Ld. Raym. 113; *Harrison v. Godman*, 1 Burr. 12, 16; *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Brelon*, 4 Burr. 2260, 2267; *Rex v. Head*, 4 Burr. 2515, 2521; *Rex v. Dublin*, 1 Strange, 587; *Rex v. Ginerer*, 6 T. R. 732; 3 Kyd, Corp. pp. 24, 26, 29, 30, 107, 109, 112, 113, 114, 119, 156, 157; *Boisot, By-Laws*, §§ 27, 36, 44, 50; *Lowell, Transfer of Stock*, § 31; *Lindley*, Partn. 4th ed. 701.

By common law of Massachusetts and the United States:

Mass. Pub. Stat. chap. 105, §§ 4, 5, chap. 106, § 30; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Sargent v. Essex Marine R. Corp.* 9 Pick. 201; *Boston Music Hall Assn. v. Cory*, 129 Mass. 436; *Re Klaus*, 67 Wis. 401; *State v. St. Louis Union Merchants Exchange*, 2 Mo. App. 96; *Farmers & M. Bank of Lineville v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Moore v. Bank of Commerce*, 52 Mo. 377; *Koiff v. St. Paul Fuel Exchange*, 48 Minn. 215; *Bergman v. St. Paul Bldg. Assn. No. 1*, 29 Minn. 275.

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made on the books of a company which is being merged in the new one under an arrangement for the issue of shares in the new company for those in the old. *Slee v. International Bank* (1868) 17 L. T. N. S. 423.

Transfers of shares fully paid up by the holders, who were the largest creditors of the company, made to different persons in order to give them votes at a proposed meeting to consider the winding up of the company, were ordered by the court to be registered in time to give the transferees the right to vote at that meeting, although the articles provided that the directors might decline to register a transfer made by a member indebted to the company, or "in the case of shares not fully paid up to a person of whom they do not approve." *Re Stranton Iron & Steel Co.* (1873) L. R. 16 Eq. 559, 43 L. J. Ch. 215.

In some cases the right of transfer has been considered with reference to the subsequent liability of the seller of the shares.

Thus under articles giving directors power to refuse approval of any transfer which they think not conducive to the interests of the company where they have just before winding up resolved that no transfers then in the office be registered without the express sanction of the board, except to new directors, it was held that the official liquidator had no power to put the transferee on the list of shareholders where the transfer was not registered although it had been deposited in the office by a shareholder whose calls were paid and the transferee was a responsible person. The court intimated that a compulsory order on the directors might have been obtained if the company had been going. *Shepherd's Case* (1866) L. R. 2 Eq. 564, 35 L. J. Ch. 626, 13 Jur. N. S. 697, 14 L. T. N. S. 788, 15 Week. Rep. 2.

A transfer although approved by directors, who

had power to disapprove, is not sufficient to relieve the transferee on the winding up of the company where it was made to an irresponsible person, misrepresenting the consideration, and describing him as a "gentleman" when he was a clerk on a small salary. *Rogers' Case* (1871) 25 L. T. N. S. 406, 19 Week. Rep. 1057.

So a transfer of shares to a clerk in the office of the transferor describing him as a "gentleman" and falsely reciting a consideration, while in fact the clerk was hired to take the transfer, although it was registered by the directors who had power to disapprove, it was held on subsequent winding up of the company, which began soon afterwards, insufficient to relieve the former shareholder from liability as a contributory. *Payne's Case* (1869) L. R. 9 Eq. 223.

A very similar case was that of *Williams* (1869), reported in a note in L. R. 9 Eq. 224, where a transfer made to a clerk describing him as a public accountant, was registered.

Substantially the same was held in *Ex parte Kintrea* (1869) L. R. 5 Ch. 95, 39 L. J. Ch. 193, 21 L. T. N. S. 668, in case of a transfer to a ship steward earning small wages which the directors registered although they had power to disapprove.

Under articles providing that directors may decline to register a transfer to a person whom they consider irresponsible, a transfer to an irresponsible person deposited with the company but not registered before an order to wind up the company six weeks afterwards is not sufficient to relieve the transferor from liability as a contributory. *Shipman's Case* (1868) L. R. 5 Eq. 219, 37 L. J. Ch. 193, 16 Week. Rep. 354.

Want of formal consent of the board of directors to the transfer of shares in a joint-stock bank which consent was required under its deed of settlement, and which had been held in an action at

does not govern plaintiff company (§ 1) and was never accepted by them as permitted by Massachusetts Laws 1890, chap. 815, § 2.

Chouteau Spring Co. v. Harris, Re Klaus, and Sargent v. Franklin Ins. Co. supra.

(2) The by-law in question is void, furthermore, because it requires the plaintiff corporation to buy its own stock.

Mass. Stat. 1871, chap. 142, 1890, chap. 168, 1888, chap. 413, §§ 13, 14.

(3) It is further void because it requires shareholders to submit to arbitration (appraisal), and makes the directors judges as between them and their own corporation.

Bonham's Case, 8 Coke, 114a, 118a; *State v. St. Louis Union Merchants Exchange, supra*, citing *Middleton's Case*, 3 Dyer, 332b.

(4) The amended seventh by-law is further void, because it prescribes a penalty of more than \$20 (to wit, the loss of all subsequent dividends, which is practical forfeiture of the stock) for any breach of its provisions, contrary to the common law, where a by-law could only be enforced by a money penalty; and to Pub. Stat., chap. 105, § 5; Gen. Stat., chap. 68, § 7, which fix such money penalty at \$20.

2 Kyd, Corp. §§ 109, 156, 157; *Doggerell v. Pokes*, F. Moore, 411.

(5) The by-law is further void, because, as amended, it requires the plaintiff company to declare and pay a dividend on only part of its shares, which is illegal, and will be enjoined in equity.

Re Election of Directors of Cape May Delaware Bay Nav. Co. 51 N. J. L. 79; *Jackson v.*

Newark Fl. Road Co. 81 N. J. L. 277; *Luling v. Atlantic Mut. Ins. Co.* 45 Barb. 510; *March v. Eastern R. Co.* 43 N. H. 515; *Ryder v. Atton & S. R. Co.* 13 Ill. 516; *Carpenter v. New York & N. H. R. Co.* 5 Abb. Pr. 277; *Carlisle v. South Eastern R. Co.* 1 Macn. & G. 689.

The by-law itself is invalid, cannot be enforced, as a contract made between the plaintiff and the defendant's testator.

A by-law is nothing but a contract sanctioned by law between the corporation and all its members, and therefore what is illegal as a by-law is no less illegal as a general contract with all the stockholders.

Rez v. Head, 4 Burr. 2515, 2521; 2 Kyd, Corp. § 114; *Boisot, By-Laws*, §§ 2, 7; *Adley v. Whitstable Co.* 18 Ves. Jr. 323; *Bergman v. St. Paul Bldg. Asso. No. 1, supra.*

Even if the stockholders expressly assent to, or vote for, the by-law in question.

Boisot, By-Laws, §§ 77, 97; 2 Kyd, Corp. 114; *Re Klaus, supra*; *Thomas v. Mutual Prot. Union*, 49 Hun, 171; *Rez v. Head*, and *Bergman v. St. Paul Bldg. Asso. No. 1, supra.*

If a contract be claimed to have been made by defendant's testator with the corporation, there was no consideration therefor.

Gray v. Portland Bank, 3 Mass. 864, 3 Am. Dec. 156.

A by-law can only be enforced by a penalty.

A court of equity will not decree specific performance of an illegal contract, or one void as against public policy, or even unfair.

Dunham v. Presby, 120 Mass. 285; *Noyes v. Marsh*, 123 Mass. 286; 1 Story, Eq. Jur. §§ 769, 770.

law (Bosanquet v. Shortridge (1850) 4 Exch. 609, 19 L. J. Exch. 221, 14 Jur. 71), ineffectual to release the shareholder from liability as such, was held in equity sufficient to release him where the transfer was made according to the usage of the company. Shortridge v. Bosanquet (1852) 16 Beav. 84.

The approval of a transfer by directors, who have authority to approve or disapprove, may be inferred from their conduct with respect to the shares. *Re parte Bentinck*, 1 Meg. 2 (Mew's Dig. Supp.).

Specific performance of a contract to sell shares may be compelled by the purchaser notwithstanding the objection of the directors who have power to disapprove of the transfer. The court said it did not pass upon the effect of the transfer or say that the plaintiff would become a shareholder unless the board of directors approved it. *Pool v. Middleton (1861) 29 Beav. 644, 9 Week. Rep. 753, 7 Jur. N. S. 1262, 4 L. T. N. S. 651.*

But where purchase money was paid for shares in a company which was ordered to be wound up before any legal transfer was made, and the official liquidator refused to register or recognize it, while a provision in the deed of settlement required approval of the board of directors, the court refused a specific performance in favor of the seller to compel the transferee to pay calls made by the liquidator and denied an injunction against his suit to recover back the purchase money, although the court said the company might ratify the transfer and it would then bind the parties to the contract from the time it was entered into. *Birmingham v. Sheridan (1864) 33 Beav. 660.*

The vendor of shares in a company bought and sold on the stock exchange is not under an implied obligation to procure the consent of the directors to the transfer, where they have power to disapprove it. *London Founders Assn. v. Clarke (1886) 37 L. R. A.*

59 L. T. N. S. 93, L. R. 20 Q. B. Div. 576, 57 L. J. Q. B. 291, 36 Week. Rep. 439; *Stray v. Russell (1859) 1 El. & El. 833, 29 L. J. Q. B. 115, 6 Jur. N. S. 163, 3 Week. Rep. 240.*

But in case of shares not sold on stock exchange so that there was no usage binding the vendee to procure the transfer to be registered for the perfecting of the transfer to him, and where the deed of the company which was in the knowledge of both parties cast the duty of obtaining the consent of the directors on the vendor, by whose default only it was that the consent of the directors was not obtained, it was held in *Wilkinson v. Lloyd (1845) 7 Q. B. 27, 14 L. J. Q. B. 165, 9 Jur. 223*, that the purchaser was entitled to recover back the purchase money which he had paid, on the ground of a failure of consideration.

The sufficiency of a transfer to relieve the former owner of the shares on the winding up of the company is denied in *Walker's Case (1860) L. R. 2 Eq. 554*, where the transfer had not been submitted to the board for approval as required by the articles, or registered.

The result of full investigation of all the cases on the subject shows that the power to restrict transfers of stock by a by-law of a corporation is denied unless there is express authority given by statute or by articles of association to make such by-law. That such power to restrict transfer of shares may be given by statute is hardly open to question. That articles of association may restrict such power of transfer as a valid agreement between members of the corporation is left somewhat unsettled by reason of the lack of harmony of the decisions on this point.

The right to transfer interests in the property of corporations not represented by shares of stock is not considered in this note.

B. A. R.

This alleged contract is against the public policy of Massachusetts.

See *Gray v. Portland Bank*, *supra*; *Davis v. Second Universalist Meeting-House Proprs. in Lowell*, 8 Met 321.

The court erred in excluding evidence of the fairness and adequacy of the appraisement, it being made by the plaintiff's officers themselves.

1 Story, Eq. Jur. §§ 769, 770; *Margraf v. Muir*, 57 N. Y. 155; *Manofield v. Sherman*, 81 Me. 365; *Ramsay v. Olsen*, 99 N. C. 215; *Chute v. Quincy*, 156 Mass. 189.

Defendant has never offered his stock for appraisal; and a court of equity will not decree specific performance of an agreement to submit a matter to arbitration.

Noyes v. Marsh, *supra*; *Pearl v. Harris*, 121 Mass. 890; *Oobb v. New England Mut. Marine Ins. Co.* 6 Gray, 192.

Specific performance for an agreement for the sale of stock will be denied if the plaintiff has an adequate remedy at law for defendant's refusal to purchase.

Noyes v. Marsh, *supra*.

Morton, J., delivered the opinion of the court:

This is a bill brought by the plaintiff to compel the transfer to it, by the defendant, as executor of the will of Josiah G. Abbott, of certain shares in the plaintiff corporation, which were held by said Abbott at his decease, and which, it is alleged, he agreed, when the certificates were issued to him, should be appraised at his death by the directors, and transferred to the plaintiff at the appraisal, if the directors so elected. The bill also seeks to enjoin the defendant from prosecuting an action at law brought by him against the plaintiff to recover certain dividends upon said shares that have been declared by it.

The plaintiff was organized in 1869, under a special charter (Acts 1869, chap. 182), with a capital of \$500,000, which was afterwards increased to \$1,000,000. The terms of the alleged agreement are found in the by-laws, of which all that is now material is as follows:

"Art. 7. Any member of this corporation who shall be desirous of selling any of his shares, the executor or administrator of any member, deceased, and the grantee or assignee of any shares sold on execution, shall cause such, their shares, respectively, to be appraised by the directors, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the corporation at such appraised value; and, if said directors shall choose to take such shares for the use of the corporation, such member, executor, administrator, or assignee shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said corporation; provided, however, the said directors shall not be obliged to take said shares at the appraised value, unless they shall think it for the interests of the company; and if they shall not, within ten days after such shares are offered to them in writing, take the same,

and pay such member, executor, administrator, or assignee the price at which the same shall have been appraised, such member, executor, administrator, or assignee shall be at liberty to sell and dispose of the same shares to any person whatever.

"Art. 8. The directors shall have power, and it shall be their duty, to sell and dispose of the shares which may be transferred as aforesaid to the corporation, whenever, in their judgment, it can be done with safety and advantage to the corporation; and in all sales made by the directors, under any of the aforesaid provisions, it shall be their duty to sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; no greater number than one hundred shares being assigned to any one person, nor, in the case of a person already a member, a greater number than will be sufficient to increase his previous number to one hundred shares."

These by-laws were adopted before any certificates of stock were issued. Afterwards but before the capital was increased, article 7 was duly amended by adding to it the following:

"It shall be the duty of such executor, administrator, grantee, or assignee to offer said shares for appraisal, and to be taken by the corporation, if it shall so elect, whenever requested by the actuary or secretary, and no dividends or interest shall be paid or allowed after a failure to comply with such request: provided, that such request shall not be made until after the payment of one dividend and the expiration of six months from the death of the owner or sale as aforesaid, but the offer may be made at any earlier period if the party shall prefer."

Every certificate contained on its face, as part of the certificate, the provision that "said shares are transferable only in person or by attorney, duly constituted, on the books of the company, and in the manner and upon the conditions expressed in the by-laws of the company, printed upon the back of this certificate." On the backs of the certificates were printed by-laws 7 and 8. By-law 7 was printed as amended on the backs of those issued after the increase. There were also on the stubs from which the certificates were detached, in the certificate books, two receipts given and signed by the defendant's testator at the time the two certificates were issued to him in the original and increased capital, which were each as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform." The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain

rights, or to submit to certain restrictions respecting which the stockholders might have no power of compulsion over him. In *Adley v. Whistable Co.*, 17 Ves. Jr. 315, 322, Lord Eldon says: "It has been frequently determined that what may well be made the subject of a contract between the different interests of a partnership would not be good as a by-law. For instance, an agreement among the citizens of London that they would not sell except in the markets of London would be good; yet it has been declared by the legislature that a by-law to that effect is void." See also, *Davis v. Second Universalist Meeting-House Proprs. in Lowell*, 8 Met. 321; *Bank of Attica v. Manufacturers & Traders Bank*, 20 N. Y. 505; *Cook, Stock & Stockholders*, § 408. In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in by-laws which may have been invalid as such does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this state that a corporation, unless prohibited, may purchase its own stock (*Dupes v. Boston Water Power Co.*, 114 Mass. 87); and we see nothing opposed to public policy in such an agreement as this with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to. In England it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint-stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Pool v. Middleton*, 29 Beav. 646; *Ex parte Penney*, L. R. 8 Ch. 446; *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591; *Chappell's Case*, L. R. 6 Ch. 902. No objections seem to have been made to these provisions. In this state, the legislature, in numerous instances, has provided, in the charters of corporations like this, that the shares shall be transferable according to such rules and regulations as the stockholders shall establish, and not otherwise. It is hardly possible that the legislature was ignorant of the construction which has been put upon the power thus conferred, and which in the case of the first corporation of the kind chartered in the commonwealth,

the Massachusetts Hospital Life Insurance Company (Acts 1818, chap. 180), was shown, it is said, by the adoption of by-laws from which those in this case were copied. It is true that this charter contains no provision in regard to by-laws or to the transfer of shares; but the policy of the legislature cannot be affected by such an omission, especially in view of the fact that many of the charters since granted contain this provision.

Neither do we think that the agreement is void for the reason that it authorizes the plaintiff to invest, as the defendant contends, in its own stock, or because it compels the defendant to submit to the appraisal of the directors. If the enumeration in its charter of certain things in which it may invest is to be construed as excluding, among others, its own stock, we think that the object of the agreement is not to secure the transfer of the shares to the plaintiff as an investment, but to enable the directors to dispose of it to such person or persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; and though, pending its disposition by the directors, it may, for convenience's sake, be placed with the company's securities, and dividends, if declared, collected upon it, that does not alter the essential character of the tenure upon which the company holds it. It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested; provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown. *Brown v. Bellows*, 4 Pick. 179, 189; *Palmer v. Clark*, 106 Mass. 873, 889; *Haley v. Bellamy*, 137 Mass. 357, 359; *Fox v. Hazellon*, 10 Pick. 275; *Strong v. Strong*, 9 Cush. 569; *Benjamin, Sales*, 6th Am. ed. § 88, note 3.

The defendant objects that there was no real appraisal, and that he did not offer the stock for appraisal. The records of the plaintiff show that at a directors' meeting, at which were present sixteen directors, it was voted that the defendant's stock be appraised at \$220 per share, and taken for the use of the corporation. The directors were not bound to give the defendant notice or a hearing (*Palmer v. Clark, supra*); and we must assume that they gave the matter such attention as, in their opinion, was necessary, and that the appraisal correctly expresses their judgment, after taking into account such matters as they thought should be considered. There is nothing to show that they were so mistaken about the facts that what they did was in no fair sense an appraisal of this stock, but of something else. It is said that they omitted the good-will. If so, it was, at most, an error of judgment, which would not invalidate the appraisal. It was not a condition precedent to the appraisal that the defendant should offer the stock. The agreement of defendant's testator was, in substance, that the stock should be appraised by the directors, and that it might be taken at the appraisal by them if they so elected; and that has been done. The offer was for the

purpose of fixing a time from which the ten days should begin to run at whose expiration the stockholder could dispose of his stock if the directors had not elected to take it. If the directors appraised the stock, and voted to take it at the appraisal, an offer was unnecessary.

Lastly, the defendant contends that the plaintiff is not entitled to specific performance, because the stock was greatly undervalued and because the plaintiff has a remedy at law. It is evident that to remit the plaintiff to an action at law for damages would defeat the very purpose of the contract, and would not, we think, furnish an adequate remedy. No stock in the plaintiff company has ever been sold in the market, and all the shares that have been transferred have been transferred to the plaintiff, and disposed of by the directors in the manner provided. About three fourths of the stock of the original subscribers has been thus transferred. There is no evidence that the testator ever objected to this mode of dealing with it; and we see no good reason why the plaintiff should be obliged to accept damages for which it might be difficult to lay down a clear rule, instead of performance. *Western R. Corp. v. Babcock*, 6 Met. 846; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 865, 82 Am. Rep. 815. The case would perhaps stand differently if the shares were bought and sold in the market like most stocks. *Adams v. Messinger*, 147 Mass. 185. The defendant does not charge the directors with any fraud in the appraisal. He expressly disclaims that. It is well settled that where one agrees that another may fix the price for certain property, or the sum to be paid for material or services, the decision of the party selected cannot be impeached by showing that he has committed an error of judgment, or failed to avail himself of all the information which he might have obtained, or has valued the

property too high or too low. *Palmer v. Clark, supra*; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 129 Mass. 145; *Martinsbury & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255; *Stevenson v. Watson*, L. R. 4 C. P. Div. 148; *Sharpe v. San Paulo R. Co.* L. R. 8 Ch. 597; *Richards v. May*, L. R. 10 Q. B. Div. 400; *Tullis v. Jackson* [1892] 3 Ch. 441; *Ranger v. Great Western R. Co.* 5 H. L. Cas. 72. The evidence that was offered by the defendant relating to the value of the stock was therefore rightly excluded. It is equally well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced. *Chute v. Quincy*, 156 Mass. 189; *Lee v. Kirby*, 104 Mass. 420; *Park v. Johnson*, 4 Allen, 259; *Western R. Corp. v. Babcock*, 6 Met. 846, 352; *Cathcart v. Robinson*, 80 U. S. 5 Pet. 271, 8 L. ed. 123; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 1 L. ed. 400; *Belchier v. Reynolds*, 2 Kenyon, Ch. pt. 2, p. 87; *Weekes v. Gallard*, 21 L. T. N. S. 655; Fry, Spec. Perf. 3d Am. ed. § 424, note 1. It is to be observed that this is a suit directly between the company and a stockholder, to enforce a contract made with the company by the latter, and that the rights of third parties are not involved. Many of the cases cited and relied upon by the defendant are cases where the rights of third parties are involved, and therefore inapplicable to this.

The result is that the plaintiff is entitled to a decree compelling the defendant to convey the shares upon payment by it of the amount of the appraisal, with interest, and enjoining him from prosecuting the action at law.

Ordered accordingly.

OREGON SUPREME COURT.

Kate BUDD, Resp't.,
v.

UNITED CARRIAGE CO., Appt.

(25 Or. 314.)

1. The carrier has the burden of proving freedom from negligence on proof of injury to a passenger in a public carriage resulting from the running and kicking of the horses, which the driver could not control.
2. Whether a passenger in jumping from a public carriage when directed to do so by the driver, while the horses were running and kicking, was guilty of contributory

negligence or not is a question of fact for the jury.

3. A passenger is not guilty of contributory negligence in jumping from a public carriage while the team is running and kicking, if persons of ordinary prudence would take that course.
4. General directions of a passenger in a public carriage to drive down a certain street does not relieve the driver from responsibility in driving over an unsafe place on such route, as the driver is expected to know whether the road is suitable and reasonably safe

(January 22, 1894.)

NOTE.—As to the burden of proof of negligence in case of injury to a passenger, see note to *Barnowski v. Helson* (Mich.) 15 L. R. A. beginning on page 36; also later cases: *Thomas v. Philadelphia & R. B. Co.* (Pa.) 15 L. R. A. 416; *Fredericks v. Northern Cent. R. Co.* (Pa.) 22 L. R. A. 806; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 22 L. R. A. 361; *Carrioco v. West Virginia Cent. & P. R.* 27 L. R. A.

Co. (W. Va.) 24 L. R. A. 50; also (as to passengers on street-cars) *Hawkins v. Front Street Cable R. Co.* (Wash.) 16 L. R. A. 808; *Spellman v. Lincoln Rapid Transit Co.* (Neb.) 20 L. R. A. 316; *Elliot v. Newport Street R. Co.* (R. I.) 23 L. R. A. 208.

For implied warranty of horse and vehicle by liveryman, see note to *Copeland v. Draper* (Mass.) 19 L. R. A. 238.

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County, in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Paddock for appellant.

Mr. Thomas O'Day, for appellee:

There is required of the carrier "the utmost degree of care and skill in the preparation and management of the means of conveyance."

Angell, Carriers, § 532; *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 517.

All precautions as far as human foresight will go.

Kent, Com. 602; *Edwards v. Lord*, 49 Me. 279.

Every person who contracts for the conveyance of others is bound to the utmost care and skill, and if through any erroneous judgment on his part any mischief is occasioned he must answer the consequences.

Jackson v. Tollett, 2 Stark. 84.

The proprietors of stage-coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers which could have been prevented by human care and foresight.

Frink v. Coe, 4 G. Greene, 555, 61 Am. Dec. 141; *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 686; *Story*, Bailm. 4th ed. 592, 602; *Bremner v. Williams*, 1 Car. & P. 414; *Crofts v. Waterhouse*, 3 Bing. 831; *Woland v. Elkins*, 1 Stark. 272; *Christie v. Griggs*, 2 Campb. 79.

When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is, that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatever.

Baltimore & O. R. Co. v. Noell, 82 Gratt. 894; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 535, 75 Am. Dec. 258; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351, 89 Am. Rep. 787; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, O. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 812; *Dawson v. Manchester, S. & L. R. Co.* 7 Hurlst. & N. 1087; *Feital v. Middlesex R. Co.* 109 Mass. 898, 12 Am. Rep. 720; *Breen v. New York Cent. & H. R. R. Co.* 109 N. Y. 297; *Galena & C. U. R. Co. v. Farwood*, 17 Ill. 509, 65 Am. Dec. 682; *Anderson v. Scholey*, 114 Ind. 553; *Wilson v. Northern Pac. R. Co.* 26 Minn. 278, 87 Am. Rep. 410; *Lemon v. Chandler*, 68 Mo. 840, 80 Am. Rep. 799; *Hapsley v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 848; *Ingalls v. Bills*, 9 Met. 1, 48 Am. Dec. 346; *Hegeman v. Western R. Co.* 13 N. Y. 9, 64 Am. Dec. 517; *Christie v. Griggs*, *supra*; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115; *Memphis & A. River Packet Co. v. McCool*, 83 Ind. 892, 43 Am. Rep. 71; *Inland & Seaboard Coasting Co. v. Tolson*, 189 U. S. 551, 25 L. ed. 270; *City & Suburban R. Co. v. Findley*, 76 Ga. 811; *Carpus v. London & B. R. Co.* 5 Q. B. 749; *Stager v. Ridge Ave. Pass. R. Co.* 119 Pa. 70; *Ohio & 97 L. R. A.*

M. R. Co. v. Voight, 123 Ind. 288; *New Jersey R. & Transp. Co. v. Pollard*, 89 U. S. 23 Wall. 341, 22 L. ed. 877.

It was not negligence in the plaintiff to jump from the carriage under the belief of impending danger.

Iron R. Co. v. Mowery, 86 Ohio St. 418, 88 Am. Rep. 597; *Galena & C. U. R. Co. v. Farwood*, 17 Ill. 509, 65 Am. Dec. 682; *Twombly v. Central Park, N. & E. River R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115; 2 Shearm. & Redf. Neg. § 519.

Whether the plaintiff in doing that act acted negligently or not is a question of fact for the jury.

McIntyre v. New York Cent. R. Co. 37 N. Y. 287; *Edgerly v. New York & H. R. Co.* 89 N. Y. 237; *Filer v. New York Cent. R. Co.* 59 N. Y. 851; *Pool v. Chicago, M. & St. P. R. Co.* 56 Wia. 237; *Chicago, B. & Q. R. Co. v. Sykes*, 96 Ill. 162; *Cleveland, O. C. & I. R. Co. v. Manson*, 80 Ohio St. 451.

Lord, Ch. J., delivered the opinion of the court:

This is an action brought to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint, after alleging that the defendant was a common carrier, and its undertaking to carry the plaintiff around and through the city, avers, in substance, that the defendant, in disregard of its duty, sent a team for this purpose which was fractious and unsafe; that it was not properly and safely hitched to the carriage with safe gearing and appliances; and that the driver which the defendant furnished to drive such team was negligent and incompetent. It also alleges "that, while the plaintiff was being conveyed as aforesaid, said team, by reason of being wild, fractious, and unsafe, and being carelessly hitched to said carriage with unsafe gearing and appliances, and being driven by said careless and incompetent driver, became unmanageable and ran away, and said driver was wholly unable to control the team; and that plaintiff, being in imminent danger of life and limb, and believing herself so to be, at the request of said driver, in order to escape greater injury, attempted to get out of said carriage, and was thereby forcibly thrown to the ground, breaking and dislocating the bones of her forearm near the wrist, and otherwise greatly bruising and injuring her." The answer admits that the relation of passenger and carrier existed between the plaintiff and defendant, but denies the alleged negligence, and sets up contributory negligence as a defense. The evidence shows that the plaintiff informed the defendant, through the telephone, that she had a sick or invalid daughter whom she desired to take for a drive about the city, and requested the defendant to send to her residence, for this purpose, an easy carriage, with a safe and gentle team, and a careful and competent driver. In response to this telephonic order, the defendant sent a team hitched to a close carriage or coupé, with a driver, to her residence, and plaintiff and her sick daughter

entered the carriage, and the driver, as directed by the plaintiff, proceeded to convey them, with said team and carriage, from place to place upon several business and social errands about the city. The plaintiff, noticing that the horses, when at a halt, were nervous and fidgety, asked the driver whether they were gentle and safe, and he answered that "the horses were all right." The evidence shows that she was induced to make this inquiry by solicitude for her sick daughter, whom she did not wish to be subjected to the excitement and fright likely to result if the horses proved intractable or unruly. When through with her errands, the plaintiff instructed the driver to convey them to the city park, where, after driving around its driveways for some time, she told him to leave the park by way of Park avenue, so as to pass a certain new residence located thereon which she desired to see. This avenue was graded out to the city park line, but there was a declivity of one or two feet which the carriage had to descend in turning from the park driveway into it. In making this turn, when the wheels descended the pitch or declivity, the tongue flew up between the heads of the horses, the carriage ran forward, whereupon one of them got his leg over the trace and commenced kicking, and then both ran away, kicking. As the horses were thus running and kicking, the driver hallooed to the ladies, "For God's sake, jump out!" which they promptly did; the plaintiff's daughter jumping out on one side, and she on the other, causing the injury complained of. As tending to show the conduct of the driver and the behavior of the horses under the circumstances, one witness testified: "It seemed as though, just as the team started down the hill, one of the horses became frightened and commenced to kick. . . . As soon as the horses began to kick, the man got scared. His actions indicated that from his performance. The driver immediately raised to his feet, and commenced to halloo. I could not understand what he said, but the horses were going down the hill at a rapid rate, and kicking, and the driver did not seem to have any control over them at all. When the team got opposite of us, the carriage door opened, and a woman fell out from the other side from where we were, and, after going several feet, another woman fell out on the other side," etc. Another witness testified that "the pitch was about a foot, and that when they came around, and made the turn to come into the road, the front wheels pitched down, and upon that the tongue flew up between the horses' heads, and one horse got his foot over the trace. Then they started forward again, and the trace straightened out under his hind leg, when the horse commenced kicking, and the man kept hallooing, and they kept coming over the hill in that shape." There was some further evidence tending to show that the team was not hitched to the carriage with proper gear to enable the horses to hold the carriage back when going down a pitch or declivity. Upon the part of the defendant the evidence tended to prove that the man in charge of the team at

the time of the accident was a skillful, careful, and competent driver; that the team was safe and gentle, and was hitched to the carriage in a safe and proper manner, with safe harness and gearing; that the plaintiff had directed the driver where to go, and which way to drive, and that just before the accident she directed him to leave the park by Park avenue, where there was a sharp declivity of one or two feet; that, in driving down this declivity, in some unknown manner one of the horses got his leg over a trace, which frightened him and caused him to kick, and, the carriage pushing forward on the horses, they commenced running down the street, that the driver checked the team to about a standstill, and requested the plaintiff and her daughter to alight from the carriage; that plaintiff's daughter stepped out without injury, but the plaintiff, being greatly excited, jumped out hastily, and sustained the injury complained of. The trial resulted in a verdict for the plaintiff, and, from the judgment which followed, this appeal is taken.

The record discloses that, when the plaintiff rested, the defendant moved for a nonsuit on the ground that the testimony was insufficient to sustain the allegations of the complaint, which motion the court overruled, and the defendant excepted. The contention for the defendant is, conceding that the driver was careless on the occasion of the accident, it shows but a single act of negligence, which is not, of itself, sufficient to establish his general incompetency; and for a like reason, conceding that the team became unmanageable, and began to kick and run, under the circumstances indicated, it only shows that the team was intractable or unsafe on this particular occasion, which is not sufficient to establish the character of the team as fractious and unsafe. This contention is based on the hypothesis that the negligence alleged as the cause of the injury imposed upon the plaintiff the burden of proving that the team furnished by the defendant was habitually fractious and unsafe, and that the person provided by the defendant to drive such team was incompetent, or not possessed of the requisite skill and qualifications for that business. As a consequence, the defendant claims that the testimony for the plaintiff showing that she sustained an injury by jumping from the carriage by direction of the driver, while the horses were running and kicking, under the circumstances disclosed, although the relation of passenger and carrier existed between the plaintiff and defendant, is incompetent and insufficient to show that such injury resulted from the negligence alleged, and therefore the court erred in overruling the motion for nonsuit and submitting such evidence to the jury. From these considerations it will be observed that, in the view taken by counsel, he has wholly ignored the evidence in support of the allegation that the team was not properly hitched to the carriage with safe gearing and appliances, and confined his objections to the evidence in support of the allegations that the horses were unfit or unsuitable for the service required, and the driver

incompetent and careless in the performance of his duty. He overlooks the fact that the complaint embraces nearly the whole field of the carrier's duty and obligations, and that evidence tending to prove negligence or failure to perform its duty in any essential particular alleged, adequate to have caused the injury, would be sufficient to sustain the verdict. But, as the objection raised involves the same principle as an objection to an instruction given by the court to which an exception is reserved, its consideration becomes important and imperative. The real point of the objection is that the alleged negligence to which it refers, considered in connection with the evidence in support of it, does not make a case which comes within the principle, as sometimes briefly stated, that the happening of an injurious accident raises a presumption of negligence, and throws upon the defendant the *onus* of showing that it does not exist. The gravamen of the complaint is that, while the relation of passenger and carrier existed between the plaintiff and defendant, the former was injured by reason of the defendant's negligence in furnishing a fractious and unsafe team, which, not being properly hitched with safe gearing to the carriage, nor provided with a careful and competent driver, became unmanageable, and began to kick and run away, when the plaintiff, at the urgent request of the driver, attempted to get out of the carriage, and was forcibly thrown to the ground and injured. As the relation of carrier and passenger is admitted, does the fact that the plaintiff sustained an injury, under the circumstances indicated, make a *prima facie* case of negligence against the defendant? The general rule undoubtedly is that, in actions for personal injuries caused by the alleged negligence of the defendant, the plaintiff is required to produce some evidence of negligence to warrant the judge in submitting the case to the jury. "But when the cause of the accident is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence for the jury, in the absence of explanation by the defendant, that the accident arose from want of proper care." *Scott v. London Docks Co.* 8 Hurlst. & C. 598. The law imposes the duty upon the proprietor of a stagecoach or other public vehicle to provide a reasonably safe conveyance, drawn by steady horses, with secure harness, and a skillful and competent driver. In the discharge of his duty the carrier is bound to use the utmost care and diligence of cautious persons to prevent injury to passengers. In *Crofts v. Waterhouse*, 8 Bing. 321, Best, Ch. J., said: "The coachman must have competent skill, and use that skill with diligence. He must be well acquainted with the road he undertakes to drive. He must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and

they are answerable for any injury or damage that happens." But it is not meant by this language that a stage proprietor is a warrantor of the safety of his coach, its equipments, the competency of his driver, or other appliances used, but that he is bound to use the utmost diligence and care in making suitable provisions for those whom he carries. So, in *McKinney v. Neil*, 1 McLean, 540, it is held to be the duty of a stage proprietor "to furnish good coaches, gentle and well-broke horses, good harness, and a prudent and skillful driver," and that he is liable to any passenger who may receive an injury for any defect in these particulars; and Greene, J., said: "With horses gentle and well broke, with coaches and harness good and strong, with drivers sober, prudent and skillful, a stagecoach line might be regarded as managed with human care and foresight." *Prink v. Coe*, 4 G. Greene, 558, 61 Am. Dec. 141. The liabilities of the carrier arise from the duties which the law imposes, and, while he is not an insurer against all defects, his liability extends to such as might be guarded against by care and skill; so that, although the duty is not imposed upon him of conveying his passengers with absolute safety, yet his liability goes to the extent of requiring that he shall use all care and diligence in providing a suitable vehicle, safe horses and harness, and a qualified driver. This is based on the principle that, the means of transportation being under the management of the carrier, and their fitness for such service peculiarly within his knowledge, he is bound to be supplied with every reasonable requisite to insure the safety of his passengers. This being so, when the duty is performed in the ordinary course of things, an accident would not be likely to happen; but, when one occurs from some apparent defect in the means, appliances, men, or apparatus employed by such carrier in the transportation, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care. Hence, the rule is well settled that in an action by a passenger for personal injuries when it is made to appear that the accident resulted from defects in the carriage or in the appliances, or in the want of skill of the driver, or in the unfitness of the team, the presumption of negligence arises, and the *onus* is cast upon the defendant to relieve himself of responsibility by showing that the injury was the result of an accident which the utmost care and foresight could not have prevented. When, therefore, a plaintiff establishes the relation of carrier and passenger, the fact that he received an injury from any defect in the instrumentalities which it was the duty of the carrier to furnish as a means for his transportation makes a *prima facie* case of negligence against the carrier. The *onus* is then cast upon the carrier to show that he used reasonable care and diligence in providing a suitable conveyance, steady and well-trained horses, good harness and proper appliances for the journey, and a competent driver, who acted with reasonable caution and skill. In a word, if a carrier would relieve himself from liability, he must rebut

the presumption of negligence which arises from the happening of the accident by showing that the injury was not occasioned by any defect in the hack, or want of care or skill in the driver, or any neglect or want of diligence or foresight on his part. *Christie v. Griggs*, 2 Campb. 80; *Jackson v. Tollett*, 3 Stark. 84; *Sales v. Western Stage Co.* 4 Iowa, 547; *Farish v. Reigle*, 11 Gratt. 711, 63 Am. Dec. 666; *Mauzy v. Talmadge*, 2 McLean, 157; *Stokes v. Saltonstall*, 88 U. S. 13 Pet. 181, 10 L. ed. 115; *Boyce v. California Coach Co.* 25 Cal. 468; *Treadwell v. Whittier*, 80 Cal. 589, 5 L. R. A. 498; *Story*, Bailm. §§ 592-601.

In the case at bar the record discloses the circumstances under which the horses began to run and kick, the conduct of the driver on the occasion, and how the injury occurred to the plaintiff. The defendant claims that these circumstances afford no inference that it failed in its duty to provide a safe and steady team, or a careful and competent driver. Counsel argues that the fact that the team ran and kicked, or that the driver was careless, on this occasion, does not show that the team were addicted to this habit or vice, or that the driver was generally incompetent, and hence was not evidence that the plaintiff's injury was caused by reason of the defendant's negligence in providing an unsafe or unreliable team, or a careless and incompetent driver. This is putting the *onus* on the person who has no means of knowing the temper or character of the team, or the particular skill or qualifications of the driver, to show that the team is habitually vicious or unsafe, or that the driver is without the requisite qualifications for his position. In *Simson v. London General Omnibus Co.*, L. R. 8 C. P. 891, a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle, but there was no evidence to show that this particular horse was vicious or a kicker. It was contended that a casual kick by one of the numerous horses employed by the company was no evidence of a want of due and reasonable care on its part. It was argued, as here, that a horse which has never kicked before may do so once without acquiring the character of being vicious, and hence that the burden of proving the horse unsafe rested on the plaintiff. But in that case Bovill, *Ch. J.*, said: "In the present case a horse drawing an omnibus belonging to the defendants, without any assignable cause, kicks out, and strikes and injures the female plaintiff, who was riding in the vehicle. It seems to me that that alone presents a case which calls for some explanation on the part of the proprietors. It is said that it is the nature of horses to kick. But I think it ought not to be the nature of a horse employed to draw a public vehicle to kick. Proof having been given that the horse in question had misconducted itself in the way charged, the burden of showing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima*

facie evidence for the jury." In the present case, the fact that the horses ran and kicked, and the driver was unable to control them, under the circumstances disclosed, tended to show that the defendant, in disregard of its duty, had provided wild and unsafe horses, and a careless and incompetent driver, as charged, and cast the *onus* upon the defendant of showing that such horses were not habitually unsafe or unmanageable, or the driver negligent or incompetent, or something to account for the running and kicking of the horses, or the inability of the driver to control them, on this particular occasion. In *Roberts v. Johnson*, 58 N. Y. 616, the evidence tended to show that, while the plaintiff was getting out of the omnibus, the horses started, whereby plaintiff was violently thrown upon the ground, and injured. Grover, *J.*, said: "This showed, *prima facie*, either that the horses were unsuitable for such service, or the driver incompetent or negligent in the performance of his duty. If the starting of the horses was attributable to some other cause, for which the defendants were not responsible, it was for them to show it. This results from the fact that where proper horses and suitable drivers, who attend to their business, are employed, the horses will not start while passengers are getting into and out of the stage. If anything occurs, causing such start, which is beyond the control of the driver or proprietor, they can readily show it. Such fact is peculiarly within their knowledge, while, in most cases, the persons injured would be entirely ignorant of it." So here, with equal reason, the fact that the horses misconducted themselves showed, *prima facie*, either that the horses were wild and unsafe for such service, or that the driver was negligent and incompetent in the performance of his duty; for, if the running and kicking of the team was attributable to some other cause, for which the defendant was not responsible, it was for the defendant to show it, as such matter was peculiarly within its knowledge, and, generally, without the knowledge of the person injured. But there was other evidence. It was proved that the horses were without breeching, and that the pole was not firmly fastened down by some appliance, so that the horses could hold the carriage back, and prevent it from running upon them, as happened when the team turned from the park into the avenue, in passing down a declivity of a foot or so, when one horse got his hind leg over the trace, and both horses commenced to run and kick. The evidence for the defendant fails to account for the horse's getting his leg over the trace, but says that, "in driving over this declivity, in some unknown manner one horse got his leg over the trace." The cases cited by counsel to the effect that the fact that a horse becomes unmanageable on one occasion does not show him to be vicious in disposition are in actions where no contractual relations existed between the parties, and those that a single act of negligence by a servant does not establish general incompetency are in actions where the relation of master and servant existed. As Gordon, *J.*

said: "An employé, by his contract, is presumed to run the ordinary risks of the machinery and appliances he is engaged to supervise or use. He is also held to a knowledge of the character and obvious defects of such machinery and appliances, as well as the skill and habits of his coservants. A passenger, on the other hand, neither can know, nor is presumed to know, anything about these things. He has paid his passage, and he is wholly passive in the hands, and at the mercy, of the transportation company and its agents. The doctrine advocated by the defendant's counsel, by which the passenger would be put on a par with an employé, will not do; it accords neither with reason nor precedent. *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 359, 39 Am. Rep. 787.

Whether the plaintiff was contributorily negligent in jumping from the carriage, under the circumstances, depends upon whether her act was precipitate or rash, or such as a person of ordinary prudence might do. The evidence shows that the plaintiff was in a closed coupé, that the horses were running and kicking, and that the driver, who appeared to be frightened and unable to control them, was calling excitedly to the plaintiff and her daughter, "For God's sake, jump out!" These circumstances showed presumptively that the negligence of the defendant had placed the plaintiff in a situation of imminent peril. In such case the law does not require of the passenger the exercise of all the presence of mind and care of a prudent man; and if the plaintiff, in endeavoring to escape from such danger, either by following the directions of the driver or the dictates of her own judgment, acted as a person of ordinary prudence would have done under similar circumstances, she was not negligent. 2 Am. & Eng. Encyclop. Law, p. 766. Hence, whether she acted negligently or not was a question of fact to be submitted to the jury. So, also, in determining whether the plaintiff was negligent, the jury were not only

to consider the presumption arising from the happening of the accident and injury, but all the facts and circumstances in evidence.

But it is claimed that, as the plaintiff directed the driver to go down the avenue, so as to afford her an opportunity to view a certain house which was being erected, she assumed the entire control of the driving, and therefore was responsible for the accident which occurred in traveling down such street. This contention relates to that portion of the charge in which the court said that "the plaintiff did not take the responsibility of the road being safe, but left that to the driver's judgment." It is usual for persons who hire a carriage and driver to give general directions as to places where they desire to be conveyed, and the driver is expected to know whether the roads over which he must pass to reach the places to which he is directed to go are suitable and reasonably safe for passage. The carrier cannot escape liability for an injury caused by driving a team over an unsafe road, by showing that the injured passenger directed or expressed a wish to travel over such road. As the court said in *Anderson v. Scholey*, 114 Ind. 553: "It is true, the driver testified that he was in the road, pursuing the right track, and that he pulled to the left, thereby upsetting the conveyance over the bank, because the plaintiff told him repeatedly he was too far to the right. The plaintiff denies this. However the fact may be, it was the duty of the defendants to supply the coach with a driver who knew the way for himself, and who would not be controlled by the suggestion of a passenger on the inside, while he occupied the seat charged with the duties and responsibility of driver." The fact is, that there is no evidence that the road was unsafe. We do not think, therefore, that the evidence was incompetent, or that the court erred in refusing the nonsuit, or that there was error in the instructions.

It follows that *the judgment must be affirmed.*

SOUTH CAROLINA SUPREME COURT.

William L. MAULDIN, *Respt.*,

v.

City Council of GREENVILLE, *Appt.*

(.....S. C.....)

1. The law of the land within the meaning of a constitutional restriction upon interference with private rights means the common law and the previously existing statute law.
2. Prior laws and decisions not directly or by necessary implication denied in a new constitution, survived with full force and effect.
3. The assessment on abutting owners of the whole or part of the cost of grading, paving, or otherwise improving public streets, on the basis of supposed benefits to their property,

is not according to the law of the land and is unconstitutional unless directly authorized by the constitution.

4. Charging upon abutting owners the cost of improving sidewalks and sewers in front of their property, having been recognized as valid prior to the adoption of a state constitution, must be regarded as embraced in the law of the land to which the constitution refers.

(January 22, 1895.)

A PPEAL by defendant, from a judgment of the Common Pleas Circuit Court for Greenville County, in favor of plaintiff in an action brought to enjoin the collection of a cer-

NOTE.—The above case is a striking one because of its conflict with nearly all the authorities in this country on the constitutional question as 27 L. R. A.

shown in the note to *Raleigh v. Peace* (N. C.) 17 L. R. A. 380.

tain tax assessment. *Reversed in part; affirmed in part.*

The exceptions which became the grounds for appeal are as follows:

"(1) Because his honor erred in holding that all of the material allegations of the complaint were admitted by the defendant. (2) In ordering and adjudging that the defendant, the said city council of Greenville, their servants and agents, be, and they are, perpetually enjoined and restrained from collecting or attempting to collect the special tax or assessment levied by them upon the property of the plaintiff and other owners of real estate situate on Main street, in the said city of Greenville, to pay the expenses of improving the said street. (3) In holding that the act of the general assembly (20 Stat. at L. p. 1372) authorizing the improvement of Main Street, in said city of Greenville, and the levying and collection of the assessment complained of, was null and void, in that it violated sections 23 and 36 of article 1, section 33 of article 2, and sections 8 and 9 of article 9, of the Constitution of South Carolina. (4) In not holding that the answer of the defendant constituted a sufficient return to the rule to show cause theretofore granted, and therefore in not dissolving the temporary injunction of date of May 20, 1893. (5) In not holding that the facts alleged in plaintiff's complaint were insufficient to entitle plaintiff to the injunction and relief prayed for. (6) In not holding that by reason of the facts alleged in defendant's second and third defenses, as contained in their answer to plaintiff's alleged cause of action, as set out in his complaint, plaintiff was estopped from disputing the validity of said assessment or his liability on account thereof. (7) In not holding that the acts and proceedings of defendant touching the matter complained of in plaintiff's complaint in improving the street, ascertaining the cost thereof, and levying and collecting the assessment in question, were lawful and regular, being authorized, by act of the general assembly for this state (vol. 20, p. 1372), and ordinance passed in pursuance thereof. (8) In not holding that plaintiff had a complete and adequate remedy at law for any injury threatened him by reason of the collection of the assessment complained of, and therefore not entitled to invoke the aid of the court of equity."

Mr. Joseph A. McCullough, for appellant:

Assessing the expense of local improvements upon the property in the vicinity does not contravene the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Dill. Mun. Corp. § 754; Cooley, Const. Lim. pp. 617, 618; Cooley, Taxn. p. 624; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 363; *Raleigh v. Pence*, 17 L. R. A. 830, 110 N. C. 82; *Speer v. Athens*, 9 L. R. A. 402, 85 Ga. 49; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

37 L. R. A.

This species of taxation is referable to the taxing power of the state, which apart from constitutional inhibitions, knows no restraint whatsoever except such as necessarily grows out of the nature of the power itself.

Cooley, Const. Lim. p. 593; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 416-423, 4 L. ed. 603-606; *Providences Bank v. Billings*, 29 U. S. 4 Pet. 514, 7 L. ed. 939; 2 Dill. Mun. Corp. § 737; Cooley, Taxn. § 8, p. 622; *People v. Brooklyn*, *supra*; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Speer v. Athens* and *Raleigh v. Pence*, *supra*; *Birmingham v. Klein*, 8 L. R. A. 369, 89 Ala. 461.

The general assembly is not to look to the organic law to ascertain what is permitted it to do, but only to find what inhibitions are put on its action.

Mobile County v. Kimball, 102 U. S. 703, 26 L. ed. 241; *Willard v. Presbury*, 81 U. S. 14 Wall. 676, 20 L. ed. 719; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, *supra*; *Re Jager*, 29 S. C. 438; *Charleston v. Pinckney*, 3 Brev. 217; *Ex parte Lynch*, 16 S. C. 82; *Feldman v. Charleston*, 23 S. C. 66, 55 Am. Rep. 6; *State Hayne*, 4 S. C. N. S. 420.

The constitutional provisions refer solely to state taxation, or, when they go further, to the general taxation for state, county, and municipal purposes; and though assessments are laid under the taxing power, and are in a certain sense taxes, yet they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes.

Cooley, Taxn. pp. 616-636, and note 4; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 198, 37 L. ed. 134; Elliott, Roads & Streets, p. 369; *Hoyt v. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Birmingham v. Klein*, *supra*; 2 Dill. Mun. Corp. §§ 755, 757, and note; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; 2 Desty, Taxn. 1252, note 3; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *Speer v. Athens*, 9 L. R. A. 402, 85 Ga. 149; *Goodrich v. Winchester & D. Turnp. Co.* 26 Ind. 119; *Holtzhauer v. Newport*, 94 Ky. 396; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251; *Dorgan v. Boston*, 12 Allen, 223; *Williams v. Detroit*, 2 Mich. 560; *Daily v. Swope*, 47 Miss. 367; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Raleigh v. Pence*, 17 L. R. A. 830, 110 N. C. 82; *Winona & St. P. R. Co. v. Watertown*, 1 S. Dak. 46.

Frontage may lawfully be made the basis of apportionment.

Cooley, Taxn. 614, note 3. See also 2 Desty, Taxn. 1368, notes 1, 2; 2 Dill. Mun. Corp. § 752; *Beaumont v. Wilkes-Barre*, 142 Pa. 196; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *O'Reilly v. Kingston*, 114 N. Y. 439; *Joyes v. Shadburn* (Ky.) April 8, 1890; *Harrisburg v. McCormick*, 129 Pa. 218; *Jennings v. Le Breton*, 80 Cal. 8; *Washington Avenue*, 69 Pa. 252, 8 Am. Rep. 260; *Davis v. Lynchburg*, 84 Va. 861; *Speer v. Athens*, *Raleigh v. Pence*, and *Barber Asphalt Paving Co. v. Gogreve*, *supra*.

In the absence of the expression of a clear intent that "special taxes" when laid on real property shall be laid in proportion to its value, the legislature may prescribe any other stand-

ard, which in its judgment would be equitable and just.

Charlotte, C. & A. R. Co. v. Gibbs, 27 S. C. 385; *State v. Hayne*, 4 S. C. N. S. 403; *Information v. Oliver*, 21 S. C. 818; *Re Jager*, 29 S. C. 438; *State v. Columbia*, 6 S. C. N. S. 1.

The rule of "equality and uniformity" prescribed in cases of taxation for state and county purposes does not require that all property or all persons in a county or district shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 705, 28 L. ed. 571; *Hurford v. Omaha City*, 4 Neb. 386; *Bishop v. Tripp*, 15 R. I. 466. See also 1 *Desty*, Taxn. 191; 2 *Desty*, Taxn. 1252; 2 Dill. Mun. Corp. §§ 748, 755, 759, 778; *Cooley*, Taxn. 680-683; *Raleigh v. Peace*, 17 L. R. A. 380, 110 N. C. 82; *Speer v. Athens*, 9 L. R. A. 402, 85 Ga. 49.

Plaintiff is estopped from disputing the validity of the assessment complained of.

Where the owner stands by and sees the street improved, on a contract made by council, without attempting by injunction to prevent it, after the work is completed or nearly completed, he cannot refuse to pay the assessment.

2 *Desty*, Taxn. 666, 1424; *Elliott, Roads & Streets*, 420, 440; 2 *Wait*, Pr. 9; 2 Dill. Mun. Corp. p. 1122, and note; *Ashton v. Rochester*, 183 N. Y. 187; *State v. Jersey City*, 53 N. J. L. 490; *Muscatine v. Chicago*, R. I. & P. R. Co. 79 Iowa, 645; *Jenkins v. Steller*, 118 Ind. 275; *Powers v. New Haven*, 130 Ind. 185; *Ritchie v. South Topeka*, 88 Kan. 369; *Murdock v. Cincinnati*, 44 Fed. Rep. 726.

Messrs. Earle & Mooney, for respondent:

In this state, the constitution expressly limits the power of taxation, and throws around its exercises many safeguards.

Whaley v. Gaillard, 21 S. C. 560; *Feldman v. Charleston*, 28 S. C. 57, 55 Am. Rep. 6.

Where property is to be taxed, the constitution, section 86 of article 1, and section 33 of article 2, fixes upon value as the means of distributing the burden that ought to be borne by the property.

State v. Hayne, 4 S. C. N. S. 424.

The act of the legislature which attempts to adopt a different rule cannot be sustained, unless it can be shown that the constitutional limitations do not apply to assessments for local improvements. Taxes and assessments are synonymous.

State Bank v. Charleston, 8 Rich. L. 347; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Hill v. Hydon*, 5 Ohio St. 243, 67 Am. Dec. 289; *McBean v. Chandler*, 9 Helsk. 349, 24 Am. Rep. 308.

The improvement of Main street in the city of Greenville is certainly a public purpose. Once admit that the work to be done is a public purpose, and it follows that the tax to be imposed for the raising of the money necessary to accomplish the work must be laid subject to all the restrictions and limitations imposed by the constitution upon the exercise of the taxing power.

Weeks v. Milwaukee, 10 Wis. 258; *Municipality No. 2 of New Orleans v. White*, 9 La. Ann. 447; *Chicago v. Larned*, 34 Ill. 208. 27 L. R. A.

When a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality for the general good as cleaning, watching, and lighting.

Hammitt v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; *Re Saw-Mill Run Bridge*, 85 Pa. 163; *Norfolk v. Chamberlain*, 17 Va. L. J. 58; *Lexington v. McQuillan*, 9 Dana, 518, 35 Am. Dec. 159; *Paris Trustees v. Berry*, 2 J. J. Marsh. 483.

As to all taxation apportioned upon property, there must be taxing districts, and within these districts the rule of absolute uniformity must apply.

Cooley, Const. Lim. p. 495.

The legislative authorization to make assessments for local improvements must be unequivocally and strictly construed.

10 Am. & Eng. Encyclop. Law, p. 276, note; *Henderson v. Lambert*, 14 Bush, 24; 2 Dill. Mun. Corp. 8d ed. § 811, and cases cited.

Estopped by conduct is where one party has been induced by the conduct of the other to do or forbear to do something which he would not or would have done, but for such conduct of the other party.

Bigelow, Estoppel, 480; 2 Pom. Eq. Jur. § 817; *Bull v. Rowe*, 13 S. C. 370.

This principle does not apply where the expenditures are made upon the public domain, or upon the lands of the person making them, for then third persons have no right to object.

Gray v. Bartlett, 20 Pick. 186, 33 Am. Dec. 208.

An estoppel can never arise founded upon an omission to object to an act which the other party had a right to perform.

Corning v. Troy Iron & Nail Factory, 40 N. Y. 221; *Ramsden v. Thornton*, L. R. 1 H. L. 129; *Keese v. Denver*, 10 Colo. 112.

Pope, J., delivered the opinion of the court:

This action in the court of common pleas for Greenville county had for its object a perpetual injunction against the city council of Greenville, restraining them from any assessment of the property of the plaintiff and other citizens of said city who owned land abutting on Main street, beginning at Ready river, and thence up to a point on said Main street where it is crossed by North street, to pay for two thirds of the cost of paving the roadway and sidewalk of such street. The basis of the demand for such relief was—First, that the act of the general assembly which empowered said city council to make an assessment of the property of those citizens for the cost of the paving of Main street and its sidewalks, so that such citizens should pay two thirds of the cost of such improvements (said assessment of such two thirds to be computed against such property holders *pro rata*, according to the frontage of their property on said street, respectively), was unconstitutional; and, second, because such city of Greenville made such assessment without giving the citizens affected thereby any opportunity to contest such

assessment so made. The defendants denied that such legislation was unconstitutional, and then, in case the court should hold it unconstitutional, claimed that the plaintiff was estopped by his conduct in not opposing its enactment by the legislature, and afterwards by his conduct in not opposing the active steps of the defendants to execute such law. The circuit court, after a hearing of the cause, confined to the complaint and answer, issued the injunction prayed for; and from this decree, therefore, the defendants have appealed. The grounds of appeal etc., will appear in the report.

If the act of the general assembly authorizing the defendant to make this assessment is unconstitutional, no other question raised by the appeal may be said to fairly arise upon the record of the case, and therefore necessary to be considered and decided. The act in question may be found on page 1872, 20 Stat. at L., and its text is as follows: "An act to provide for the grading and paving of the streets, public ways and alleys of the city of Greenville.

"Section 1. Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly and by the authority of the same, that the mayor and aldermen of the city of Greenville shall have power and authority, and it is hereby made their duty, to grade, pave, macadamize and otherwise improve for travel and drainage the streets, public ways, and alleys of said city or such of them as they may deem advisable, and to construct sidewalks and to pave the same and put down crossings, curblings, drains, side drains, and cross drains, such as may be necessary in their judgment to carry out the provisions of this act.

"Sec. 2. In order to more effectually carry out the authority hereby delegated, the said mayor and aldermen shall have power to assess one third of the costs of such grading, paving, macadamizing and improving said streets, public ways, and alleys of said city both as to sidewalks and roadways upon the abutting property owners on each side of said streets, public ways, and alleys, so that said property in the aggregate shall pay two thirds of the said costs, and the said city the remaining one third. Said assessments to be paid by said property holders *pro rata* according to the frontage of the property on said streets, public ways and alleys, respectively, and the money arising from such assessments shall be applied to the payment of interest on and as a sinking fund to redeem the same under such regulations as said mayor and aldermen may by ordinance prescribe.

"Sec. 3. The assessment provided for in section 2 of this Act shall be collected as other taxes in said city are collected and in such installments as the said mayor and aldermen shall by ordinance prescribe.

"Sec. 4. Whenever the said mayor and aldermen shall determine to improve any street, public way or alley as hereinbefore provided, they shall cause the same to be carefully surveyed, and the proposed grade definitely established, and ascertain as accurately as possible the cost of the contemplated improvement, and shall also cause the frontage of each piece of property fronting on said street, public way or alley to be determined and fixed so that the assessment on each property holder may be easily ascertained.

"Sec. 5. To obtain the means of carrying out the provisions of this act on the part of the city the said mayor and aldermen may issue and negotiate bonds of said city under the provisions of section 31 of the charter of said city.

"Sec. 6. The said mayor and aldermen shall have power and authority by ordinance to provide the details necessary and requisite for carrying out the provisions of this act." Approved December 22, A. D. 1891.

Just now, greater particularity is not needed, to bring the issue of the constitutionality of this act before the court, than to say that the defendants have passed the ordinances required by this act, and made the assessments therein contemplated, upon the plaintiff, as one of the property owners whose property abutted on the front of Main street, in said city, for one third of such cost.

The first question that presents itself here is, What power of legislation has the general assembly of this state? It may savor of extreme care, but it is eminently proper that this court should declare its recognition of responsibility in undertaking to pass upon the rights, duties, and powers of a co-ordinate branch of the state government. We are not unmindful that in the bill of rights, incorporated in—as a part of—our Constitution, section 26 distinctly provides: "In the government of the commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. . . ." Yet it is made the duty of this tribunal to decide when either of the other two has exceeded the grant of power under the constitution and laws, when such a question is fairly involved in an action or special proceeding between parties litigant; but any decision which denies efficacy to an act passed by the legislature, for the want of constitutional power, is only made after an allowance by us of all presumptions in favor of the rightfulness of such exercise, which are required to be overcome, clearly and certainly, by him who assails such constitutional power.

Our state constitution, as the grant of its power to the general assembly, in section 1 of article 2, is in these words: "The legislative power of this state shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives' and both together the 'General Assembly of the State of South Carolina.'" We may announce as the result of our considerations, fortified by decisions both before and after the adoption of this, our present constitution, that by the use of the language here quoted the people, in convention assembled, clothed the general assembly with the whole legislative power capable of being exercised within our borders, subject only to such restrictions upon and regulation of such power as are embraced in the constitu-

tion itself, or that of the United States. *State v. Charleston*, 10 Rich. L. 501; *State v. Hayne*, 4 S. C. N. S. 420; *Pelzer v. Campbell*, 15 S. C. 592, 40 Am. Rep. 705; *Ex parte Lynch*, 18 S. C. 83; *Utsey v. Charleston, S. & N. R. Co.* 88 S. C. 899; and other cases since decided. As before remarked, all presumptions are solved in favor of the constitutionality of an act of the legislature, and it devolves upon one who assails it to point out, certainly and clearly, where it is unconstitutional. This has been undertaken by the respondent in the case at bar, and the duty is now devolved upon this court to pass upon these several propositions.

A municipal corporation, in this state, can only exercise power with which it is clothed by the general assembly. *State v. Mayville*, 12 S. C. 76. And, as we have before seen, the general assembly is only able to vest such municipal corporation with powers within the restrictions contained in our own state constitution and that of the United States. The power of taxation may be given to a municipal corporation, but such power, when exercised by such municipal corporation, must not only be exerted according to the charter thereof, but also within the limits of the constitution of the state. Among the powers of the corporation of the city of Greenville is the control of its streets, ways, etc.; and, within certain well-defined restrictions, such municipality may tax the property within its territorial limits to improve and keep in repair such streets, ways, sidewalks, etc. The respondent concedes the constitutionality of the act of the general assembly which clothes the city of Greenville with the right, by taxation, to raise the funds necessary to pay for one third of the cost of the proposed improvements to the roadway and the sidewalks of the city of Greenville; but he goes further, and insists that the whole of such cost should be paid from general taxation in said city. It is too late in the day to question, in our courts, that highways (and public streets in our cities and towns are highways) belong to the public. Their being laid out over the lands of private individuals, without compensation to the private individuals, was maintained in our courts prior to our Constitution of 1868. *Lindsay v. Charleston Comrs.* 2 Bay. 88; *Patrick v. Cross Roads Comrs. on Charleston Neck*, 4 McCord, L. 541. Since our Constitution of 1868, such power exists, but compensation therefor must be first provided. Const. 1868, art. 1, § 23. But, for highways (and, as before remarked, Main street, in the city of Greenville, is a highway), belonging to the public, may taxes be laid upon private citizens, who happen to own the land abutting upon such highway, to improve such a highway, in exoneration of all other citizens who own property in said city? This is a serious question. Many other states, speaking through their courts of last resort, have so affirmed. It is always to be regretted when a difference in judgment upon the same subjects exists in the courts of last resort in the different states of this Union. Our oath of office requires us to uphold the laws of this commonwealth, subject to such

restrictions thereon as exist in the constitutions of this state and that of the United States. Among the laws of this commonwealth is the organic law, as found in the twelfth and fourteenth sections of article 1 of our Constitution of 1868. The latter section: "No person shall be arrested, imprisoned, dispoiled or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. . . ." When the clauses of the constitution of the state empowering the general assembly to clothe a city, town, or village with the right to levy a tax are considered, we must also consider sections 12 and 14 of article 1 along with them. The sections of our constitution authorizing the general assembly to clothe one of its municipalities with the power of taxation are sections 8 and 9 of article 9, in these words:

"Sec. 8. That the corporate authorities of counties, township, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law.

"Sec. 9. The general assembly shall provide for the incorporation and organization of cities and towns, and shall restrict their power of taxation, borrowing money, contracting debts and loaning their credit."

Great stress is laid by appellants upon the two decisions of this court (*State v. Hayne*, 4 S. C. N. S. 408, and *State v. Columbia*, 6 S. C. N. S. 1) as construing the power of taxation by the state itself, in the first case, and of taxes laid by a city, in the second case. These cases have been recognized by this court repeatedly since they were rendered, and we do not propose to question their ruling authority now. But, when examined, it will be ascertained that *State v. Hayne*, *supra*, affirmed the constitutional power of the general assembly of this state to require a license fee to be paid by an attorney, in addition to the tax upon property, real and personal, while that of *State v. Columbia*, *supra*, affirmed the right of the city of Columbia, under its charter, to require a license fee to be paid by a bank within its limits, in addition to a tax upon its property. When these cases are critically examined, it will be discovered that the principles presented by the case at bar were in no wise involved then.

We think it will be found that the case of *State v. Charleston*, 12 Rich. L. 702, decided by the court of errors in this state in 1860, will throw great light upon the case at bar. In the case just cited, the city council had determined that it was expedient to widen George street, in said city, and for that purpose had, at an expense of \$26,000, purchased the land on the north side of said street. Under the Act of 1860 the city council had ap-

pointed commissioners, whose duty it was to ascertain the cost and expense of widening said street, and to assess such cost and expense, to be paid by the proprietors of lots and houses on the south side of said street, according to the benefit accruing to such lots. When these assessments were made, such proprietors of lots and houses refused to pay the same, upon the ground that such assessment was "against the laws of the land, in derogation of the right of trial by jury, and is unconstitutional and void." This question arose under the Constitution of 1790, in the ninth article, whose second section provided that "no freeman of this state shall be taken, or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life or liberty, or property but by the judgment of his peers, or by the law of the land." While *Chancellor* (afterwards *Chief Justice*) Dawkins was discussing the defense that such power could be successfully referred to and bottomed upon the general power of taxation inherent in every government, he said: "No power is more necessary, none more universally recognized, and, it may be added, none the unjust exercise of which has been, in all countries and all ages, a more fruitful source of complaint and dissatisfaction. Taxes are collected in a summary manner, and without an opportunity to the party of being heard. This legal process (says Judge Nott in *State v. Allen*, 2 McCord, L. 55), which was originally founded in necessity, has been consecrated by time, etc., must be an exception to the trial by jury, and is embraced in the alternative in the law of the land. (Italics ours.) . . . But in the same case it was held by the court that an imposition by the legislature, by the name of a tax, yet wanting its qualities, could not be levied and collected as such without violation of the constitutional rights of the citizen, and the act was null and void. Essential characteristics of any system of taxation (properly so called) are *certainity, equality, universality*." The taxation proposed by the city council of Greenville upon the plaintiff (respondent), under the light furnished by *State v. Charleston*, *supra*, in order to be legal, must be either directly authorized by the constitution, or by "the law of the land." Certainly, there is no provision in the constitution which directly, or by necessary implication, authorizes this tax. Is there authority for this tax in "the law of the land?" What does this term, "law of the land," mean, as interpreted by our courts of last resort? Judge O'Neill, in pronouncing the judgment of the court of errors in this state in the case of *State v. Simons*, 2 Speers, L. 761, thus stated the doctrine: "In this state, taking as our guide *Zylstra's Case*, 1 Bay, 384; *White v. Kendrick*, 1 Brev. 471; *State v. Maxey*, 1 McMull. L. 502,—there can be no hesitation in saying, that these words mean the common law and the statute law existing in this state at the adoption of our constitution (1790). Altogether, they constitute the body of the law, prescribing the course of justice to which a freeman is to be considered amenable in all time to come."

An examination of our statutes prior to 1790, relating to the improvement of streets and sidewalks, will show that the provisions therein related to the city of Charleston, and that such statutes were confined,—that of 1698 (7 Stat. at L. p. 12) to requiring every inhabitant of Charleston to mend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed, on penalty of forfeiting, for each house, a penalty, to be collected under the warrant of a justice of the peace; and that of 1764 to requiring the construction of sewers or drains and sidewalks. These statutes were considered and upheld, with reluctance, in the two cases of *Ovishanks v. Charleston*, 1 McCord, L. 860 (decided in 1821), and *Yeadon v. Council*, ——— (decided in 1828). And when the Act of 1850 (12 Stat. at L. p. 5455) was considered by the court in the case of *State v. Charleston*, *supra*, the court of errors distinctly repudiated, as foreign to our laws, any mode of taxation for the improvement of the streets of the city of Charleston which looked to the assessment of property abutting on George street, in that city, according to the benefits to be derived from such improvement, to such land-owners, under the said Act of 1850, saying: "As has been said, the general rule knows nothing about *partial assessment for benefits*, or the selection of a portion for a class. Existence of persons, or the possession of property, and not the supposed benefits, are the guide. When each is taxed according to the value of his property, both equality and certainty may be attained, to a reasonable extent, but what may be beneficial or otherwise is a matter of opinion or fancy or vague conjecture." (Italics ours.)

These principles may be deduced from that case: (1) The right to tax persons or property abutting upon a public street, for improvements made upon such public street, in exoneration of other persons or property within the same territorial limits as are the persons or property abutting upon a highway or public street, is opposed to "the law of the land," and is therefore unconstitutional. (2) The right to tax property abutting upon a public street, to pay the costs of improvements upon the same, according to the supposed benefit to such property by such improvement, is distinctly repudiated. (3) The right to tax the land abutting upon public streets for the costs of improvements of sidewalks and sewers in front of such land, is recognized, because such power was exercised by reason of statutes passed before the adoption of the Constitution of 1790, and may therefore be said to be embraced in "the law of the land." This principle was recognized with reluctance, and only because of previous decisions affirming its existence. We heartily sympathize in the reluctance expressed, and only affirm its existence under the authority of such previous adjudications.

When our constitution was adopted, in 1788, this case of *State v. Charleston*, *supra*, had construed the legislative power of this state, so far as its exercise in the direction of requiring property abutting upon streets to pay for improvements upon the same ac-

cording to the benefits derived therefrom was concerned; and, as before remarked, there is no provision of such instrument which directly or indirectly contravenes the same. The principle is well recognized that when, previous to the adoption of a new constitution, there exist laws and decisions construing such laws, and this force and power is not directly or by necessary implication denied in the new instrument, such laws and decisions survive with full force and effect. Such being the case, we do not feel at liberty to disregard them, unless we would assume the responsibility, by reversing such decisions, of asserting the existence in our commonwealth of a different system. This latter step we do not feel at liberty to adopt. It may be frankly admitted that we have employed much of the time since the hearing of this appeal in considering this very question. This consideration of the subject has tended to increase our respect and acquiescence in the previous policy of the state, as being bottomed upon the immutable principles of right in the citizen to the enjoyment of his property free from any danger of its being taken from him by such exercise of arbitrary power, when it is remembered that the fundamental object of government is the protection of the life, liberty, and property of each individual residing within a state; that the exercise of the right of taxation is supported by the truth that every individual should contribute of his means to defray the expenses of government, to enable it to protect life, liberty, and property within its territorial limits; that such taxation is for a public purpose, and must be uniform in its imposition upon all the persons and property within a state, when for state purposes, and upon all the persons and property within a municipal corporation, when for its purposes; that there exists no power, except the police power, in a state, to compel an individual citizen to improve his property, and of this class *Charleston v. Werner*, 88 S.

C. 488, is an instance, and that the improvement of public streets does not fall within the police power; that the experience of mankind has established, as a truth, that, in republics, no greater protection from unjust taxation exists than the power of the people, who select the representatives who lay taxes upon them, to change such representatives, if the taxing power has been unjustly exercised, but that the beneficent results of this principle of our government, in this respect, are largely denied when onerous taxation upon a few, to the exclusion of the many, is laid by representatives chosen by the many against the united opposition of the few. Granted, as it should be, that eminent text-writers, and the judicial tribunals of many states of this Union, adopt a different view of this matter; why may not the people of this commonwealth adopt a domestic policy at variance with the views of others? We have a settled policy of our own on other grave subjects,—for instance, the indestructibility of the contract of marriage, except by death. No reason exists, or can be suggested, why the domestic policy of this state touching the mode of taxation for local improvements should be made to conform to that adopted by any of our sister states.

It is therefore the judgment of this court that so much of the judgment of the Circuit Court as grants a perpetual injunction against the defendants, preventing any assessment upon the property of the plaintiff, and other citizens of the city of Greenville in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street, in said city, be affirmed; but when the said judgment enjoins the defendants from levying and assessing upon the plaintiff, and others in like plight with him, the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed.

Gary, J., did not hear this case.

OHIO SUPREME COURT.

David HENDERSON, *Ptff. in Err.*,

v.

Charles C. JAMES.

(61 Ohio St. —.)

- *1. An escaped convict who is convicted and sentenced to the penitentiary for another crime may, at the expiration of the latter sentence be held to serve out the remainder of his first sentence.
2. A final order of discharge on habeas corpus may be reviewed and reversed on error by a higher court.
3. In such case the order of discharge may be stayed by the higher court, under sec-

*Headnotes by the Court.

NOTE.—As to effect of absence from prison on time of sentence, see also *Ex parte Vance* (Cal.) 18 L. R. A. 574, and *note*.
27 L. R. A.

tion 5725, without fixing any terms other than the stay of the execution of the order.

(February 5, 1896.)

ERROR to the Circuit Court for Franklin County to review a judgment reversing a judgment of the Court of Common Pleas in favor of petitioner in a habeas corpus proceeding to procure the petitioner's release from defendant's custody as keeper of the penitentiary. *Affirmed*.

Statement by Burket, J.:

On September 18, 1879, the plaintiff in error, David Henderson, was received at the penitentiary to serve a five years' sentence from Warren county. On October 12, 1881, after serving a little over two years of that sentence, he escaped and was at large until March 16, 1891, when he was received at the penitentiary under the name of Carrol Scott,

on a five years' sentence from Cuyahoga county, but nothing was known by the Cuyahoga county court as to the prisoner's real name being David Henderson, nor as to his former sentence, nor as to his escape. When he reached the penitentiary he was received and put to work as Carrol Scott, without being recognized as David Henderson by the warden. After he had been there some time, registered and working as Scott, the deputy warden recognized him as being David Henderson, but no action was taken by the warden or any one else upon such recognition, and the prisoner served out his sentence as Carrol Scott, and was discharged July 14, 1894. The warden having learned that Scott was Henderson, detained him as the escaped Henderson, and duly registered him as the returned convict, and put him to work to serve out his unexpired sentence.

Thereupon David Henderson filed his petition for writ of habeas corpus, the warden made due return, and the plaintiff replied. The reply is in effect that within a week after he was received at the penitentiary as Scott, he was recognized as the escaped convict Henderson by the deputy warden who was then, in the absence of the warden, in charge of the prison. To this reply the warden demurred which demurrer was overruled by the court of common pleas of Franklin county, and on hearing the case, the prisoner was ordered to be discharged. Exceptions were taken by counsel for the warden, and on hearing the case in the circuit court on petition in error the judgment of the court of common pleas, discharging the prisoner, was reversed and the prisoner remanded to the custody of the warden to serve out his unexpired sentence.

Thereupon Mr. Henderson filed his petition in error in this court to reverse the judgment of the circuit court, and for the affirmance of the judgment of the common pleas.

Mrs. George B. Okey and James A. Allen, for plaintiff in error:

There being no statutory provision in our state on this question, a judgment discharging a prisoner in habeas corpus proceeding, whether erroneous or not, and as being in favor of personal liberty, must be regarded as final and conclusive.

1 Freem. Judgm. § 324, p. 587; 9 Am. & Eng. Encyclop. Law, p. 288; *Ex parte Fife*, 64 Mo. 205, 27 Am. Rep. 218; *Re Clabby*, 3 Utah, 183; *Com. v. McBride*, 2 Brewst. (Pa.) 545.

The judicial discharge of a prisoner upon habeas corpus conclusively settles that he was not liable to be held in custody upon the then existing state of facts.

1 Freem. Judgm. § 324, p. 586; *Re Clabby*, *supra*; 9 Am. & Eng. Encyclop. Law, p. 288; *Ex parte Fife*, *supra*.

The indictment against the person of Henderson affected in the same manner the person of Carrol Scott. The name has no substance and therefore cannot be indicted, tried, convicted or punished.

Lasure v. State, 19 Ohio St. 50; *Mead v. State*, 26 Ohio St. 505.

When Carrol Scott was received at the penitentiary to serve the Cuyahoga county sen-

tence David Henderson at the same time entered the penitentiary, and having a part of a term to serve commenced at that moment upon its execution.

The term of imprisonment imposed by a court of this state having jurisdiction may be made to begin upon the expiration of another term of imprisonment, but it must be definite and certain.

Picket v. State, 22 Ohio St. 405; *Williams v. State*, 18 Ohio St. 46.

When there is no statute providing for cumulative sentences, the common law rule will prevail, which is laid down by the various courts to be, that when there are several convictions and several terms of imprisonment adjudged, the terms run concurrently.

Miller v. Allen, 11 Ind. 389; *Kennedy v. Howard*, 74 Ind. 89; *Ex parte Myers*, 44 Mo. 279; *People v. Whitson*, 74 Ill. 20; *Ex parte Hunt*, 28 Tex. App. 361; 21 Am. & Eng. Encyclop. Law, 1075, notes; 9 Am. & Eng. Encyclop. Law, p. 282.

Mr. J. K. Richards, Atty-Gen., for defendant in error:

By no shift or device can a criminal escape the full punishment for his crimes under the laws of Ohio.

It is not so essential when punishment shall be inflicted, as it is essential that the kind of punishment, and the amount of punishment, fixed by law and the court for the crime committed, shall be inflicted; and especially that a criminal shall know that he cannot escape the full punishment of one crime by escaping and committing a new crime.

Dolan's Case, 101 Mass. 219; *Clifford v. State*, 30 Md. 575; *Holland v. Hopkins*, 21 Kan. 688.

A sentence cannot be altered or postponed at the pleasure of the warden of the penitentiary.

Williams v. State, 18 Ohio St. 46; *Picket v. State*, 22 Ohio St. 410.

Error lies to reverse and correct the judgment of a lower court.

People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; *Ex parte Lafayette*, 2 Rob. (La.) 495; *Lark v. State*, 55 Ga. 435; *Macready v. Wilcox*, 33 Conn. 321; *Smith v. State*, 21 Neb. 552; 2 Spelling, Extraordinary Relief, §§ 1356, 1358.

Burket, J., delivered the opinion of the court:

The latter part of section 7325, Revised Statutes, provides that "if any convict escape from the penitentiary, . . . no part of the time such convict is absent shall be counted as a part of the time for which such convict was sentenced."

The plaintiff in error claims that, as his sentence in Cuyahoga county was not made to begin in the future, his imprisonment under that sentence began at once upon his arrival at the penitentiary, and that by virtue of the above section, his imprisonment, under the Warren county sentence, again began to run immediately upon his return to the penitentiary, so that both sentences were being served at the same time, and that upon the expiration of the longer sentence, he was entitled to his discharge from both sentences. There was no attempt to invoke the doctrine of cumulative sentences, and the prisoner was

sentenced to five years without knowledge on part of the court that he was an escaped convict.

As we have no statute authorizing cumulative sentences for crime, it would seem at first blush, that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute. *Williams v. State*, 18 Ohio St. 46; *Pickett v. State*, 22 Ohio St. 405; *Larney v. Cleveland*, 34 Ohio St. 599; *Bishop, Crim. L. § 953*; *Rea v. Wilkes*, 4 Burr. 2575; *State v. Smith*, 5 Day, 175, 5 Am. Dec. 182; *Fitzpatrick v. People*, 98 Ill. 269; *Mims v. State*, 26 Minn. 498; *Mills v. Com.* 13 Pa. 631; *Russell v. Com.* 7 Serg. & R. 459; *McCormick's Petition*, 24 Wis. 492, 1 Am. Rep. 197; *Kite v. Com.* 11 Met. 581. In Texas, Indiana, and Kentucky the courts hold cumulative sentences unauthorized. In Indiana there is a statute to the effect that the term of service shall commence on the day of conviction and sentence. See *Kennedy v. Howard*, 74 Ind. 87; *Prince v. State*, 44 Tex. 480; *Hannahan v. State*, 7 Tex. App. 664; *Baker v. State*, 11 Tex. App. 262; *James v. Ward*, 3 Met. (Ky.) 271.

The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist, and under our just and humane statutes, those who violate the law should be duly punished for each offense. Tilgham, *Oh. J.*, in *Russell v. Com. supra*, well says: "But to consider the thing on principle; where a man has been sentenced to imprisonment for one offense, and is afterward convicted of another, what can be so proper as to make his imprisonment for the second offense commence at the expiration of the first imprisonment. Would it not be absurd to make one imprisonment a punishment for two offenses? Nay the absurdity does not end there, for unless imprisonment for the last offense is to begin where the imprisonment for the first ends, it would be impossible, under our system, to punish the offender, in certain cases, for the last offense, at all."

But as there was no attempt to impose a cumulative sentence in this case, it might be said that the doctrine of cumulative sentences is not involved in this case. It has been argued at length and in one phase of the case it is pertinent.

Had the court known that the prisoner on trial was the escaped convict Henderson, the court might, on proper proof of that fact, have sentenced him to five years' service in the penitentiary, and ordered him to be delivered to the warden, and fixed his term of service to begin at the expiration of the Warren county sentence. The power of the court to do this, in the absence of any statute, seems clear from the cases above cited.

Again, had the court known that the prisoner under indictment in Cuyahoga county was the escaped convict Henderson, the warden of the penitentiary might have been notified and the convict returned to the peni-

tentary to serve out his Warren county sentence. Being then in the penitentiary under a sentence from one county and under indictment for another crime in another county, section 7234, Revised Statutes, would have been applicable, and under that section he could have been taken from the penitentiary to Cuyahoga county, and tried under the indictment pending against him there, and upon conviction, he could have been sentenced to the penitentiary, and returned thereto under section 7238, Revised Statutes, to serve out the full term of both sentences. Sections 7234 and 7238, are as follows:

"7234. A convict in the penitentiary who escaped or forfeited his recognizance before receiving sentence for a felony of which he was convicted, or against whom an indictment for felony is pending, may be removed to the county in which such conviction was had, or such indictment is pending, for sentence or trial, upon the warrant of the court of such county; but this section shall not extend to the removal of a convict for life except the sentence to be imposed, or indictment pending against him, is for murder in the first degree."

"7238. If such convict be acquitted he shall be forthwith returned by the sheriff to the penitentiary, there to serve out the remainder of his term; but if he be sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff, and his term of imprisonment thereon shall begin to run from the expiration of the term for which he was imprisoned at his removal; or, if he be sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary."

These two sections clearly show the legislative intent, that convicts shall serve out one sentence for each offense of which they are convicted and sentenced. It is therefore clear, from these two sections, and the decisions of this court sustaining cumulative sentences, that the service under the Cuyahoga county sentence could apply on that sentence only, and that after having served out that sentence, he still remained an escaped convict under the Warren county sentence, subject to be held to serve out the remainder of that sentence.

As he concealed his true name and identity, and was sentenced by the name of Scott, his term to begin *in presenti*, the warden was bound to receive and treat him as designated in the record, and even had the warden recognized him at first sight as being the escaped convict Henderson, he would have been powerless to treat him as such, so long as the sentence from Cuyahoga county remained in force and unsatisfied. Both the warden and the prisoner were conclusively bound by the record and sentence in that case.

While for many purposes there is nothing in a mere name, yet for many other purposes a name is very important. The plea of abatement by reason of a wrong name, and the disclosure of a true name, is a very valuable protection to the prisoner, as in case of a second prosecution for the same crime, he can with more force invoke the record of the first case in support of his plea of former acquit-

tal or conviction. *Lasurs v. State*, 19 Ohio St. 51.

In *Mead v. State*, 26 Ohio St. 505, the judgment was reversed on the ground that Elish Davidson and Elijah B. Davidson are different names, and that the description of a person by one of these names is not supported by proof of a person bearing the other name.

A person allowing himself to be tried and convicted by the name mentioned in the indictment is, for the purpose of serving out the sentence under such conviction, conclusively held to be the person bearing such name, and he cannot lawfully gain any advantage by concealing his true name and identity. He may take his chances, as did the plaintiff in error, and if he succeeds well and good for him; but should his identity and true name be discovered before his discharge, he would be liable to be held as an escaped convict to serve out his old sentence.

The warden, therefore, was right in holding the prisoner to serve out the remainder of his Warren county sentence.

In the next place it is claimed, that having been ordered discharged by the court of common pleas on habeas corpus, that such order is conclusive, and cannot be reviewed or reversed by a higher court.

A proceeding in habeas corpus is essentially a civil, and not a criminal proceeding. In *Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826, Chief Justice Waite uses this language, on page 559, 27 L. ed. 827: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. . . . The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. . . . Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution."

When the code of civil procedure was first adopted, section 604 contained the provision, that until the legislature should otherwise provide, the code should not affect proceedings on habeas corpus; but it contained the

further provision that such proceedings might be prosecuted under the code, whenever applicable; thus clearly recognizing such proceedings as a civil remedy.

By the Revision of 1890, the legislature did otherwise provide, and habeas corpus became a part of the civil procedure statute, being chapter eight of title one, division seven; and it is classed with actions for dower, partition, real actions, replevin, rights and remedies of sureties, contest of will, and some other actions.

That judgments and final orders in the actions just named, and with which habeas corpus is classed, can be reviewed and reversed by a higher court, is too clear for argument. That the same can be done in habeas corpus is settled by section 5751, Revised Statutes, which provides that the proceedings upon a writ of habeas corpus may be reviewed on error as in other cases. This court, in the case of *Wilcox v. Nokes*, 34 Ohio St. 520, entertained a petition in error to review a proceeding on habeas corpus when the plaintiff below had been discharged by the lower court.

It is therefore clear that the rule found in some cases, to the effect that a discharge on habeas corpus, being in favor of personal liberty, must be regarded as final and conclusive, and not subject to review or reversal on error, does not prevail in this state.

It is also claimed that section 6725 does not apply to a judgment of discharge on habeas corpus. That section provides: "Execution of a judgment or final order, other than those enumerated in this chapter, of any judicial tribunal, or the levy or collection of any tax or assessment therein litigated, may be stayed on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof."

Because the circuit court stayed the execution of the judgment or final order of discharge without fixing any terms, other than the simple stay, it is claimed that the above section is not applicable to such case, and that there can be no stay, except on such terms as may be prescribed by the court. The answer to this is that the court has ample power to stay the execution of the judgment or final order, and it may grant the stay upon such terms as it sees fit, and if in the opinion of the court no other terms than the stay itself are required, the stay may be so granted. In the case at bar, while no terms were prescribed in the order of stay, in fact the prisoner remained in the custody of the warden until the hearing of the petition in error. The order of stay might well have been upon the terms that the warden safely keep the prisoner, until the final hearing.

We think, therefore, that section 6725 is applicable to a stay in habeas corpus proceedings.

We find no error in the record, and the judgment of the Circuit Court is therefore affirmed.

MARYLAND COURT OF APPEALS.

BALTIMORE BREWERIES CO. (LIMITED), *Appt.*,

Lyman T. RANSTEAD.

(78 Md. 501.)

Water brought in large quantities to a brewery for the purpose of cooling beer and cleaning utensils cannot be discharged upon the surface of the ground in such manner as to injure neighboring proprietors.

(January 18, 1894.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City, in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property which were alleged to have been caused by defendant's wrongfully turning water thereon. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Marshall, William L. Marbury, and H. J. Bowdoin for appellant.

Messrs. J. Alexander Preston and Robert Ludlow Preston, for appellee:

A landowner who places noxious substances on his land, polluting the surface water or superficially percolating waters passing thence upon the premises of an adjoining owner, to his injury, will be liable in an action for such pollution.

Gould, Waters, 2d ed. § 278, and cases cited in note.

Such pollution is a nuisance, and the familiar maxim, *sic utere tuo ut alienum non laedas*, applies.

Gavtry v. Leland, 81 N. J. Eq. 885; *Beckley v. Skroh*, 19 Mo. App. 75, brewery discharge; *Jutte v. Hughes*, 67 N. Y. 287; *Charles v. Finchley Local Board*, 43 L. T. N. S. 569, 572.

The plaintiff is entitled to recover if the lot of the appellee was flooded with water by the construction of the sewer by the appellant and thereby damaged.

Scott v. Bay, 8 Md. 481; *Lawson v. Price*, 45 Md. 123; *Lewin v. Simpson*, 88 Md. 468; 6 Am. & Eng. Encyclop. Law, pp. 15, 16 notes, and cases cited.

Water must be drawn off in some natural

channel in vicinity, or by any other means preferred, provided no damage is done to others by this plan.

McCormick v. Kansas City, St. J. & C. B. R. Co. 70 Mo. 359, 35 Am. Rep. 431.

A landowner cannot increase the quantity of water upon another's property, in any different manner from that in which the same would have naturally flowed upon it.

Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 568; *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521; *Templeton v. Voshlos*, 73 Ind. 134, 87 Am. Rep. 150; *Cooley, Torts*, 2d ed. §§ 685, 688, artificial drains, §§ 695, 696, flooding, §§ 671-676, nuisances.

An owner of land cannot even drain off surface water in such a way as to injure his neighbors.

O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Cooley, Torts*, p. 480; *McCormick v. Kansas City, St. J. & C. B. R. Co. supra*.

Robinson, Ch. J., delivered the opinion of the court:

The plaintiff is the owner of an inclosed lot of ground in Baltimore city, bounded on the North by Bayard street, and on the east by Ridgely street, containing about five acres of land. The lot had been used as a cattle or stock yard, from which the plaintiff derived an annual revenue of from \$400 to \$500. The defendant company is the owner of a brewery abutting on Ridgely street, and uses from three to four hundred barrels of water daily for the purpose of cooling the beer; and in addition to this it uses from three to four barrels of water, mixed with acids and ashes, once a week, for the purpose of scouring the copper coils. All the water thus used is conveyed from the brewery to a sewer box built inside the brewery lot, and running inside the lot, about 80 feet, to the west side of Ridgely street, and then down the street, 128 feet, to a wooden box or trough built by the city authorities across Bayard street, and through this trough the water is discharged upon the plaintiff's lot. The plaintiff proved that, in consequence of this discharge of water upon his lot, it had become miry and unfit for use; and he further proved that the water was mixed with vegetable matter, the refuse grains used in brewing the beer, and was noxious and of-

NOTE.—*Disposal of water brought in unnatural quantities upon property.*

While there are several cases which discuss the question decided in *Rylands v. Fletcher*, L. R. 3 H. L. 330, upon which the above decision is based as to the duty to care for water stored in unnatural quantities upon property, a careful search has failed to reveal any precedent upon the question of the right to dispose of the water. The case nearest in point is perhaps *Frye v. Moor*, 58 Me. 583, in which the discharge was into the natural channel of the water, the accumulation having been caused by a dam across the channel. In that case the court held that the one making the accumulation must exercise at least ordinary care in letting the water pass again into its natural channels so far as one against whom the accumulation was rightful

was concerned. But in respect to one against whom he had no right to make the accumulation he acted at his peril and he would be responsible for the consequences of his wrongful act in case he returned the water so rapidly that injury was done to the former.

If such is the rule when the water is returned to its natural channel it must be much more true when as in this case no attempt is made to return it to its channel but it is cast upon the surface of the earth.

A reason that the question has not arisen more frequently probably is that the sewerage systems are ordinarily sufficient to carry off all such accumulations and there is no necessity of finding other outlets.

H. F. F.

fensive. Assuming these facts to be found by the jury,—and it is upon this assumption the plaintiff rests his case,—there can be no question, it seems to us, as to the liability of the defendant. That it had no right to discharge noxious and offensive water through its sewer to the wooden trough built across Bayard street, and thence upon the property of the plaintiff, is conceded. And it is equally clear, we think, that the defendant had no right to bring or collect upon its premises large quantities of water to be used in the manufacture of beer, and to discharge the water thus used upon the bed of Ridgely street, in consequence of which the plaintiff's property was injured, even though the water was not noxious or offensive. Having brought this water upon its premises to be used by it for its own purposes, the defendant was bound to provide proper drains or means for its escape without injury to the property of others. The whole contention of the defendant rests upon the assumption that it has the absolute right to discharge the water used by it in brewing beer upon the bed of Ridgely street, and if the plaintiff's lot lies below the level of the street, in consequence of which his lot is flooded, the defendant is not liable for the injury, unless the jury shall find that the water so discharged was unreasonable or excessive, in view of the character of the locality. The question is not whether the water discharged upon the bed of Ridgely street, the same not being surface water, was unreasonable or excessive in quantity, having in view the character of the locality, but whether the water thus discharged did in fact come upon the plaintiff's lot. Although the facts are different the principles upon which the leading case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, was decided, would seem to be conclusive as to the defendant's contention. In that case the defendant, the owner of a mill, constructed a reservoir for the purpose of accumulating water, but, the supports being insufficient, the sides of the reservoir gave way, and the water percolated through some old and disused coal workings into the plaintiff's colliery; and the house of lords, affirming the court of exchequer, held that the defendant was liable for the injury sustained by the plaintiff. In the court of exchequer, Blackburn, J., says: "We think that the true rule of law is that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

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cape." *Fletcher v. Rylands*, L. R. 1 Exch. 285. In affirming the exchequer chamber, Lord Chancellor Cairns says: "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land be used; and if, in what I may term the 'natural user' of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place." "On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a 'non-natural use,'—for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground, in quantities, and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to pass off into the close of the plaintiff, then it appears to me that which the defendants were doing they were doing at their own peril, and if, in the course of their doing it, the evil arose, to which I have referred,—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff, and injuring the plaintiff there,—for the consequence of that, in my opinion, the defendants would be liable." Now, in this case, it was held that if one brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril; and if this be so, *a fortiori*, where one brings or accumulates on his land water in large quantities, to be used for any purpose he may see proper, and discharges the water upon the property of his neighbor, he will be liable for the injury thereby occasioned. And such is the case before us. The proof shows that the water used by the defendant in the manufacture of beer is conveyed from its premises by means of a sewer built by the defendant to the west side of Ridgely street, and thence down said street to a trough across Bayard street, and thence upon the land of the plaintiff. And, such being the case, there was no error in granting the plaintiff's prayers, and in rejecting the prayers offered by the defendant.

Judgment affirmed.

IOWA SUPREME COURT.

Fred EIGHMY

v.

UNION PACIFIC R. CO., *Appl.*

(....Iowa....)

A railroad company is not liable to employes for negligence of physicians and surgeons in a hospital which it voluntarily maintains for the gratuitous accommodation of injured employes to whom the company owes no statutory or contractual obligation in the matter.

(January 23, 1906.)

A PPEAL by defendant from a judgment of the District Court for Pottawattamie County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Wright & Baldwin, for appellant:

To render one person liable for the negligence of another the relation of master and servant must exist between them.

Stevens v. Armstrong, 6 N. Y. 435; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Larock v. Ogdensburg & L. O. R. Co.* 26 Hun, 882; *Hexamer v. Webb*, 101 N. Y. 877, 54 Am. Rep. 708.

In order to establish this relation more must be shown than the mere fact of employment.

1 Shearm. & Redf. Neg. § 144; Wood, Mast. & S. §§ 311, 312; 14 Am. & Eng. Encyclop. Law, p. 880, and cases cited.

It must be shown that the employment created the relation of master and servant.

King v. New York Cent. & H. R. R. Co. 66 N. Y. 181, 28 Am. Rep. 37; 1 Shearm. & Redf. Neg. § 144.

If the person sought to be charged for the negligence of another did not have such control over him as enabled him to direct the manner of performance, he is not liable for his wrongful or negligent acts.

Callahan v. Burlington & M. R. R. Co. 23 Iowa, 562; *Wood v. Independent School Dist. of Mitchell*, 44 Iowa, 27; *Van Winter v. Henry County*, 61 Iowa, 684; Wood, Mast. & S. §§ 311-314; 14 Am. & Eng. Encyclop. Law, p. 850; *Painter v. Pittsburgh*, 46 Pa. 220; *Edmundson v. Pittsburgh, M. & Y. R. Co.* 111 Pa. 313; *Hexamer v. Webb*, *supra*; *Sherbourne v. Yuba County*, 21 Cal. 114, 81 Am. Dec. 151; *Du Pratt v. Lick*, 88 Cal. 691; *Prairie State Loan & T. Co. v. Doig*, 70 Ill. 54; *Hilliard v. Richardson*, 8 Gray, 354, 63 Am. Dec. 743; *De Forrest v. Wright*, 2 Mich. 868; *Pierce v. O'Keefe*, 11 Wis. 181; *Brown v. McLeish*, 71 Iowa, 332; *Miller*

NOTE—As to liability for negligence of employes of charitable institutions in general, see *Williamson v. Louisville Industrial School of Reform* (Ky.) 23 L. R. A. 200, and note, and the later case of *Downs v. Harper Hospital* (Mich.) 25 L. R. A. 602.

As to liability of railroad company to employe for negligent treatment by physicians, see also *Union Pac. R. Co. v. Artist* (U. S. C. C. 8th C.) 23 L. R. A. 581.

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v. Minnesota & N. W. R. Co. 76 Iowa, 658; *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; *Fire Ins. Patrol of Philadelphia v. Boyd*, 1 L. R. A. 417, 120 Pa. 642; *Tindley v. Salem*, 137 Mass. 174, 50 Am. Rep. 289.

The duty of the company is performed, and it has performed all the law requires when it furnishes a competent man. If he does not properly treat the plaintiff and thereby the injury is increased he is responsible. But the company would be not liable, because it had performed all the duty that is incumbent upon it when it selected a proper and competent man.

Secord v. St. Paul, M. & M. R. Co. 18 Fed. Rep. 221; *O'Brien v. Cunard S. S. Co.* 13 L. R. A. 829, 154 Mass. 272; *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228; *Allan v. State S. S. Co.* 15 L. R. A. 166, 132 N. Y. 91; *Loftus v. Union Ferry Co. of Brooklyn*, 84 N. Y. 455, 38 Am. Rep. 538; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Van Tassel v. Manhattan Eye & Ear Hospital*, 59 N. Y. S. R. 781.

Messrs. Jordan & Brockett and N. M. Pusey, for appellee:

The confidence induced in Eighthmy by the undertaking of appellant to have his injuries treated by its medical department was a sufficient consideration to create a duty on the part of appellant to treat those injuries with care.

Philadelphia & R. R. Co. v. Derby, 55 U. S. 14 How. 458, 14 L. ed. 504; 1 Parsons, Cont. p. 372; *Cogg v. Bernard*, 3 Ld. Raym. 909; Story, Bailm. §§ 9, 164-172; *Thorne v. Deas*, 4 Johns. 96; *McArthur v. Sears*, 21 Wend. 190; *Morrison v. Davis*, 20 Pa. 175, 57 Am. Dec. 695; 2 Hilliard, Torts, 532; *Backhouse v. Sneed*, 5 N. C. 173; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; 1 Addison, Torts, 4th Eng. ed. 527-538.

In the treatment which the doctors connected with the medical department, gave to Eighthmy they were acting in the course of their employment, and their omission, or their acts of commission, were such acts as their employer is liable for.

Slath v. Wilson, 9 Car. & P. 607; *The New World v. King*, *supra*; *Southwick v. Estes*, 7 Cush. 835; *Lovett v. Salem & S. D. R. Co.* 9 Allen, 557; 1 Redf. Railways, § 130, notes 6, 7, 11.

Robinson, J., delivered the opinion of the court:

At the time the injuries in question were received by the plaintiff, he was in the employ of the defendant as brakeman on a freight train. On the 11th day of April, 1888, the train with which he was employed was moved from the yards in Council Bluffs, over the bridge, to the yards in Omaha. As the train was made up, the locomotive engine was at the front or west end, the way car or caboose was next to it, and in the rear of that were thirty-four freight cars. The plaintiff was on the top of the rear car. Just after the engine passed over the bridge, the train was stopped, most of it being on the

bridge. When the train was started, the two rear cars were detached and left behind by the breaking of a car link, but the train was stopped before it had moved half its length, another link and a pin were procured, the train was backed, and the plaintiff, after giving the signal to back slowly, proceeded to make the coupling. While so engaged, his right hand was caught between the bumpers of the cars, and he received the injuries of which he complains. He charges the defendant with negligence which caused the injury, as follows: (1) In not providing the bridge with a floor or other safeguard against the unusual perils of coupling cars upon it; (2) in requiring freight trains to stop on the bridge before entering the switch at the east end of the Omaha yards; (3) in starting the train in question so violently as to separate it from the two rear cars; (4) in the sudden increase by the engineer, without warning, of the speed of the rear car of the train, as it approached the standing cars; (5) in the giving by the head brakeman of the signal to stop, without warning. In the second count of his petition, the plaintiff alleges that by reason of his employment by the defendant, his injuries, and the custom in such cases, it became the duty of the defendant to furnish him the services of a skillful and careful surgeon; that the defendant undertook to perform that duty, but that the surgeon employed for the purpose, after dressing the hand once, refused to treat it further, except to have it examined by an inexperienced and unskillful student; and that by reason of this negligence the hand became stiff, and almost wholly useless. The amount of damages the plaintiff is alleged to have sustained in each count is the sum of \$1,995, and judgment for that amount is demanded. The defendant denies all liability on its part, and alleges that negligence of the plaintiff contributed to the injuries for which he seeks to recover. The jury found specially that, if the plaintiff had used a coupling stick or implement of like character for guiding the link, his hand would not have been caught; that he knew, when he went between the cars to make the coupling, that the cars would necessarily be moved a short distance before they would be stopped; that the engineer did not make any movement of the engine, to increase its speed or the speed of the train, after he received the signal to back slowly; that at or near the time the plaintiff stopped near the stationary car, to make the coupling, the engineer was signaled to stop it, and did so. The jury returned a general verdict in favor of the plaintiff for the sum of \$1,500.

1. It appears that the defendant has what is called a "medical department" for the treatment of its employes who are injured on its road. Dr. Galbraith was employed by that department, on a salary, to attend to persons so injured. He was the one who amputated some of the fingers, and first dressed the injured hand of the plaintiff, and was assisted by Dr. Gibbs, the alleged student. There is no evidence that Dr. Galbraith was not in all respects competent and skillful, and it is shown affirmatively that Dr. Gibbs was a competent physician. He treated the

hand after it was first operated upon and dressed. There was evidence from which the jury might have found that the treatment was improper and negligent, and that it was injurious to the plaintiff.

The next question to be determined is, To what extent is the defendant liable for the negligence of its physicians and surgeons? There is but little evidence in regard to its medical department. It seems to have included a hospital building, of which Dr. Gibbs had charge. The plaintiff went there to have his hand treated, and was placed in a room and given a bed. But he refused to remain there, and went to an hotel. It does not appear that the defendant was under any obligation by contract to furnish surgical and hospital accommodations for its injured employes, and, so far as is shown, its doing so was wholly voluntary. Its employes were under no obligation to avail themselves of the facilities for treatment offered, and paid nothing for them when accepted. That the defendant maintained its medical department for its own advantage, and not for charitable purposes only, may be presumed, but that does not alter what appears to be the fact, that it was not maintained to discharge any statutory or contractual obligations. In the case of *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 18 L. R. A. 329, the plaintiff sought to recover for damages alleged to have been caused by the negligence of the surgeon of the defendant. He had been employed by the defendant under an act of congress which required every steamship or other vessel engaged in carrying or bringing passengers, other than cabin passengers, exceeding fifty in number, to carry a duly competent and duly qualified surgeon or medical practitioner, who should be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases incident to sea voyages. The services of such surgeon or medical practitioner were required to be promptly given, in any case of sickness or disease, to any of the passengers who should need his services. It was said that the masters or owners of the vessel do their whole duty under that statute when they employ a duly qualified and competent surgeon and medical practitioner and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. That rule was followed in *Alan v. State S. S. Co.* 139 N. Y. 91, 15 L. R. A. 166. In *Laubheim v. De Koninglyks Nederlandsche Stoomboot Maatschappij* 107 N. Y. 229, it was said: "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to its passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. . . . It is responsible solely for its own negligence, and not for that of the surgeon employed. In performing such duty, it is bound only to the exercise of reasonable care and diligence." In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the plaintiff sought to recover for damages caused by unskillful treatment. The

defendant was a public charitable institution. It was held that it was, at most, liable only for a failure to use due care in selecting its inferior agents, and, if it had used such care in selecting the surgeon of whose conduct complaint was made, it was not further liable. We are of the opinion that the rule of the cases cited is applicable in this case. The charge of the court in regard to the liability of the defendant for the acts and omissions of its surgeons was based on the theory that it was responsible for their negligence. In that respect the charge was erroneous.

2. The appellee contends that, even if there was error in permitting a recovery on the second count of the petition, no prejudice resulted, because it clearly appears that he was entitled to recover on the first count. The appellant is fully as positive that there was no evidence upon which to base a recovery on that count, and insists that the court erred in not sustaining its motion for a judgment upon it. Of these conflicting claims, that of the appellant has the most support in the record. It appears that, at the time the coupling in question was attempted, the plaintiff gave the signal to back slowly, or, as it is called, "the easy signal," to allow the cars to run back without pressure from the engine, and then went between the cars to make the coupling. At about that time, the head brakeman gave the engineer the signal to stop, which was obeyed. The plaintiff claimed in his testimony, and now claims in argument, that the action of the engineer in stopping his engine had the effect to increase the speed of the moving car nearest the stationary one, to which it was to be coupled. We are not entirely satisfied that the theory of the plaintiff in regard to this is sustained by the evidence, and think the jury would have been

as apt to find for the plaintiff on the second as on the first count of his petition; and it is quite probable, in view of the charge of the court, that the amount of the verdict was increased by, if it was not wholly based upon, the second count.

3. The appellant insists that it was entitled to judgment on the first count. A rule of the defendant prohibited its employees from making couplings by hand, and required each one to provide himself with a stick or proper instrument for raising and guiding the link. The plaintiff knew of the rule, and the court charged the jury that there was not sufficient evidence to show that the rule had been set aside or waived by any one having authority to do so; that, as the plaintiff knew of the rule, and voluntarily disregarded it, he could not recover for injuries he received by reason of any negligence on the part of the defendant which occurred prior to the time he went between the cars to make the coupling. It seems that, five or six years before the accident, the brakemen of the defendant used coupling sticks for about thirty days; that they have not been used since, and that couplings are universally made on the defendant's road by hand. Whether the court was justified in instructing the jury that the rule had not been waived is a question not before us for determination. The signal of the head brakeman of which the plaintiff complains, was given after he went between the cars, and therefore, if negligently given, and a cause of the injury, the plaintiff might be entitled to recover under the charge of the court.

For the reason shown, the court erred in not granting the defendant a new trial, and for its refusal to do so the cause is remanded for further proceedings.

Reversed.

ILLINOIS SUPREME COURT.

Charles C. FORD *et al.*, *Appts.*,
v.
CHICAGO MILK SHIPPERS' ASSOCIATION.

(.....Ill.....)

1. A corporation and its members in their control over it may constitute a trust or combination to fix the price of merchandise or limit the amount sold within the meaning of a statute prohibiting such trust or combination and relieving third persons from liability to pay for goods purchased from such combination.
2. A combination between a corporation and its members to control the price of food products may be made illegal by subsequent legislation.

3. A statute relieving purchasers from a trust or combination to raise the price of food products from liability to pay for their purchases will apply to purchases made after its passage under a continuing contract previously executed which guarantees payment on the 15th of each month for goods furnished during the prior month.

(January 15, 1895.)

A PPEAL by defendants from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to recover the contract price of milk sold and delivered by plaintiff to defendant Charles C. Ford. *Reversed.*

NOTE.—The proposition that a corporation in itself may constitute an illegal combination, which is clearly presented in the above case, is substantially sustained also in the New York case of *People v. Milk Exchange*, *post*, 487, on a decision 27 L. R. A.

annulling the corporate existence of a milk exchange.

For general principles as to monopolies to fix prices, see *note* to *Lovejoy v. Michaels* (Mich.) 12 L. R. A. 770.

Statement by Phillips, J.:

Appellee brought its action of assumpsit against appellants to recover for milk sold and delivered, the declaration containing the common counts, to which was pleaded the general issue and two special pleas which substantially alleged that the plaintiff was a corporation organized and created for the purpose of regulating and fixing the price and amount and quantity of milk to be shipped and sold within the corporate limits of the city of Chicago to the city dealers and retail dealers, and, pursuant to its purpose to become a party to an agreement undertaking combination and confederation with certain persons named, and with divers other persons, to regulate and fix the price and the amount and quantity of milk to be shipped and sold within the corporate limits of the city of Chicago, and in pursuance of that unlawful agreement, plaintiff sold and delivered to the defendant Charles C. Ford, a retail milk dealer, large quantities of milk, at the price fixed and determined by the plaintiff and the other persons in pursuance of said unlawful agreement, whereby plaintiffs were not entitled to recover, etc. To these pleas replication traversing the same was filed, and the case was tried on a stipulation of facts, before the judge without a jury. The court was requested by the plaintiff to hold the following propositions, which were refused:

"(1) The court holds, as a proposition of law, that, although the Chicago Milk Shippers' Association may have been an illegal corporation on April 15, 1891, in that it was a combination in restraint of trade, yet the contract between it and defendants, who were not members of said corporation, having been fully performed, with the single exception of payment on the part of defendants to the plaintiff for milk delivered by plaintiff to them in October, 1891, is not affected thereby, and the plaintiff is entitled to recover from defendants the amount shown to be unpaid by the defendants to the plaintiff for the milk so delivered. (2) The court holds, as a proposition of law, that an act entitled, 'An act to provide for the punishment of persons, co-partnerships and corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891, is, so far as it provides that 'any purchaser of any article or commodity from any individual or company transacting business contrary to the provisions of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for any such price or payment,' unconstitutional and void. (3) The court holds that the original contract for the sale of milk by the plaintiff to the defendant C. C. Ford, and the written guaranty of payment for such milk, made by both defendants to the plaintiff, were valid contracts in law at the time they were made, to wit, on April 15, 1891; and the court further holds that the act of the general assembly of Illinois entitled, 'An act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts and combines, and mode of procedure

and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891, in so far as it provides that 'any purchaser of any article or commodity from any individual, company or corporation, transacting business contrary to any provisions of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment,' does not prevent a recovery by the plaintiff in this cause, by reason of section 14, article 2, of the Constitution of Illinois, which provides that 'no law impairing the obligation of contracts shall be passed.' (4) The court holds, as a proposition of law, that the fixing of the retail price of any article by the board of directors of any corporation dealing in such article is not such a fixing of a price as is prohibited by any statute of the state of Illinois. (5) The court holds, as a proposition of law, that the contract which forms the basis of this action was such a valid and subsisting contract at the time the act of the general assembly of the state of Illinois, entitled, 'An act to provide for the punishment of persons, co-partnerships, or corporations forming pools, trusts, and combines, and mode of procedure and rules of evidence in such cases,' became in force, to wit, on July 1, 1891; that said law does not apply to this case, since said law, if applied, would impair the obligation of said contract, contrary to section 14, article 2, of the Constitution of Illinois. (6) The court holds, as a proposition of law, that an act entitled, 'An act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts, and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1st, 1891, is unconstitutional and void." To the refusing of which plaintiffs excepted.

At the suggestion of defendants' attorney, the following propositions of law were held: (1) The defendant C. C. Ford submits to the court, and asks the court to hold as a proposition of law, upon the testimony shown in this case, the plaintiff, at the time of the sale and delivery to the said defendant of the goods and merchandise, viz., a certain quantity of milk by the plaintiff sold to the defendant, was a corporation which, under the by-laws shown in evidence, had created, entered into, and was a combination then existing for the purpose of regulating, fixing, and establishing the price of milk to be sold within the corporate limits of the city of Chicago, by purchasers, shippers, and wholesale dealers, to the city dealers and retail dealers, and also for the purpose of fixing and limiting the amount and quantity of milk to be supplied and sold within the limits of the city of Chicago by purchasers, shippers, and wholesale dealers, and retail dealers; that the purchase by the defendant from the plaintiff of the milk, the price of which is sought to be recovered in this case, was made by the defendant pursuant to the purpose of such combination, and, as matter of law, the court holds that the said combination existed for an unlawful purpose, and that the purchase by the defendant from the plaintiff of said

milk was done in furtherance of such unlawful purpose, and created no indebtedness for the recovery of which the law will afford any remedy, and that, therefore, the judgment of the court is for the defendants. (2) The defendants submit to the court, and ask the court to hold as a proposition of law, upon the testimony shown in this case, the plaintiff, at the time of the sale and delivery to the defendant C. C. Ford of the goods and merchandise, viz., a certain quantity of milk by the plaintiff sold to the defendant, was a corporation which, under the by-laws shown in evidence, had created, entered into, and was a combination then existing for the purpose of regulating, fixing, and establishing the price of milk to be sold within the corporate limits of the city of Chicago, by purchasers, shippers, and wholesale dealers, to the city dealers and retail dealers, and also for the purpose of fixing and limiting the amount and quantity of milk to be supplied and sold within the limits of the city of Chicago by producers, shippers, and wholesale dealers to the city dealers and retail dealers; and that the purchase by the said defendant from the plaintiff of the milk, the price of which is sought to be recovered in this case, and the execution of the guaranty offered in evidence, were made by the defendants pursuant to the purpose of such combination, and, as a matter of law, the court holds that the said corporation existed at said time for an unlawful purpose, and that the purchase by the defendant from the plaintiff of said milk, and the giving of the guaranty offered in evidence and executed by both the defendants, was done in furtherance of such unlawful purpose, and created no indebtedness for the recovery of which the law will afford any remedy, and that, therefore, the judgment of the court is for the defendants. To the holding of each of which counsel for plaintiff excepted.

The circuit court entered a finding and judgment for defendants, and an appeal was prosecuted to the appellate court of the first district, where a finding of facts was made and entered, and a judgment reversing the trial court, the facts found, and judgment entered as follows:

"This day came again the said parties, and the court, having diligently inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, find from evidence contained in said record the following facts:

"That the appellant is a corporation, organized and doing business in the manner shown by the constitution and by-laws hereto attached, which said constitution and by-laws are as follows:

"'Constitution and General Laws of the Incorporated Joint-Stock Association of Milk Shippers and Producers Tributary to the City of Chicago.

"'Article I. Name and Subject.

"'Section 1. This company shall be known as the Chicago Milk Shippers' Association.

"'Section 2. The object of the incorporation of this association shall be to secure to the purchaser of milk a just return for the sale of the same; to rid the field of city

distribution of irresponsible and dishonest dealers; to establish a central bureau of information, for the shipper's benefit; and to secure to the dealer of milk a pure, wholesome, honest quality of that product.

"'Article II. Jurisdiction and General Office.

"'Section 1. This association shall have jurisdiction over all districts shipping dairy products to the city of Chicago, in which local organizations of milk shippers have been, or may hereafter be, established in accordance with the regulations hereinafter provided.

"'Section 2. The general office of this association shall be permanently located in the city of Chicago and state of Illinois.

"'Article III. Capital.

"'Section 1. This association shall be incorporated with a capital of one hundred thousand dollars, which shall be divided into ten thousand shares of ten dollars each.

"'Article IV. Board of Directors, and Duties.

"'Section 1. A board of directors, to consist of nineteen members, shall be chosen by ballot at the first regular meeting of the stockholders, and annually thereafter.

"'Sec. 2. The board of directors shall hold its second regular meeting upon the last Tuesday of March, 1892, and annually thereafter. The board may be convened by the secretary, at any time, whenever a request shall be made by five members of the same.

"'Sec. 3. It shall be the duty of the board of directors, upon the day of its selection, to proceed to elect by ballot, for the term of one year, a president, a secretary, and a treasurer.

"'Sec. 4. The board of directors shall, at the first regular meeting of each year, select an advisory committee, to consist of five members of said board; this committee, with the president of the association, to constitute the board of management.

"'Article V. Duties of the Officers of the Association.

"'Sec. 1. The president of this association shall preside over all meetings of the stockholders and board of directors; he shall convene the advisory committee whenever the affairs of the association require its attention; he shall recommend for the approval of the board of management a manager, and an assistant manager, whenever, in his opinion, the business necessities of the association require the services of such assistants, and shall perform all the duties ordinarily attached to the position of president.

"'Sec. 2. The secretary shall keep a full and complete record of all the business transactions of the association, in all its relations with its membership, as well as with all other parties doing business with it; he shall be present at all meetings of the stockholders and board of directors, and shall prepare minutes of the same; he shall give bond for the honest and faithful performance of his duties, in such amount as the board of directors may deem sufficient. The board of directors shall determine the compensation he shall receive for his services.

"'Sec. 3. The treasurer shall keep a correct

account of all the receipts and expenditures of the association, based upon his own record of the same, and confirmed by the books of the secretary; he shall secure vouchers for the payments of money made; his books of account, money on hand, and vouchers shall be open to the inspection of the board of management at all times, and shall be promptly delivered to his successor in office; he shall give bond for the honest and faithful performance of his duties, in such amount as the board of directors may deem sufficient, and, at the end of his official term, make a full and complete report of the financial condition of the association. The board of directors shall determine the compensation which he shall receive for his services.

"Article VI. General Laws—Capital Stock.

"Sec. 1. The certificates of capital stock of the association shall be held by the secretary until paid for. All assessments, as paid, shall be indorsed thereon, and, whenever desired, the secretary shall furnish a duplicate receipt to the party in whose name the stock is recorded.

"Sec. 2. No transfers, sales, or assignments of the capital stock of this association shall be made to any person who is not expected soon to become a producer and shipper of milk.

"Sec. 3. In order to secure the full protection and benefits of the association, all members must own as many shares of its capital stock as they ship cans of milk per day; but it is expressly stipulated that in no case shall any stockholder own more than fifty shares of the same.

"Sec. 4. The board of management shall determine the number and limit of the periods for the delivery of milk; it shall, between the first and fifteenth of the month, previous to the beginning of said periods, establish the price to be paid for milk, and shall give due and sufficient notice of the same to the members of the association and the city dealers.

"Sec. 5. City dealers will be required to pay the price ordered by the board of management; and, in order to secure compliance with this and other requirements of the association, all parties purchasing milk of the same will be required to give bonds or furnish other security to the satisfaction of said board.

"Sec. 6. Of the market price, as determined by the board of management, the treasurer shall retain five cents upon each can of milk sold for each day. The fund so created shall be used to make up the loss in price which any member may sustain who is required, at any time, to sell his milk out of the city market for more than five days during any one month, and at a less price than that ordered by the board. The expenses of managing the association shall also be paid out of the above fund, and any balance remaining on hand at the end of the year shall be returned to the stockholders in proportion to the number of cans shipped.

"Sec. 7. This association shall have supervision and authority over all milk consigned by any of its members to any stand or other place of reception within the corporate limits of the city of Chicago.

"Sec. 8. The stockholders at any stand

or station, holding not less than fifty shares of the capital stock of the association, may organize a local organization, to take charge of all local interests, and to keep up close business relations with the central association. Stands holding less than fifty shares may, for purposes of organization, attach themselves to others nearest of access, so that their combined shares represent the necessary number. Local associations shall have full power to adopt by-laws for their government, provided they do not conflict with any of the provisions of the constitution and general laws of this association.

"Sec. 9. Of any proposed amendment to the constitution and general laws of this association, fifteen days' notice shall be furnished the members of the board of directors, and a two-thirds vote of the members present shall be necessary to secure the adoption of the same."

"That appellant receives milk from various persons operating under and in connection with said association, all of whom are members or stockholders in said association, and accounts to them for the same, and guarantees to them payment for milk so sold by said appellant to the customers of said appellant; that said association fixes and determines the price at which such milk shall be sold, precisely as set forth in said constitution and by-laws; that said appellant, on April 5, 1891, fixed the price of its milk for the ensuing six months as follows: During the months of May and June, 75 cents per can; during the months of July, August, and September, 80 cents per can; during the month of October, 90 cents per can,—all in year 1891. And appellees agreed to said price, and to receive and pay for milk during said period of six months at said prices, at the date of the guaranty, hereto attached.

"That all milk for which the appellant claims the right to recover in this suit was received by appellant from the persons so consigning the same in the manner aforesaid, and was delivered to the appellee C. C. Ford, during the month of October, 1891, under and pursuant to the agreement and arrangement previously referred to, and a written guaranty accompanying the same, which forms a part of the admitted facts in this case, which said guaranty is as follows:

"Guaranty.

"Chicago, April 15th, 1891.

"Whereas, Charles C. Ford is 'about to purchase and receive milk from the Milk Shipper's Association of the city of Chicago, a corporation doing business in the city of Chicago, in the state of Illinois; Now, in consideration of one dollar, and the furnishings of said milk, I, Elias Ford, for myself and jointly with the said Charles C. Ford, do hereby guarantee the payment of the amount due for milk on the fifteenth day of each month, for all milk furnished by said association during the preceding month.

"Charles C. Ford, 1055 Adams.

"Elias Ford, Niantic, Ill."

"That all of said business between said appellant and appellees was done and transacted under and pursuant to the aforesaid regulations of said association, and that, for and on

account of the milk so sold and delivered under said arrangement during said month of October, there is yet a balance unpaid to the appellant by the appellees of four hundred and thirty-three dollars and eighty cents (\$433.80).

"That the number of stockholders (members) of said association is approximately fifteen hundred (1,500), and was at the date aforesaid.

"Therefore, it is considered by the court that the judgment of the said circuit court of Cook county, in this behalf rendered, be reversed, annulled, and wholly for nothing esteemed, and that the said Chicago Milk Shippers' Association have and recover from Charles C. Ford and Elias Ford, appellees, the sum of four hundred and thirty-three dollars and eighty cents (\$433.80), as and for its damages; and it is further considered by the court that the said Chicago Milk Shippers' Association, appellant, recover of the said Charles C. Ford and Elias Ford, appellees, its costs in this behalf expended in this court, and also its costs in said circuit court, to be taxed as part of its costs in this court, and that it have execution for its said damages and its said costs."

From that judgment the defendants appealed to this court.

Mr. H. T. Helm, with Mr. E. A. Aborn, for appellants:

A corporation can deal with its stockholders and directors in the same way and upon the same terms as it can with strangers.

Merrick v. Peru Coal Co. 61 Ill. 478.

The entire transactions between the members, the appellee, and the appellants were a combination in restraint of trade, and "the end to be obtained being illegal, the contracts and agreements entered into to secure the end must be equally so."

More v. Bennett, 15 L. R. A. 361, 140 Ill. 69; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 666; *Cook, Stock & Stockholders*, p. 526, note 2; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 595; *Case of the Monopolies*, 11 Coke, 84.

Messrs. Cutting & Castle for appellee.

Phillips, J., delivered the opinion of the court:

Stockholders in an association may enter into contracts with it and deal with it in reference to contracts and agreements, acquiring the same rights and incurring like liabilities as strangers. *Merrick v. Peru Coal Co.* 61 Ill. 478. The right to enter into contracts and agreements thus existing, their effect and construction, is the same as if made with other corporations or with strangers; and where void by reason of a statutory provision in the one case it would be so in another. As a general rule, no recovery can be had upon a contract made in violation of the express provisions of a public statute. Where an act is forbidden by a statute, no right arises under any agreement made in carrying out such forbidden act, as no legal right exists to do that which is declared illegal, and, in the absence of a legal right, there can be no legal remedy. *Penn v. Bornman*, 102 Ill. 523, and cases cited. The constitution and by-laws

of this association furnish the evidence of the object and purpose of the organization of the corporate body, and the contract between it and its members is to be determined by that instrument. From the facts found by the appellate court, there are reciprocal relations between this association and its 1,500 members, which may be summarized as follows: Appellee receives milk from members, and accounts to them for same, guarantees to members payment for milk sold by it, fixes and determines the price of milk, retains five cents upon each can of milk sold for each year, has authority over all milk consigned by any of its members to any stand within the corporate limits of the city of Chicago. Member cannot sell his stock excepting to shipper and producer of milk, and must own as many shares as he ships cans of milk per day, but not to own more than fifty shares of stock.

That the object of the association is to control the price of the purchase and sale of milk to retail dealers within the limits of the city of Chicago is clearly apparent, and this object is carried out by the concurrent action of the members and association; by the action of the association on the one part, aided by the agreement of its members, who, assenting to the constitution and by-laws, carry out a scheme which is a combination, agreement, or trust by which they fix the price of an article of merchandise, and limits the amount to be sold, within the corporate limits of the city of Chicago. By the Act approved June 11, 1891, in force July 1, 1891, entitled "An act to provide for the punishment of persons, co-partnerships and corporations forming pools, trusts and combines and mode of procedure and rules of evidence in such cases," it is provided that any corporation, partnership, individual, or association of persons who shall create, enter into business as members of, or a party to, any pool, trust, agreement combination, or confederation with another corporation, partnership, association, or individual to regulate or fix the price of any article of merchandise or commodity, or to limit or fix the amount or quantity to be produced or sold, is made a misdemeanor, punishable as provided in the act. By the sixth section of that act, any purchaser of any article or commodity from any individual or corporation transacting business contrary to the provisions of the act shall not be liable for the price or payment of such article or commodity, and may plead the act as a defense to any suit for the price. These provisions were, by the special pleas, invoked as a defense to the suit. The statute by its terms makes a combination, trust, or agreement between corporations, partnerships, associations, or individuals to fix the price of any article of merchandise, or to limit the amount to be sold, an offense which is sought to be prohibited; and it further provided that a purchaser of any article or commodity from any individual company or corporation transacting business contrary to the preceding section of the act is not liable for the price or payment of such article or commodity. The purpose of the arrangement between this corporation and the stockholders thereof was to

fix the price and control and limit the amount shipped. The purposes attempted to be accomplished through the corporation were illegal. To carry out such purposes, it stands as the active business agent of the members, who are stockholders, contracting with it to create and carry out the purpose of the organization. It is a combination in violation of the statute and in restraint of trade. Any purchaser of any commodity thus sold by such organization is not liable for the price thereof. It is urged that the corporation cannot alone enter into a trust or combination that could be a violation of this statute. While it is true, as a general proposition, that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it cannot act independently, or against the will, or abstain from complying with the direction, of the natural persons who constitute the corporate body. A corporation is in fact an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it. *Morawetz, Priv. Corp. § 237; 1 Kyd, Corp. 18.* Such being the nature of the corporate body, acts done by it are the acts of the associated persons, as corporations or as individuals; and in which capacity the act is done must be determined from the nature and character of the act, and the purpose for which organized. *State v. Standard Oil Co. 49 Ohio St. 187, 15 L. R. A. 145.* And when the acts of the corporate body are violative of the statute of the state which would be a misdemeanor that would subject to punishment in accordance with law, such acts are wholly without the lawful power of the corporation, as the state will create no body with authority to violate its laws. And where the organization of the corporate body, or the control exercised by the stockholders in determining the agencies selected for managing its business, and the business, as thus conducted, managed, and controlled, is against public policy, or in contravention of a statute of the state, such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be no immunity to evasion of the policy of the state by its own creations. The corporation as an entity may not be able to create a trust or combination with itself, but

its individual shareholders may in controlling it, together with it, create such trust or combination that will constitute it, with them alike, guilty.

This corporation was organized February 24, 1891, and engaged in business, and the statute invoked by the pleas as a defense became a law July 1, 1891; and the appellee urges that, even if it be admitted that a combination between a corporation and its stockholders exists, such combination, occurring before the passage of the act, cannot be held contrary to its provisions, and that the circuit court erred in refusing to hold propositions presented by appellees which presented this question. The rule is settled that corporations created within this state are amenable to the police power, and such bodies are not beyond legislative control, and are amenable to the same extent as natural persons. *Ruggles v. People, 91 Ill. 256.* The corporation is subject to the statute, and, although the contract of guaranty was entered into before the passage of the act, yet, by its terms, the furnishing of the commodity named from month to month was contemplated, and, by the facts as found by the appellate court, that for which the price is sought to be recovered in this case was furnished, after the passage of the act. The acts of the corporation and its stockholder with reference to this sale were within the meaning of the act. While the corporation and appellants entered into the contract before the passage of the law, the contract at the time of its execution was unilateral, and under no circumstances could a recovery be had thereon until the defendants had the benefit of the consideration for which they bargained (*Richardson v. Hardwick, 106 U. S. 252, 37 L. ed. 145*), which did not occur until after the passage of the act. That, with reference to this guaranty, the act was not in contravention of section 14, article 2, of the Constitution of this state.

There was no error in the trial court refusing to hold as law the propositions submitted by the appellee, nor in holding as law the propositions submitted by appellants, and finding for the defendants and entering judgment against the plaintiff for costs. There was error in the appellate court reversing the judgment of the circuit court.

The judgment of the Circuit Court is affirmed, and the judgment of the Appellate Court is reversed.

VERMONT SUPREME COURT.

Lucy ROBINSON
v.

Martin V. B. LEACH *et al.*

(.....Vt.....)

A homestead is not exempt from a note

NOTE.—The denial by the above decision that a renewal of notes affects the character of the debt with reference to a homestead is so fully sustained by the authorities that any analysis and compilation of them can hardly be needed.

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given in renewal of notes outstanding when the homestead was acquired, the parties to the notes being the same.

(February 4, 1895.)

EXCEPTIONS by defendant to rulings of the Rutland County Court in favor of plaintiff in a proceeding to establish a claim against an estate which defendant claimed to be exempt as his homestead. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Fayette Potter* for defendant.

Mr. J. C. Baker, for plaintiff:

The object of the statute was to prevent men, after they had obtained credit, from putting their property into a homestead, and thus preventing their creditors from reaching it by attachment.

West River Bank v. Gale, 42 Vt. 27; *Lamb v. Mason*, 45 Vt. 500.

It is the existence of the debt at the time the deed is left for record that establishes the right of attachment and levy upon the land.

Gilson v. Parkhurst, 53 Vt. 884; *White v. White*, 63 Vt. 577.

The note of a debtor is not a payment of the debt unless it is taken as such by agreement of the parties.

8 Randolph, Com. Paper, 1509; 18 Am. & Eng. Encyclop. Law, p. 167.

The debt represented by this new note was a cause of action existing when the homestead was acquired.

Holland Trust Co. v. Waddell, 75 Hun. 104; *Kidder v. Knox*, 48 Me. 551; *Lee v. Hollister*, 5 Fed. Rep. 752; *McLaughlin v. Bank of Potomac*, 48 U. S. 7 How. 228, 12 L. ed. 679; *Lovry v. Fisher*, 2 Bush, 70, 92 Am. Dec. 475; *Bank of Hanover v. Bridgers*, 98 N. C. 67; *Dickinson v. King*, 28 Vt. 378.

This homestead being subject to attachment and execution for the debt of Mrs. Robinson, which was a cause of action at the time when the homestead was acquired, passed to the assignee by the assignment for administration in the payment of her debt, so far as the homestead was liable for its payment.

Tilden v. Crimmins, 60 Vt. 546.

Rowell, J., delivered the opinion of the court:

The question is whether a homestead is exempt from a note given by the homesteader after its acquisition, in renewal of his notes given before its acquisition, the parties to the notes being the same. The statute subjects the homestead to attachment and levy of execution upon "causes of action existing at the time" it is acquired. It is contended that the cause of action meant is the claim that the plaintiff makes and declares upon as the ground of his suit, and which is to be litigated on trial. But this construction is too strict. The words "causes of action" are evidently used in a sense broad enough to embrace the debt, as distinguished from the evidence of it. The statute is the same for the purposes of this case as though it read "debts existing," etc. Hence, if the original debt can be said to exist, the case is with the plaintiff.

Courts will, if they can, when justice requires it, look behind the evidence of the debt, and consider the debt itself, and decide accordingly to that. This is always done when mortgage notes are renewed. As long as the original debt can be traced, the security remains, no matter how many renewals there have been. So in *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579, we looked behind a judgment rendered, after the defendant's discharge in insolvency, but founded on a note unaffected by the discharge, and held the judgment not discharged because the note was not. The ground of the holding was that although the note, as evidence of the indebtedness, was merged in the judgment, yet the judgment was

not to all intents a new debt, but the old debt in a new form, for the purpose of protecting the right connected therewith before the judgment. The same view was held and applied in *Pinney v. Kimpton*, 46 Vt. 80. There the plaintiff held a note as collateral for signing with another. Having had to pay, he took the note of his principal for the amount, and afterwards brought suit on the collateral. It was held that, by taking his principal's note, he did not discharge his claim on the note he held as collateral. The court said that the debt still existed, though evidenced by the principal's note; that, in an action against the principal for the collection of the debt, the plaintiff would, in form, be confined to his remedy on the note, instead of the open account; that, in this sense and for this purpose, it is often said in this state that the giving of a promissory note for an existing debt is *prima facie* payment; but that it is not payment in the sense of extinguishing the debt so as to discharge the creditor's claim on property put into his hands by the debtor as collateral security for the debt, unless so agreed. This principle is entirely applicable here. The new note was but a new evidence of the old debt. True, the old notes were extinguished as affording a ground or cause of action, but the debt evidenced thereby continued to exist for the purpose of preserving the right against the homestead that was originally connected with it. *Weaver's Estate*, 25 Pa. 434, is a case precisely like this. There a creditor held the promissory note of his debtor given before the passage of the homestead act. After its passage, he gave up that note, and took in place of it a single bill, with warrant of attorney for confession of judgment, and it was held that a judgment entered on the bill was not subject to the act. Even where a negotiable promissory note given for land, and payable to the vendor, went into the hands of a third person, who, while he held it, took a new note therefor, payable to himself, with a party added as surety, it was held that this was not such a novation of the original contract that a homestead laid off in the land was not subject to levy and sale to satisfy a judgment founded on the bill. *Wofford v. Gaines*, 53 Ga. 485, cf. *Perrin v. Sargeant*, 33 Vt. 84.

The defendant relies on *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Rep. 624, where it was held that the taking of a negotiable promissory note is an extinguishment of any implied promise on the part of the maker to pay the consideration for which the note was given, and that, therefore, the taking of such a note in payment of an account for labor bestowed on an article is such a manifestation of the intent of the taker to rely on the personal security of the maker as to be a waiver of any lien given by law on the property. The ground of that decision seems to be that the lien is but an incident of the implied contract; and so, when the creditor takes a note, thereby extinguishing that contract, which is the principal thing, he must be taken to intend to waive the lien, which is the incident. If this case is opposed to what we now hold, it must be regarded as departed from to that extent.

Judgment affirmed, and ordered to be certified to the court of insolvency.

PENNSYLVANIA SUPREME COURT.

EVAN MORRIS *et al.*
v.
METALLINE LAND CO. of Lake Superior
and
William H. STEVENS *et al.*, *Appts.*
(164 Pa. 326.)

A declaration of forfeiture of shares in an unincorporated joint-stock company or partnership is absolutely void where the articles of association provide for publication of notice in newspapers of Philadelphia and Detroit thirty days before declaring a forfeiture, and such notice has been published in Philadelphia but not in Detroit.

(October 8, 1894.)

A PPEAL by defendants Stevens, Brooking, and Miller from a decree of the Court of Common Pleas, No. 2, for Philadelphia County refusing recognition to them in the distribution of assets of the Metalline Land Company. *Reversed.*

The case sufficiently appears in the opinion.

Mr. T. Elliott Patterson, for appellant William H. Stevens:

Chancellor Kent, of articles of agreement like those of the Metalline, said: "There cannot be a doubt upon any mind, after perusing these articles, and connecting them with the admissions in the (bill), that they are of the character and authority of permanent constitutional provisions, binding upon all the members when adopted by all, as a solemn private contract; and that they can only be abolished by the like con-

current will by which they were adopted. If these are not of the nature, and do not partake of the force of fundamental articles, it is not in the power of any private association to have any."

Livingston v. Lynch, 4 Johns. Ch. 595, 1 L. ed. 948.

The duties and obligations, as well as the rights, of the parties *inter se* being ascertained and defined by the several provisions contained in such articles, they are regulated, and can alone be enforced consistently with the terms and stipulations agreed upon.

Gow, Partn. 7-9; *Chapple v. Cadell*, Jac. 587; *Parsons*, Partn. p. 284, footnote; *Ex parte Lawes*, 10 Eng. L. & Eq. 168; *Const v. Harris*, Turn. & R. 496; *Clarke v. Hart*, 6 H. L. Cas. 638.

In *Johnson v. Lytle's Iron Agency*, L. R. 5 Ch. Div. 687, when notice of a call demanded payment of interest from the day of the call instead of the day fixed for its payment as the by-law required, *Mellish*, *Lord Justice*, said: "I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question, how much it departs. It is bad notice and the subsequent resolution, which is founded upon it, is invalid."

Where a forfeiture is sought to be enforced, it is the notice for the call for the assessment that is of greater importance than any subsequent steps in the procedure.

Cook, Stock & Stockholders, p. 150.

Where the charter expressly requires notice to be given in certain newspapers, and for a

NOTE.—Forfeiture of corporate stock.

I. Power to forfeit.

II. Validity of exercises of power.

a. *In general.*

b. *Necessity of notice.*

c. *Sufficiency of notice.*

III. Redemption or other remedy of stockholder.

IV. Effect of forfeiture on personal liability of stockholder.

a. *As to unpaid assessments.*

b. *As to creditors.*

V. Miscellaneous.

L. Power to forfeit.

That a corporation has no inherent power to forfeit delinquent stock is declared in *Budd v. Multnomah Street R. Co.* (1897) 15 Or. 413.

The right to forfeit shares must come from the law and can be exercised only in the manner prescribed by law, says *Judge Cooley* in *Westcott v. Minnesota Min. Co.* (1871) 23 Mich. 145.

In a case of a mining partnership on the cost-book principle, it was held that the right of forfeiture was not inherent in such a company. *Clarke v. Hart* (1858) 6 H. L. Cas. 638, affirming *Hart v. Clarke* (1854) 6 DeG. M. & G. 232, 27 L. J. Ch. 415, 5 Jur. N. S. 447, reversing 19 Beav. 365.

Paid-up stock of non-assenting members of a corporation cannot be subjected by any action of the majority to forfeiture for nonpayment of additional assessments. *Gresham v. Island City Sav. Bank* (1899) 2 Tex. Civ. App. 52.

Directors have no power to declare a forfeiture of stock for nonpayment of installments unless the power has been conferred upon them by charter. 27 L. R. A.

A by-law providing for such forfeiture is not authorized by general power to make by-laws not inconsistent with any existing law for the management of property, the regulation of its affairs, and the transfer of stock. *Re Long Island R. Co.* (1897) 19 Wend. 37, 32 Am. Dec. 429.

But a declaration of a forfeiture of stock without express grant of power in the charter, but in pursuance of a by-law printed on certificates and acquiesced in, was upheld on the theory that the by-law had been agreed to by all, and relief against the forfeiture was denied in *Lesseppe v. Architects Co. of New Orleans* (1849) 4 La. Ann. 318.

A statute giving a corporation a power of sale to enforce a forfeiture of stock is applicable to existing stockholders where the former law gave a lien on the stock leaving the holder of the lien to common remedies for its enforcement. *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.* (1890) 89 Ala. 361.

A declaration of forfeiture after a judgment for the full amount of unpaid calls is void where the deed of settlement of the company provided for forfeiture, and also that the directors, if they should think fit, might enforce the payment of the amount due "instead of declaring the same to be forfeited." *Giles v. Hutt* (1848) 3 Exch. 13, 13 L. J. Exch. 53, 5 Railway Cas. 605.

A statute requiring payment of calls and providing that 5 per cent shall be added for every month's delay, and that "if the same and the said additional penalty shall not be paid for such space of time as that the accumulated penalties shall become equal to the sums before paid for and on ac-

certain number of days, before calls shall be valid, the requirements must be observed, or there can be no recovery upon a call.

Boone, Corp. 161; *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508; *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. C. 41; *Northampton Mut. Life Stock Ins. Co. v. Stewart*, 39 N. J. L. 486.

The power to declare a forfeiture of the shares for non-payment of calls is derived only from express statute provision, and usually depends on certain conditions, as a prescribed notice, and mode of sale. If these are not strictly complied with, or if the assessment itself is illegal, the sale will be void, and the shareholders will not be liable for the deficit.

Redf. Railways (1887) 214; *Morawetz, Priv. Corp.* (1886) 127; *Walker v. Ogden*, 1 Biss. 287; *Sparks v. Liverpool Water Works*, 18 Ves. Jr. 428; *Westcott v. Minnesota Min. Co.* 23 Mich. 145; *Portland, S. & P. R. Co. v. Graham*, 11 Met. 1; *Lexington & W. O. R. Co. v. Staples*, 5 Gray, 522; *Alabama & F. R. Co. v. Rowley*, *supra*.

The language of *Judge Sharswood*, in *Germantown Pass. R. Co. v. Fittler*, 60 Pa. 180, 100 Am. Dec. 548, is: "We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and if any restrictions or limitations therein provided have been disregarded, the alleged act of forfeiture must be declared invalid."

See also *Johnson v. Lyttle's Iron Agency*, L. R. 5 Ch. Div. 687; *Pitcher v. Barrows*, 17 Pick. 865, 28 Am. Dec. 806; *Lincoln v. Wright*, 23 Pa. 80, 62 Am. Dec. 818; *Kellogg v. French*, 15 Gray, 857.

Messrs. James E. Hood and Francis I. Gowen, for appellant, Sarah Miller:

To justify forfeiture the requirements of the

count of such shares, the same shall be forfeited to the said company," does not make a forfeiture necessary, or prevent waiver thereof and a personal action against the subscriber. *Delaware & S. Canal Nav. Co. v. Sansom* (1803) 1 Binn. 70.

The option to forfeit stock is with the corporation and not with the shareholder under a charter making the stock "liable to forfeiture on default," and a mistaken supposition of the holder as to his rights in this respect will not relieve him. *Northeastern R. Co. v. Rodriguez* (1867) 10 Rich. L. 278.

A subscriber to stock cannot elect to rescind by forfeiting payment which he has made, but the option to forfeit is with the corporation. *Klein v. Alton & S. R. Co.* (1851) 13 Ill. 514.

A forfeiture may be had for the balance due and uncollectible on a judgment against the stockholder for an assessment. *Chase v. East Tennessee, V. & G. R. Co.* (1880) 5 Lea, 415.

A clause in articles of association providing for the forfeiture of the shares of any holder who may commence any action or proceeding against the company or directors, but on payment of the full market value therefor, is held invalid under a statutory provision against reduction of capital except in a specified manner. *Hope v. International Financial Soc.* (1876) L. R. 4 Ch. Div. 327, 46 L. J. Ch. 200, 35 L. T. N. S. 324, 25 Week. Rep. 203.

A consent by a member of a joint stock association that another shall represent his share and vote and act as a member of the company under a contract to give personal services to the company in payment for a share, was held to give the other person no power to forfeit the share by desertion 37 L. R. A.

articles of association regulating the mode of proceeding to enforce the same must have been strictly complied with.

Lindley, Partn. p. 744.

Messrs. Richard C. Dale and William D. Neilson, for appellees:

The articles of association of this company have been before this court in *Oliver's Estate*, 9 L. R. A. 421, 136 Pa. 48.

The company is unincorporated, and is a partnership organized on the joint-stock plan by the contract entered into by its members.

Invalid forfeitures may subsequently by acquiescence, express or tacit, be so far confirmed that they cannot be opened.

Green's Brice, Ultra Vires, 188; *Agricultural Insurance Company Cases*, in *Lindley, Partn.* p. 760.

There may be, first, a power to forfeit on a bona fide forfeiture but wanting in formalities. In such cases slight circumstances or a short lapse will suffice to bind the parties.

Green's Brice, Ultra Vires, 188, citing *Woolaston's Case*, 4 DeG. & J. 437; *Webster's Case*, 32 L. J. Ch. 185; *Knight's Case*, L. R. 2 Ch. 321; *King's Case*, L. R. 2 Ch. 714, 721; *Kelk's Case*, L. R. 9 Eq. 107; *Austin's Case*, 24 L. T. N. S. 493; *Lyster's Case*, L. R. 4 Eq. 233; *Garden Gully Quarries Min. Co. v. McLister*, 1 App. Cas. 39; *Lawrence's Case*, L. R. 2 Ch. 412; *Hart v. Clarke*, 19 Beav. 356; *Olegg v. Edmondson*, 8 DeG. M. & G. 787; *McConomy v. Reed*, 152 Pa. 42.

Messrs. R. C. McMurtrie and John G. Johnson also for appellees.

Green, J., delivered the opinion of the court:

The proceeding in this case is a bill in equity filed by certain trustees of a fund

of the enterprise. *Cox v. Bodfish* (1853) 35 Me. 302.

The rights of a stockholder on foreclosure of a railroad mortgage are forfeited by his failure to assent within the time specified by statute to a plan of reorganization which the statute authorizes. *Vatable v. New York, L. E. & W. R. Co.* (1884) 96 N. Y. 49.

A general assignment by a corporation for creditors will not prevent a forfeiture of stock for non-payment of assessments as against the contention of the stockholder after the corporation has again become a profitable concern. *Germantown Pass. R. Co. v. Fittler* (1869) 60 Pa. 124, 100 Am. Dec. 548.

The holder of paid-up stock is held liable to the sale thereof for an assessment to pay debts, although there is unsold stock in the treasury, if this cannot be sold, by virtue of 2 Utah Comp. Laws 1888, section 2296, which provides that the holder of such stock shall not be liable to assessment or for any indebtedness otherwise than by sale of stock unless distinctly provided for in the articles of incorporation. *Cary v. York Min. Co.* (1893) 9 Utah. 464.

Where a deed of settlement provided for the forfeiture of the shares of any subscribers who did not execute such deed, without giving a right of forfeiture for nonpayment of calls, it was held that forfeiture for non-execution of the deed could not be declared where the deed made payment of a call a requisite of its execution. *Norman v. Mitchell* (1854) 5 DeG. M. & G. 648, 19 Beav. 278.

A forfeiture of the interest of a member of a religious society for non-payment of an assessment is not to be justified by articles of association providing that the proprietors may tax themselves to

arising from the sale of lands owned by the defendant land company. "The company is unincorporated, and is a partnership organized on the joint-stock plan by a contract entered into by the members." *Oliver's Estate*, 136 Pa. 58, 9 L. R. A. 421. It is composed of numerous members, whose interests in the company are represented by certificates of stock, of which there were to be 20,000, of \$5 each. The business of the company was to be the purchasing of lands, developing mines of copper and other valuable minerals, and disposing of the same, situated in the Lake Superior land district, upper peninsula, state of Michigan. The funds and property of the association were vested in three trustees, to be held by them as joint tenants, and they were to have the entire control and disposal of the property, real and personal, and to make purchases, conveyances, sales, and contracts. In the exercise of their authority they sold 40 acres of the lands of the company for \$500,000, and the distribution of this money is the object of the present proceeding. Certain of the stockholders had failed to pay calls or assessments made by the trustees, and the shares of a number of stockholders, including the appellants, had been forfeited for nonpayment of the calls. If these forfeitures were lawfully made, the appellants have no case, and the decree of the court below should be sustained. If they or any of them were not lawfully made, the appellants are entitled to participate in the distribution, from which they were excluded by the master and court below. Three calls were made prior to the forfeitures involved in the present contention,—one in 1872, one in 1874, and another in 1878. As to the call made in 1872, no

question arises here, as all the appellants paid the amounts called for at that time. There are three appellants,—Roope Brooking, Sarah Miller, executrix, and William H. Stevens. The shares of Brooking and Miller were forfeited under the call of 1878 only. Of the shares of Stevens, 550 were forfeited for nonpayment of the call of 1874, and 1,500 for nonpayment under the call of 1878. In regard to the forfeiture of the 550 shares under the call of 1874, we are of opinion that the provisions of the articles of association which authorized a forfeiture were strictly and precisely followed in every particular, and therefore that forfeiture was a valid and binding act, fully authorized by the articles, and it must be sustained.

We are of a different opinion in regard to all the forfeitures under the call of 1878, and therefore do not sustain them. The authority to make any forfeitures is found in the fourth section of the articles of association, which is in the following words, viz.: "The original shares of this company shall be issued to the proprietors of the lands in proportion to their respective interests in said lands, liable to no more than five dollars per share assessment, and the board of trustees shall have authority to make a requisition upon their several stockholders for the payment of such installments upon the shares held by them whenever they may deem it necessary or expedient, by giving thirty days' previous notice of the same in one or more newspapers published in the city of Philadelphia and Detroit, specifying in such notice the amount of such installment per share, and the time and place of payment of the same: provided, however, that no installment shall be called in, which, with the

raise money to repair their house. *Perrin v. Gran-ger* (1858) 80 Vt. 506.

A condition in a deed of a pew given by an incorporated religious society that if the grantee "shall leave the said meeting-house he shall first offer the said pew to the treasurer" for a sum named, or else forfeit his rights, is upheld. *French v. Old South Soc.* in Boston (1871) 106 Mass. 479.

For rights in respect to pews, see *note to Aylward v. O'Brien* (Mass.) 23 L. R. A. 208.

II. Validity of exercises of power.

a. In general.

In accordance with the decision in the above case of *MORRIS V. METALLINE LAND CO.* it is held by all the cases that strict compliance with the law is necessary to sustain a forfeiture of stock. Such is the doctrine of *Mitchell v. Vermont Copper Min. Co.* (1876) 5 Jones & S. 406.

The right of forfeiture of delinquent shares is *strictissimi juris* and all that is necessary must be exactly pursued. *Clarke v. Hart* (1858) 6 H. L. Cas. 623, 5 Jur. N. S. 447, 27 L. J. Ch. 615, affirming *Hart v. Clarke*, 6 DeG. M. & G. 223, reversing 19 Beav. 265.

To enforce statutory liability for deficiency after forfeiture of stock the terms of the statute must be strictly complied with. *Lewey's Island R. Co. v. Bolton* (1880) 48 Me. 451, 77 Am. Dec. 236.

Under statute authorizing the sale of delinquent stock leaving a personal liability for any deficiency, the terms of sale specified are conditions precedent to a valid sale. *Portland, S. & P. R. Co. v. Graham* (1846) 11 Met. 1.

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Proof of sale must show every fact named in the statute. *Lewey's Island R. Co. v. Bolton*, *supra*.

Where articles of association are the law governing the right of forfeiture all the conditions precedent which are made by them must be strictly complied with or the proceedings will be void. *Westcott v. Minnesota Min. Co.* (1871) 23 Mich. 145.

In the absence of any provision in a charter for the sale of forfeited shares except under order of the directors, they cannot delegate their power and they cannot make the order in the alternative. *York & C. R. Co. v. Ritchie* (1855) 40 Me. 425.

A by-law providing for notice under an order of the directors makes such order necessary to a valid sale for the forfeiture of shares. *Luxington & W. O. R. Co. v. Staples* (1855) 5 Gray, 580.

A mere declaration of a forfeiture of stock without any sale thereof does not prevent an action to collect an assessment upon it, where a by-law provides for enforcing forfeiture by sale at auction after notice. *Minnehaha Driving Park Asso. v. Legg* (1892) 50 Minn. 333.

A sale of stock to enforce forfeiture is held not to be necessary where the statute merely authorizes a forfeiture without providing the mode of proceeding. *Rutland & B. R. Co. v. Thrall* (1868) 85 Vt. 536.

But forfeiture of stock incurred when there is no express mode of establishing it provided, cannot be established by declaration of trustees so as to prevent equity from allowing redemption in a proper case. *Walker v. Ogden* (1859) 1 Biss. 387.

Where the statute says the treasurer may sell stock at public auction "under such regulations as the corporation by its by-laws may direct," no

amount already paid on the share, shall make the total amount exceed the sum authorized by the articles of this association; and provided, also, that notice of the call for any installment shall be sent by letter through the postoffice, addressed to all stockholders whose residence is known to the secretary, and it shall be competent for the trustees, after the expiration of thirty days from the period at which any installment shall become due, to forfeit the stock of such parties as may fail in paying such installment and the interest thereon from the time such installment shall have become due, and the stock so forfeited shall be sold at auction in accordance with the general laws of the state of Michigan."

It will be perceived that, in order to make a forfeiture which should be in accordance with the power conferred by the foregoing article, it would be necessary for the trustees to make a requisition for the amount called "by giving notice of the same in one or more newspapers published in the city of Philadelphia and Detroit, specifying in such notice the amount of such installment per share, and the time and place of payment of the same." In point of fact such a notice was published in the city of Philadelphia, but no publication of any kind was made in Detroit; and the master has so found, and that it was an irregularity,—in fact, a non-compliance with the requirements of the articles of association. It was not only necessary that there should be a publication in a newspaper published in Detroit, but, before an act of forfeiture could be performed by the trustees, it was essential that thirty days should elapse after the first publication before the installment would become pay-

able. But, if there was no publication at all in a Detroit paper, then there was no period of thirty days which commenced to run prior to the day of payment, and by necessary consequence no day of payment. Hence the installment was not due at any time, and the stockholders were in no default for not paying. Therefore two primary, elemental prerequisites to any right of forfeiture were altogether absent, to wit—First, the publication in a Detroit newspaper; and, next, the lapsing of an interval of thirty days between the publication of the notice and the day of payment. Both of these requirements were indispensable, but the second of them is so manifestly and so fatally indispensable that the mere statement of the proposition is its own proof. If the thirty days of grace are absent from the case, the power to declare the forfeiture never arose, never came into existence, and the subsequent declaration of the forfeiture was simply a void act, altogether nugatory, and of no effect whatever.

If authority were wanting for so plain a proposition, a perfect and authoritative illustration is found in the case of *Northampton Mut. Live Stock Ins. Co. v. Stewart*, 39 N. J. L. 486. The company brought an action against a member to recover an assessment. In the court below a judgment was obtained, which was reversed by the court of errors and appeals, who said: "The plaintiff is a mutual insurance company. Its scheme of organization draws each holder of its policies into its society, as a member thereof. This suit is instituted against the defendant as a member of the corporation. As such he is subject to its constitution, and bound by its by-laws and proper corporate regulations,

valid sale can be made in the absence of any such regulations by by-law. *Mitchell v. Vermont Copper Min. Co.* (1876) 8 Jones & S. 406.

Action by a corporation attempting to forfeit stock for non-payment of assessments under a stipulation making time of the essence of the contract to pay them, was held to be effectual, although the company had advertised the sale of the shares afterwards, which was postponed from time to time and never took place. The court held that any disposition of the shares by the corporation after their forfeiture could not be contested by the former owner who attempted to redeem them. *Weeks v. Silver Inlet Consol. Min. Co.* (1897) 23 Jones & S. 1.

Where shares were forfeited to satisfy a lien thereon without any sale under a provision in the deed of settlement for a lien with liberty to forfeit the shares in satisfaction of a debt without saying anything about a default, the court says: "We must consider that the shares if taken were to be taken at their real value and applied in reduction of the debt." The company was held not obliged to sell them, but if it did not must give full market value without deduction for the probable effect of throwing the shares on the market. *Stubbs v. Lister* (1841) 1 Younge & C. Ch. Cas. 81.

A judicial sale of shares on a default decree against a nonresident shareholder for assessments, which was obtained by publication, was held void for want of jurisdiction where the charter conferred no power to forfeit and sell and the shares were not seized and taken into custody, since the proceeding must be viewed as being *in rem*. *Williams v. Lowe* (1876) 4 Neb. 383.

A resolution to forfeit the shares of a single 27 L. R. A.

stockholder is in no sense a by-law and cannot be sustained where there is no by-law on the subject but the power is given by statutory provision that the corporation may make by-laws therefor. *Budd v. Multnomah Street R. Co.* (1897) 15 Or. 413.

A resolution that the name of delinquent stockholders "be taken from the rolls" if they do not pay within the next thirty days does not show a forfeiture without further action, or defeat recovery of the assessments by the corporation. *Hays v. Franklin County Lumber Co.* (1892) 35 Neb. 511.

A statutory provision that a delinquent shareholder "shall absolutely forfeit" his shares, construed with a later provision that no advantage shall be taken of such forfeiture until thirty days' notice has been given, does not make a forfeiture effective without a declaration thereof after such notice. *Van Diemen's Land Co. v. Cookerell* (1857) 1 C. B. N. S. 722, 26 L. J. C. P. 208; *Graham v. Van Diemen's Land Co.* (1856) 1 Hurlst. & N. 541, 25 L. J. Exch. 73.

A mere resolution of directors that "if delinquent stockholders do not pay their full subscription stock within the next thirty days their names shall be taken from the rolls" will not, without further action, effect a forfeiture or prevent the enforcement of the subscription. *Hays v. Franklin County Lumber Co.* *supra*.

Calls proclaiming that stock will be forfeited if they are not paid are not enough to constitute forfeiture. *Macon & A. R. Co. v. Vason* (1876) 37 Ga. 314.

A declaration that stock of delinquent subscribers will be forfeited unless payment is made before a particular time is held not to constitute a for-

which he is presumed to know and understand; . . . and he is entitled, in his relations to the company, to whatever aid and protection they provide for him. . . . How and when the tax is to be levied is provided for in the thirteenth article of the by-laws, as follows: 'If the funds in hand be insufficient to pay all losses, the directors shall, by resolution, levy a tax on the members of the company . . . on the amount insured, and they shall publish such levying in two newspapers of the county, and all persons insured at the time of such levying of tax shall pay his amount of tax to the treasurer or his order within sixty days from the day of such public notice.' The fourteenth article provides that, if any member neglect or refuse to pay his tax for sixty days from the day public notice shall be given, the company may sue for and recover the same, with interest and costs of suit. The delinquent must be in default sixty days after publication of the tax levy in two newspapers. . . . There was nothing to show that such publication had ever been made by the company. The demand contains no allegation, and the evidence fails to show, that such public notice was given before the suit was brought. The fact, even, that personal notice of the assessment was served by the company upon the defendant is not sufficient answer to his objection."

The court said further that it might even be admitted "that personal notice served to apprise him better than public notice would have done, but sixty days of grace were not to be computed from the time when personal notice should be given him, but from the giving of public notice,—an event equally within the company's control, and adopted

in its law." If all this is true of a mere call to pay in an assessment, which can easily be recovered after another and proper assessment has been made, with how much greater force does it apply when the consequence of nonpayment is the forfeiture and absolute loss of an immensely valuable interest—in this case worth in one instance \$29,000 and upwards—for the failure to pay \$86.11.

In the case of *Stevens*, it was undoubtedly the fact that he had no knowledge whatever of the call of 1878 until in 1885, when he wrote to the secretary, making inquiry in regard to his stock, and was informed that it had been forfeited for nonpayment of the calls of 1878. He and his family lived in Detroit, but he was absent a large part of the time in the Rocky Mountain territories, engaged in geological explorations and mining. If the notice had been published in Detroit his family might have seen it, and informed him of it. The publication in Philadelphia was obviously of no service, and a publication in Detroit would be of far greater importance to him and his rights than publication anywhere else. But, while this consideration affects the merits of his case on the facts, his right to the Detroit publication is one of the conditions of his contract, and he is therefore entitled to have it rigidly and strictly enforced.

In the case of *Germantown Pass. R. Co. v. Filler*, 60 Pa. 180, 100 Am. Dec. 546, we said (*Sharswood, J.*): "We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and if any restrictions or limitations therein provided have been disregarded the alleged act of forfeiture must be declared invalid. This is so for the

feiture without a further declaration of forfeiture. *Water Valley Mfg. Co. v. Seaman* (1876) 53 Miss. 655.

But in another case a resolution that all stock on which assessments should remain unpaid on a certain date "shall be and hereby is forfeited to the use of this corporation," and that the treasurer shall give immediate notice, and that all stock forfeited by virtue of the resolution should be sold, was held a final declaration of forfeiture. *Butland & B. R. Co. v. Thrall* (1868) 35 Vt. 536.

A resolution declaring in general terms that subscriptions not fully paid, a notice of which has been duly served, be forfeited, is not effective without specifying what subscriptions are thus forfeited. *Johnson v. Albany & S. R. Co.* (1870) 40 How. Pr. 193.

A mere declaration of forfeiture is not effective when there is no express provision of charter or of law authorizing it, but in such case a judicial forfeiture may be had for default. *Chase v. East Tennessee, V. & G. R. Co.* (1880) 5 Lea. 415.

A resolution of directors declaring shares forfeited will be presumed to have been made, although there is no record of it, where entries of the transfer of the shares to the company and of the forfeiture of the shares has been made, which could only have been done when ordered by such resolution. *Knight's Case* (1867) L. R. 2 Ch. 221, 15 L. T. N. S. 544, 36 L. J. Ch. 517, 15 Week. Rep. 294.

A sale of stock forfeited must be for a legal assessment. *Lewey's Island R. Co. v. Bolton* (1880) 48 Me. 451, 77 Am. Dec. 236.

A sale for assessments of which one is illegal, is 27 L. R. A.

void, and no action will lie for a deficiency under the statutes. *Stoneham Branch R. Co. v. Gould* (1864) 2 Gray, 277.

Assessments made by directors outside the state of incorporation are not effective to justify a forfeiture of stock for nonpayment as against a stockholder who had not participated in such acts. *Ormsby v. Vermont Copper Min. Co.* (1874) 56 N. Y. 623.

A declaration of forfeiture of shares made by directors who had made the call on which forfeiture was based without being legally elected was held void for that reason. *Garden Gully United Quartz Min. Co. v. McLister* (1875) 1 App. Cas. 39, 24 Week. Rep. 744, 33 L. T. N. S. 403.

Two directors, although sufficient to form a quorum of a properly constituted board, were held incompetent either to increase the number of directors or to make a call on which a forfeiture could be based, where the articles provided that the board should consist of not less than three nor more than seven. *Faure Electric Accumulator Co. v. Phillpott* (1888) 59 L. T. N. S. 525.

But a director who acted in making a call when in fact there were not enough to make a valid board, was held estopped to deny the validity of the call on which a forfeiture of his shares had been declared. *Ibid.*

A forfeiture was held void for the reason that both it and the call on which it was based were made by four directors only where the articles provided that the business should be conducted by not less than five. *Bottomley's Case* (1880) L. R. 16 Ch. Div. 661, 29 Week. Rep. 153, 60 L. J. Ch. 167, 43 L. T. N. S. 630.

special reason that it is one of those forfeitures against which, if regular, equity does not relieve." In *Westcott v. Minnesota Min. Co.*, 23 Mich. 145, *Mr. Justice Cooley*, delivering the opinion of the court, said: "Assuming, however, that the first and second conditions to valid assessment were complied with, it is very clear, we think, that notice of the meetings as required by the articles is not shown to have been given. . . . The parties, in associating, clearly had a right to stipulate for any notice they saw fit; and we cannot say that a different one would have been equally effectual, and therefore must be held sufficient. There were reasons which they might have regarded of much force for insisting upon a written notice in every instance, and when proceedings *in invitum* were taken against them they were not bound to give heed to any other. . . . The right to forfeit shares in any joint-stock undertaking must come from the law, and can only be exercised in the manner provided by the law. In this case the articles of association were the law governing the right of forfeiture, and all the conditions precedent which were made by them must have been strictly complied with, or the proceeding would be void." In 1 *Redfield on Railways*, 211 (ed. 1887), the author says: "The company in enforcing the payment of calls by forfeiture of stock must strictly pursue the mode pointed out in their charter and the general laws of the state. This is a rule of universal application to the subject of forfeiture, and one which the courts will rigidly enforce, and more especially where the forfeiture is one of the prescribed remedies given to the party, and against which equity does not relieve when fairly exercised." In *Tom-*

lin v. Tonic & P. R. Co., 23 Ill. 429, the eleventh section of the charter required notices of calls to be published for thirty days in two newspapers published in the vicinity of the road. An action of assumpsit was brought for unpaid calls, and a certificate was filed, stating that notice had been duly given by publishing. The court said (Caton, J.): "We are inclined to think that the averments of notice in the first and second counts are insufficient. . . . The eleventh section of the charter positively requires notice of the calls to be published for thirty days in two newspapers published in the vicinity of the road. We are inclined to think that this notice required by the charter could not be dispensed with by giving actual notice to the subscriber." To the same effect is *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, in which the court said, "The subscriber, by incorporating this [newspaper notice for thirty days] into his subscription, secures the notice as a condition precedent, without compliance with which he is not liable to suit." In *Hughes v. Antietam Mfg. Co.*, 34 Md. 816, the court said: "The manner of giving notice is prescribed by the law under which the calls were made, and it was the plain duty of the directors to have complied strictly with its requirements in this respect. They had no right to dispense with the mode and manner of notice thus prescribed, and where, by positive law, personal notice is required, a written notice through the mail is not a compliance with the statute." The same doctrine is enforced in *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508; and *People v. Fire Department of Detroit*, 31 Mich. 458,—and in many other cases unnecessary to be cited.

A sale of delinquent shares is not unlawful because the assessments not paid would not have been necessary if the trustees of the corporation had not previously misappropriated its funds. *Marshall v. Golden Fleece Gold & Silver Min. Co.* (1881) 16 Nev. 156.

The tender of the amount due is sufficient to defeat a valid sale of stock as delinquent. *Mitchell v. Vermont Copper Min. Co.* (1876) 8 Jones & S. 406, affirmed in 67 N. Y. 280.

A protest against payment in a letter accompanying a check for the amount of a call and reciting the fact that the check is forwarded for the amount of the call, will not prevent it from being a valid tender so as to prevent a forfeiture for non-payment. *Sweny v. Smith* (1899) L. R. 7 Eq. 324, 38 L. J. Ch. 446.

b. Necessity of notice.

Lack of notice either personally or by mail is fatal to a sale of stock as a forfeiture where such notice is prescribed by by-law. *Mitchell v. Vermont Copper Min. Co.* (1876) 8 Jones & S. 406.

Reasonable notice that stock will be forfeited unless assessments are paid by a certain time is necessary to make a declaration of forfeiture valid. *Rutland & B. R. Co. v. Thrall* (1863) 35 Vt. 536.

But a provision for a notice of forfeiture which has been declared, made in articles of association, is held in *Knight's Case* (1877) L. R. 2 Ch. 321, 15 L. T. N. S. 546, 36 L. J. Ch. 817, not to be essential to the completion of the forfeiture, but as matter more of form than of substance. This notice was different from that called for by another article,

which was to be given twenty-eight days before forfeiture.

c. Sufficiency of notice.

Notice of forfeiture is properly served upon the person whose name is on the register as owner, although he has become a bankrupt. *Graham v. Van Diemen's Land Co.* (1856) 1 Hurlst. & N. 541, 26 L. J. Exch. 73.

A notice of assessment need not expressly notify the stockholder that forfeiture will follow non-payment where a statute authorizes calls "under the penalty of forfeiture." *Hill v. Nisbet* (1884) 100 Ind. 341.

Where a by-law prescribes that notice of forfeiture of stock must be signed by the treasurer or a director and an order prescribing sale at public auction, these provisions must be complied with. *Lewey's Island R. Co. v. Bolton* (1890) 45 Me. 451, 77 Am. Dec. 226.

A forfeiture founded on non-compliance with a notice which demanded interest from the date of a call, when it was only payable from a subsequent day, is invalid. *Johnson v. Lytle's Iron Agency* (1877) 46 L. J. Ch. 786, L. R. 5 Ch. Div. 687, 25 Week. Rep. 548, 36 L. T. N. S. 523.

Notice orally given is held insufficient to make a valid meeting so as to sustain a forfeiture for non-payment of an assessment made at such meeting, where the articles which were the law of the case required a written or printed notice served twenty days in advance. *Westcott v. Minnesota Min. Co.* (1871) 23 Mich. 145.

Notice by publication extensively made in good faith is held sufficient notice to stockholders of the

The English cases are equally clear and positive to the effect that, in order to sustain a forfeiture of property, every condition precedent must be strictly and literally complied with. In *Johnson v. Lytle's Iron Agency*, L. R. 5 Ch. Div. 687, it was said by James, L. J.: "I am of opinion that the notice of December 31st did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations of Table A. It is the established rule of the courts of chancery and of the courts of common law that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad and the forfeiture is invalid." Mellish, L. J., in the same case, said: "I think that, if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it, is invalid. In this case the notice was inaccurate in demanding the payment of interest from the date of the call." One of the provisions of Table A directed that interest should be due on calls from the date of payment, and for this small variance in the notice it was held that the subsequent resolution of forfeiture of the shares in question was void. Other English cases to the same effect are *Sparks v. Liverpool Waterworks Co.* 18 Ves. Jr. 428; *Watson v. Eales*, 23 Beav. 294; *Clarks v. Hart*, 6 H. L. Cas. 688. In the last case, Lord Chelmsford said, "It is unnecessary to advert to the principle that forfeitures are *strictissimi juris*, and that par-

ties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power."

It is not necessary to pursue the citations further. They are really not in controversy. The learned master admitted their correctness and their force. But he was misled into refusing the proper effect of absolute invalidity of the forfeitures declared under the call of 1878 by a theory of acquiescence and of laches on the part of these appellants in seeking to set aside the forfeitures. The cases he cites in support of his conclusions are all well enough in their way, but they are inapplicable to the facts of this case. In *Sparks v. Liverpool Waterworks Co.*, 18 Ves. Jr. 428, the calls were made and the proceeding to forfeit was conducted in strict accordance with the rules of the company, and the forfeiture was sustained upon the insufficiency of the excuse for noncompliance with the call on the part of the delinquent shareholder. In *Prendergast v. Turton*, 1 Younge & C. Ch. Cas. 109, the stock was paid in full, but the original articles of agreement authorized the directors to call for additional shares to carry on the operations of the company. Such a call was made in accordance with the articles, and the plaintiff did not comply, but temporized, and finally refused to pay. The company being a mining company, and requiring contributions from its members to conduct the business, and the other members having constantly paid their contributions, until the business became profitable, it was inequitable that the plaintiff should stand aloof while others were furnishing the means to proceed with the business, and be permitted to participate in the profits thus earned, by means of a restoration to his forfeited shares.

time within which assent must be made to a plan of reorganization after foreclosure in order to work a forfeiture of the rights of those who do not assent. *Vatable v. New York, L. E. & W. R. Co.* (1884) 96 N. Y. 49.

A by-law requiring notice to be posted in a conspicuous place is not shown to have been complied with by proof merely that it was posted in a public place. *Lewey's Island R. Co. v. Bolton* (1890) 48 Me. 451, 77 Am. Dec. 236.

A requirement of notice at the "usual or last place of abode" of a delinquent stockholder in order to forfeit his stock is not complied with by taking the notice for a stockholder who had left the country to the former place of business of a firm to which he belonged, but which had been shut up, and then in accordance with a direction posted on the premises to send notices of the firm to a certain place, taking the notice to that place where it was left with a request to obtain acceptance of the notice. *Van Diemen's Land Co. v. Cockerell* (1867) 1 C. B. N. S. 732, 26 L. J. C. 208.

A three days' notice of sale by publication is not reasonable notice to a stockholder who is known to reside in a remote part of another state. *Lexington & W. C. R. Co. v. Staples* (1855) 5 Gray, 320.

A declaration on August 15 of forfeiture of all stock on which assessments should remain unpaid the 20th of September following is held not unreasonable in the absence of any provision fixing the time of notice where immediate notice is required to be given of the declaration. *Rutland & B. R. Co. v. Thrall* (1863) 35 Vt. 536.

Proof of notice thirty days before sale is not sufficient. *L. R. A.*

cient where the statute requires thirty days' notice before order to sell. *Lewey's Island R. Co. v. Bolton* (1890) 48 Me. 451, 77 Am. Dec. 236.

Statutory provision for forfeiture on thirty days' neglect to pay after a notice specified in public papers must be strictly complied with and the right to enforce an unreasonable penalty against a delinquent stockholder must be tested by the letter of the statute. So where publication was prescribed in newspapers at two places, the failure to publish in one of them cannot be excused on the ground that publication of the other was sufficient. *Louisville & E. Turnp. Road v. Meriwether* (1844) 5 B. Mon. 18.

The rules of a mining partnership on cost-book principle providing power "to declare absolutely forfeited" all delinquent shares and a requirement of ten days' notice was not complied with by giving notice for an impossible day such as Monday the 9th of March, when the 9th fell on Friday. *Watson v. Eales* (1856) 23 Beav. 294, 3 Jur. N. S. 53, 26 L. J. Ch. 361.

III. Redemption or other remedy of stockholder.

Where failure to pay assessment was due to mistake, redemption of stock after mere declaration of forfeiture by trustees was allowed on full payment of principal and interest, there being no mode of enforcing the forfeiture expressly provided. *Walker v. Ogden* (1859) 1 Biss. 287.

Where shares had been forfeited without allowing the full market value, as the court held should have been allowed, a redemption was granted. *Stubbs v. Lister* (1841) 1 Younge & C. Ch. Cas. 81.

The fact that failure to pay a call on which a

Clarke v. Hart, 6 H. L. Cas. 649, was an application of the same principle in somewhat different circumstances. It was held that upon all the facts in the case there was an intentional abandonment of the enterprise by the plaintiff after a full knowledge of the forfeiture, and an opportunity to join in the further necessary expenditures to maintain the existence and business of the company. *Rule v. Jewell*, L. R. 18 Ch. Div. 660, was quite similar in its leading facts, being an absolute refusal to pay, not only previous calls, but subsequent necessary contributions to enable the business to be carried on; and the court held that both intentional abandonment and persistent laches and lying by to take chances, after full notice of forfeiture proceedings, were developed by the testimony, and they refused to restore the forfeited shares. But there are no such facts in the present case. The Metalline Land Company was not engaged in any mining or manufacturing business requiring constant contributions from its members to sustain either its existence or its business. The proceedings to forfeit the shares of the appellants were absolutely void for a fatal want of compliance with an essential prerequisite to any forfeiture. There was no lying by for chances while others were keeping the company alive by constant contributions which were essential to that end. There was no intentional abandonment of their interests in the enterprise, and no conscious laches, after full knowledge of the forfeiture proceedings. On the contrary, there was only an illegal and void forfeiture of their shares set up against their claim to a continued ownership of the shares which were originally their property, and which ownership had never been legally divested. This being their legal status, their original ownership continued, notwithstanding the dec-

laration of forfeiture. That declaration was founded upon a default of which they had never been guilty, for there never was a time, thirty days after a notice to pay a call, published in two newspapers,—one in Philadelphia and one in Detroit,—at which they could have paid the sum demanded, or any sum. Such a time never arrived, because there never was such a publication. Hence they never were in default, and there was no power to forfeit their shares, and they remained the owners of their shares as fully and as lawfully, in all respects, after the declaration of forfeiture as before. They were not bound to take any notice of it, or to seek to have it set aside. They already held their shares, and they continued to hold them, and to be capable of asserting their ownership in any circumstances and for any purpose. They are not the actors in the present proceeding. They were the original owners of the shares in question, and if any other persons assert such ownership they must show it affirmatively, and obtain a judicial decree to that effect. This they cannot do by setting up a void declaration of forfeiture.

There is much discussion of other matters in the paper books, but we do not deem its consideration essential, in consequence of our views upon the leading subject which lies at the foundation of the entire contention. We are of opinion that the appellants are entitled to participation in the distribution to the extent of the shares held by them at the time of the call of 1878, and to that extent the decree of the learned court below must be reversed. *The decree of the court below is reversed*, at the cost of the appellees, and the record is remitted, with instructions to distribute the fund in the hands of the trustees in accordance with this opinion.

forfeiture resulted was due to ignorance of the call although the prescribed notice was sent to the shareholder's house while he was absent from town, and he had relied upon payment by his bankers who had been in the habit of paying his calls on receipt of notice for the shares of another person, but who at the time of this call no longer held those shares and received no notice, does not constitute ground for relief in equity against the forfeiture. The court says it cannot relieve against such accident and that the plaintiff ought to have taken all due pains to inform himself. *Sparks v. Liverpool Waterworks Co.* (1807) 13 Ves. Jr. 428.

A stipulation "that the failure to pay calls when due, time being of the essence of the stipulation, shall be and be taken to be a relinquishment by the holder of the shares on which payment has not been made, and the certificate and all interest thereunder in regard to such shares shall be null and void," is held in *Weeks v. Silver Islet Consol. Min. Co.* (1887) 23 Jones & S. 1, to make a contract clear, reasonable, and in all respects binding, which should be enforced without interference of a court of equity to sanction or sustain its violation.

A notice that a forfeiture of shares will be remitted on payment before the evening of May 10, with a postscript to the effect that the directors have no power to remit after the 11th, was held to be complied with where payment was tendered at the company's office on the afternoon of the 10th and on direction of a clerk to pay it to the com-

pany's account at a bank was taken to the bank five minutes after closing hours, where the bank clerk directed the money to be brought in the morning, which was done. The court considered that payment was actually tendered on the 10th, and also it would have been sufficient if not made until the 11th. *Re Quebrada Co.* (1873) 42 L. J. Ch. 277, 27 L. T. N. S. 843, 21 Week. Rep. 429.

Relief against a forfeiture of shares in a joint-stock company for working a mine because of refusal to pay calls was denied in *Prendergast v. Turton* (1841) 1 Younge & C. Ch. Cas. 96, 11 L. J. Ch. N. S. 22, 5 Jur. 1102, on the ground that the owners had acquiesced in the forfeiture of the shares for a long period.

And after a declaration of forfeiture of shares of a partner in a cost-book mine, it was held that even if it was not regular, a claim to the shares could not be asserted after lying by for more than six years. *Rule v. Jewell* (1881) L. R. 18 Ch. Div. 660, 29 Week. Rep. 755.

Delay in taking steps to reinstate delinquent stock for which opportunity was given on reasonable terms, where the forfeiture was justified by a stipulation that the certificate should be null and void on failure to pay calls when due, was held in *Weeks v. Silver Islet Consol. Min. Co.* (1887) 23 Jones & S. 1, to make such laches as to defeat any claim for judicial relief against the forfeiture.

After refusal to render forfeited shares on the ground that they were not worth it and acquiescing

ILLINOIS SUPREME COURT.

Emanuel MANDEL, *Appt.*,
v.
SWAN LAND & CATTLE CO. (LIMITED).

Henry L. FRANK, *Appt.*,
v.
SAME.

Joseph E. FRIEND, *Appt.*,
v.
SAME.

(154 Ill. 177.)

1. The liability of stockholders in foreign corporations must be determined by the law of the state under which such corporations were created.
2. The liability of a stockholder to the corporation for calls made, though dependent upon the phraseology of the statute creating it, is contractual, and will ordinarily be enforced by the courts of another jurisdiction, unless a wrong or injury will be done to the citizens of such jurisdiction, or the policy of its laws will be contravened or impaired.
3. The general rule in the United States is that, while a corporation having the right under the statute creating it to declare a forfeiture of shares for nonpayment of calls may exercise an option to forfeit the stock or sue for the amount of the calls, it cannot forfeit the stock and afterwards sue at law for such amount.
4. A positive statutory provision that a corporation may not only forfeit stock for nonpayment of calls, but collect all calls made prior to the forfeiture, will control any principle adopted as a mere equitable rule.
5. A right of recovery by a foreign cor-

poration, of calls made upon stock which has been forfeited for nonpayment of such calls, being in conflict with the current of legislation in this country, cannot depend on a by-law merely, but must exist in the act under which the company is incorporated.

6. A statute authorizing recovery after forfeiture of corporate stock, of all calls owing upon it at the time of forfeiture, does not authorize recovery of interest and expenses thereafter accruing.
7. The right of a corporation to recover in another jurisdiction the amount of calls made upon its stock does not depend upon any principle of comity, but upon the right to enforce a contract validly entered into.
8. The Illinois statute providing that foreign corporations doing business in the state shall be subject to the liabilities, restrictions, and duties imposed upon domestic corporations, and have no other or greater powers, does not relieve a citizen becoming a stockholder in a foreign corporation from a liability for calls made upon stock forfeited for nonpayment of such calls, imposed by the statute under which such corporation was organized, as the term "doing business" has no relation to the by-laws of the company, or its relations to its own members, or its resort to the Illinois courts to enforce such liability.
9. A corporation whose articles of association provide that the holders of shares for the time being, whatever the number issued or subscribed for, shall form the company, may make calls upon its stock, although the entire amount of stock has not been subscribed for or the shares allotted.
10. Secondary evidence of the books and papers of a corporation is inadmissible in its behalf, where the originals are under its control.

in the forfeiture until the shares became valuable, the right to redeem is lost. *Sayre v. Citizens Gas Light & Heat Co.* (1888) 60 Cal. 207.

But mere neglect to take action for a period short of the statute of limitations will not defeat a stockholder's remedy at law by action for conversion against an invalid forfeiture and sale of his stock. *Ormsby v. Vermont Copper Min. Co.* (1874) 56 N. Y. 623.

Under Cal. Civ. Code, section 339, requiring the first publication of delinquent sales of stock to be at least fifteen days prior to the sale, a sale on thirteen days' notice, made under valid assessments, will not be restrained by injunction, but under section 347 the delinquent stockholder may at any time within six months tender the amount of the assessment to the purchaser and bring action to recover the stock. *Burnham v. San Francisco Fuse Mfg. Co.* (1888) 76 Cal. 32.

No waiver of a right of action for conversion of stock by invalid proceedings to forfeit it was made by receiving a check for the surplus proceeds without knowledge of the failure to comply with the by-laws. *Allen v. American Bldg. & Loan Assn.* (1892) 49 Minn. 544.

After invalid forfeiture and sale of stock for default in assessments the remedy is by action for its recovery and not by an action for a specific undivided share of the property of the corporation. *Smith v. Maine Boys Tunnel Co.* (1861) 18 Cal. 111.

A corporation is liable in damages for forfeiting and selling shares on account of a default of one 27 L. R. A.

who has transferred them to the plaintiff by a lawful transfer which the company has neglected to make on the books. *Catchpole v. Ambergate, N. & B. & E. Junction R. Co.* (1859) 1 El. & Bl. 111, 7 Railway Cas. 221, 22 L. J. Q. B. 35, 17 Jur. 345.

The right to damages for irregular forfeiture of shares which is the only remedy provided in articles of association in case shares are forfeited irregularly, can be asserted by a shareholder against the company in liquidation where the forfeiture was declared without giving him notice for the time prescribed. The court denied the contention that the forfeiture must be held wholly invalid so as to exclude him from this remedy and leave him on the list of contributories. *Re New Chile Gold Min. Co.* (1890) 68 L. T. N. S. 344.

A decree against a foreign corporation to relieve from forfeiture of shares in opposition to the construction of the contract by the courts of the country where the corporation belongs is denied in *Sudlow v. Dutch Rhenish R. Co.* (1855) 21 Beav. 43.

A court has no jurisdiction to issue a writ of mandamus to a foreign corporation to compel the annulment of a forfeiture of stock. *North State Copper & Gold Min. Co. v. Field* (1885) 64 Md. 151.

If an assessment is lawful no injunction will be granted against forfeiture of shares for failure to pay it. *Gorman v. Guardian Sav. Bank* (1877) 4 Mo. App. 180.

An injunction against the forfeiture of shares may be granted where a resolution directing a call

11. Proof of papers, entries, and records of a private corporation in its possession cannot be made by the opinion or conclusion of a witness as to what is shown.

12. Entries of mailing letters and notices of calls upon corporate stock are mere memoranda to which the person making them may refer to refresh his recollection, and not a record which can be proved only by the originals or by certified copies.

(January 15, 1893.)

APPEALS by defendants from judgments of the Appellate Court, First District, affirming judgments of the Circuit Court for Cook County, in favor of plaintiff in actions brought to enforce payment of calls upon stock of the plaintiff corporation, to which defendants had subscribed. *Reversed.*

The facts are stated in the opinion.

Messrs. Otis & Graves, for appellant:

No action can be maintained by a corporation to recover upon a call made upon its stock, after the stock itself has been forfeited by the corporation for nonpayment.

Small v. Herkimer Mfg. & Hydraulic Co. 2 N. Y. 380; *Buffalo & N. Y. O. R. Co. v. Dudley*, 14 N. Y. 386; *Mills v. Stewart*, 41 N. Y. 384; *Taylor, Corp.* § 546; 1 *Morawetz, Priv. Corp.* 124; *Rutland & B. R. Co. v. Thrall*, 85 Vt. 558; *Cook, Stock & Stockholders*, §§ 121, 134; *Great Northern R. Co. v. Kennedy*, 4 Exch. 417.

The power to sue and recover the amount of a call after forfeiture of the stock for nonpayment of that particular call was not given to

the appellee by the statutes of Great Britain, or otherwise, and the articles of association neither can, nor properly construed do, confer any such power.

Rutland & B. R. Co. v. Thrall, supra.

The appellee being a foreign corporation, organized under the general statutes of Great Britain, can exercise no powers in this state except by comity, and only upon such terms and conditions as the people of Illinois may deem proper to impose. Nor can a foreign corporation exercise any right which is not conferred on a corporation created by our laws.

Santa Clara Female Academy v. Sullivan, 116 Ill. 384, 56 Am. Rep. 776; *Granite State Provident Assn. v. Lloyd*, 145 Ill. 620; *Stevens v. Pratt*, 101 Ill. 206; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349; *Hutchins v. New England Coal Min. Co.* 4 Allen, 580; *Jones v. Sisson*, 6 Gray, 238; *Penobscot & K. R. Co. v. Barlett*, 12 Gray, 244; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray, 488; *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157; *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen, 336; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34; *Rice v. Merrimack Hosiery Co.* 56 N. H. 114; *Ash v. Baltimore & O. R. Co.* 72 Md. 144; *Richardson v. New York Cent. R. Co.* 98 Mass. 85; *Usher v. West Jersey R. Co.* 4 L. R. A. 261, 126 Pa. 206; *O'Reilly v. New York & N. E. R. Co.* 6 L. R. A. 719, 16 R. I. 395; *Hanna v. Grand Trunk R. Co.* 41 Ill. App. 116; *Illinois Cent. R. Co. v. Gragin*, 71 Ill. 177.

No matter what construction may be given to the articles of association in this case by the

on stock which is fully paid up threatens to enforce it by forfeiture. *Moore v. New Jersey Lighterage Co.* (1889) 3 N. Y. S. R. 213.

A forfeiture of stock constituting part of an illegal increase for default after payment in part defeats the right of a holder, although all the increased stock was subsequently retired by a resolution to "reduce" the stock to the original amount and bonds were issued to holders of such stock. *Knowlton v. Congress & E. Spring Co.* (1874) 57 N. Y. 513.

IV. Effect of forfeiture on personal liability of stockholder.

a. As to assessments.

It is said in the above case of *MANDEL v. SWAN LAND & CATTLE CO.* to be the general rule in this country that a corporation having the right to declare a forfeiture may have the option to do so or to collect the calls, but cannot forfeit the stock and afterwards sue at law, as the exercise of forfeiture would end the relation between the parties and exclude a resort to the other remedy; but adds that it has never been held that a right to do both cannot be given. Provisions authorizing recovery of the deficiency have in fact been frequent.

The general doctrine above stated has been declared in several cases saying in substance that a corporation cannot both forfeit shares of stock and sue for the amount due upon them. *Macon & A. R. Co. v. Vason* (1876) 57 Ga. 314; *Lexington & O. R. Co. v. Bridges* (1847) 7 B. Mon. 556, 46 Am. Dec. 523.

Also that after forfeiture of stock the corporation cannot recover for prior unpaid assessments even if it holds the stockholder's promissory note therefor. *Ashton v. Burbank* (1873) 2 Dill. 435.

Also that while an unsuccessful attempt to sell shares for the purpose of forfeiting them will not

defeat personal liability for the assessments although the court says: "Had the shares been sold their right to sue the defendant would without doubt have been destroyed." *Instone v. Frankfort Bridge Co.* (1812) 2 Bibb, 578.

But it does not appear that in these cases there was any sale of the stock or any accounting to the owner for its value or anything except an absolute forfeiture. The true doctrine we believe to be expressed with proper limitations in the cases following to the effect that a stockholder cannot be sued for deficiency on his assessments after declaring his stock forfeited without any sale thereof. *Rutland & B. R. Co. v. Thrall* (1868) 35 Vt. 536.

Or that after the forfeiture of stock without any liability to account whatever the value of the property may have been, no action can be maintained for subscriptions or any part thereof. *Small v. Herkimer Mfg. & Hydraulic Co.* (1849) 2 N. Y. 330.

Also that the forfeiture of stock pending suit to recover the amount due thereon will constitute a perfect defense to the action if it was shown that the value of the stock forfeited is equal to the amount due, and if not, it will satisfy the debt in proportion to such value. *Herkimer Mfg. & Hydraulic Co. v. Small* (1839) 21 Wend. 273.

It is perfectly reasonable to hold that a sheer forfeiture of stock is inconsistent with a claim of personal liability for unpaid calls thereon, but it is not so reasonable to say that a sale of shares in the nature of a foreclosure sale to obtain what is due thereon should relieve the shareholder of liability for any deficiency.

So it has been held on principle without any express provision therefor that a personal liability for a deficiency after sale of forfeited stock remains. *Carson v. Arctic Min. Co.* (1858) 5 Mich. 229; *Dexter & M. Pl. Road Co. v. Miller* (1854) 3 Mich.

courts of Great Britain, where the operation was created, our courts will not enforce the claim in this case.

Santa Clara Female Academy v. Sullivan, *supra*.

If the right of action in this case is given by a statute of Great Britain, it is purely and simply an action to enforce the penal statutes and provisions of a foreign country, which no court will carry into effect and for which no claims of comity can be invoked.

Sherman v. Gassett, 9 Ill. 531; *Diversity v. Smith*, 103 Ill. 379, 42 Am. Rep. 14; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Mechanics Foundry & Mach. Co. v. Hall*, 121 Mass. 272; *New Haven Horse Nail Co. v. Linden Spring Co. supra*; *Erickson v. Nesmith*, 4 Allen, 233; *Halsey v. McLean*, *supra*; *Woods v. Wicks*, 7 Lea, 40; *Sayles v. Brown*, 40 Fed. Rep. 8; *Fourth Nat. Bank of New York City v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *Derrickson v. Smith*, 27 N. J. L. 166; *First Nat. Bank of Plymouth v. Price*, 33 Md. 437, 3 Am. Rep. 204; *O'Reilly v. New York & N. E. R. Co.* 5 L. R. A. 864, 16 R. L. 388; *Queenan v. Palmer*, 117 Ill. 619.

Before any call can be enforced upon shares of stock in a corporation, it must be shown that the capital of the company has been all subscribed; of which there is absolutely no evidence in this record or outside of it.

Allman v. Havana, R. & E. R. Co. 68 Ill. 531; *Temple v. Lemon*, 112 Ill. 51; *Beach, Corp.* § 566; *Bray v. Farwell*, 81 N. Y. 600; *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277; *Fry v. Lexington & B. S. R. Co.* 2 Met. (Ky.) 314.

91; *Merrimac Min. Co. v. Bagley* (1886) 14 Mich. 501. And an action will lie for the balance due on calls after sale by executory process of forfeited stock and a purchase thereof by the corporation itself. *Re Thomson's Succession* (1894) 46 La. Ann. 1074.

The court says the judicial proceedings were by way of direct enforcement of the contract and not by way of forfeiture within the rule as to forfeitures.

The doctrine now generally repudiated that subscription to stock of a corporation does not imply any promise to pay assessments or calls thereon leads to the decision in Maine that charter power to make and collect assessments in the manner prescribed by by-laws does not authorize a by-law providing that the holder of shares which were forfeited for unpaid assessments shall be personally liable for a deficiency, as this is regarded as effecting a change of his contract. *Kennebec & P. R. Co. v. Kendall* (1850) 31 Me. 470.

The same court also decides: A by-law making the owner of delinquent shares which are forfeited liable for the deficiency due upon them is held unauthorized by authority to "make by-laws for regulating their affairs not repugnant to the law of the state," and even if such a by-law would be binding on an original shareholder on the ground that he had accepted it, his assignee of stock will not be bound thereby. *Jay Bridge Corp. v. Woodman* (1850) 31 Me. 573.

In Massachusetts following the same doctrine it is held that after a sale of the shares of a manufacturing company under Mass. Stat. 1870, chap. 224, § 27-29, no action for a deficiency can be sustained unless the subscriber had expressly promised to pay the amount assessed. *Mechanics Foundry & Mach. Co. v. Hall* (1876) 121 Mass. 272; *Katama Land Co. v. Jernegan* (1823) 126 Mass. 155.

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Messrs. Swift, Campbell, Jones & Martin, for appellee:

The right of action now exercised by plaintiff is expressly given by its articles of association and these articles are expressly warranted by the laws of Great Britain.

The forfeiture of shares discharges the liability to pay calls due before forfeiture only when the charter of the company contains no provision to the contrary.

Small v. Herkimer Mfg. & Hydraulic Co. 2 N. Y. 380; *Rutland & B. R. Co. v. Thrall*, 85 Vt. 558; *Dawes Case*, 88 L. J. Ch. 512; *Morawetz, Priv. Corp.* pp. 9, 10, 18, §§ 124, 126, 874, 875; *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597; *Beach, Priv. Corp.* p. 1117; *First Nat. Bank of Deadwood v. Gustin-Minerva Consol. Min. Co.* 6 L. R. A. 676, 42 Minn. 327.

The statute of Illinois relating to foreign corporations has no bearing whatever upon any question in this case.

This action is in no sense an action to recover a penalty given by statute or otherwise.

Patterson v. Lynde, 112 Ill. 196; *Fowler v. Lamson*, 146 Ill. 472; *Cook, Stock & Stockholders*, 2d ed. § 228; *Queenan v. Palmer*, 117 Ill. 619; *Flaah v. Conn.* 109 U. S. 371, 27 L. ed. 966.

It was not necessary in this case to allege or to prove that all of the capital stock of the plaintiff corporation had been subscribed for.

Ornamental Pyrographic Woodwork Co. Limited v. Brown, 2 Hurlst. & C. 63.

The plaintiff was entitled to the interest included in the judgment.

Stocken's Case, L. R. 5 Eq. 6; *Faure Electric*

These cases are distinguished by the court from those as to railroad companies on the ground that the railroad acts contain a distinct provision making a personal obligation to pay assessments. *Mass. Rev. Stat. chap. 39, § 63.*

Where by the act of incorporation the right of forfeiture is given as an alternative of the right to enforce calls, a forfeiture of shares is held to preclude a subsequent right of action for the call. *Edinburgh, L. & N. R. Co. v. Hebblewhite* (1840) 6 Mees. & W. 707.

Under Maine Special Laws 1840, chap. 361, § 5, a delinquent stockholder is personally liable for a deficiency on the sale of forfeited stock. *York & C. R. Co. v. Pratt* (1855) 40 Me. 447.

Personal liability for a deficiency on a sale of forfeited stock is expressly provided by statute in Connecticut. *Danbury & N. R. Co. v. Wilson* (1853) 22 Conn. 435.

A declaration of forfeiture is not an alternative remedy under 8 & 9 Vict., chap. 16, and therefore does not defeat an action for the amount due, although when the shares are sold or converted into others the prior owner must be given credit for the proceeds or the benefit of the new security *pro tanto*. In this case the acts said the company might forfeit the shares "whether the company have sued for the amount of such call or not." *Great Northern R. Co. v. Kennedy* (1849) 4 Exch. 417, 7 Dowl. & L. 197.

There is no liability for a deficiency where notice was given by an auctioneer purporting to be by order of directors merely and did not comply with the statute requiring notice by the treasurer pursuant to the order of directors, and where the sale was not at auction as the statute requires. *Portland, S. & P. R. Co. v. Graham* (1846) 11 Met. 1.

Procuring substituted subscriptions to stock

Accumulator Co. v. Phillipart, 58 L. T. N. S. 525.

Phillips, J., delivered the opinion of the court:

The appellee was a corporation organized in Scotland under the "Companies Act of 1862," of the United Kingdom, in which appellants became shareholders. The capital stock of the company was £600,000, divided into 60,000 shares of £10 each. The appellant Mandel became the owner of 880 shares. The appellant Henry L. Frank became the owner of 140 shares. Louis E. Frank was the owner of 395 shares, and Joseph E. Friend was the owner of 99 shares. On these shares calls had been made and paid amounting to the sum of £6 per share. On the 11th of October, 1887, a call was made of £1, 2s. per share by the directors, which not being paid, they, by a resolution of the board passed September 4, 1888, declared the stock forfeited.

On the 24th of March, 1890, the appellee instituted its actions of assumpsit in the circuit court of Cook county to recover from each of said several appellants the amount owing on their stock by reason of the calls so made, and filed its declarations setting up the foregoing facts; to which the defendants therein filed pleas of general issue and *nil tiel* corporation and on trial before the judge, a jury being waived, appellee recovered judgments. Whereupon appeals were prosecuted to the appellate court of the first district, where the several judgments were affirmed, and these appeals are now prose-

cuted to this court. The same questions of law are presented in the several cases. By stipulation certain portions of the acts of parliament of Great Britain comprising what is generally known as the "Companies Act of 1862" with its amendments were in evidence from which it appears that seven or more persons by subscribing their names to a memorandum of association and otherwise complying with the statute in respect of registration, may form an incorporated company with or without limited liability. The act contains the usual provisions prescribing the powers and duties of corporations, the manner in which they can be created, their business conducted, and how their affairs may be wound up and put into liquidation in case of insolvency.

By a schedule to this act known as "Table A," certain regulations for the management, government, and control of the business affairs of corporations organized under this law are given, which each corporation was at liberty to adopt or make other and different regulations in lieu thereof.

These regulations contained in "Table A" are substantially by-laws regulating the manner in which the corporate business may be conducted.

The appellee did not adopt the regulations in "Table A" but expressly provided they should not apply, and this they were authorized to do by the act.

The appellee introduced the evidence of sundry witnesses, by deposition, who testified in substance that the books of the company showed that the appellant Mandel was

from other persons, filling up the stock to the maximum limit, waives the right of the corporation to sue the former holder of stock for deficiency after sale thereof under Mass. Gen. Stat., chap. 63, § 9, as the sale if valid would create additional stock which could not be done in this way. *Athol & E. R. Co. v. Prescott* (1872) 110 Mass. 213.

Failure to sell shares for want of bidders does not prevent recovering from the owner personally for the amount due under a statute authorizing the sale and a personal recovery from him on the deficiency. *Grays v. Lynoburg & S. Turnp. Co.* (1826) 4 Rand. (Va.) 578.

A forfeiture not confirmed at a meeting of the company is insufficient to exempt a shareholder from liability for calls where the right to forfeit or sue for calls is in the alternative, with a provision that no advantage of the forfeiture shall be taken until the declaration is confirmed at a general or special meeting of the company. *London & B. R. Co. v. Fairclough* (1841) 2 Mann. & G. 674; 2 Railway Cas. 544, 3 Scott, N. R. 68; *Birmingham, B. & T. Junction R. Co. v. Looke* (1841) 1 Q. B. 256, 2 Railway Cas. 367.

A provision that a member whose shares were forfeited should be liable to pay all calls owing upon them and interest, if any, thereon, was held to make the shareholder liable for interest on the call up to the time of forfeiture from the time the call was payable, but not upon a later call which did not become payable until after the forfeiture. *Faure Electric Accumulator Co. v. Phillipart* (1888) 58 L. T. N. S. 525.

Where a forfeiture of shares was made for default in payment of a prior call before a second call thereon became payable but after it was made, it was held that the second call was "owing" at the 27 L. R. A.

time of the forfeiture within the meaning of a provision in the articles for personal liability of the shareholder to pay all calls owing at the time of the forfeiture. *Ibid*.

The right of forfeiture under the general companies act being cumulative, and a special act under which a company was formed giving power to cancel any forfeited shares if the market price is insufficient to meet the arrears of calls, and issue new shares, it was held that such issue and sale of new shares in lieu of the canceled shares realizing more than the unpaid portion of the canceled shares did not defeat an action for calls, but that the original shareholder was entitled to the benefit of payments on the new shares. *Ingis v. Great Northern R. Co.* (1852) 1 Macq. H. L. Cas. 113, 16 Jur. 395.

Under articles providing for interest at 25 per cent on over-due calls, and also providing that the members should continue liable for calls due at the time of forfeiture of his shares, it was held that the continuation of liability was for the calls only and not for interest thereon. *Stoken's Case* (1868) L. R. 3 Ch. 412, 37 L. J. Ch. 290, 17 L. T. N. S. 554, 16 Week. Rep. 322, affirming L. R. 5 Eq. 4, 16 Week. Rep. 99, 37 L. J. Ch. 5, 17 L. T. N. S. 161.

A provision in the English companies act authorizing action for a deficiency after forfeiture which a company could adopt or reject, having been expressly rejected by an English company, which nevertheless adopted a by-law to substantially the same effect, it was held in the above case of *Mandel v. Swan Land & Cattle Co.* that the by-law could not be given effect as against a shareholder in this country, since it was in conflict with the general rule in this country. But that case holds that a resident stockholder in a foreign corporation would be subject to liability for such deficiency on

the owner of three hundred and eighty shares of the capital stock of the company, of the par value of \$10 per share, on which only \$6 per share had been paid in, and that a call was made by the directors on the stock of the appellant, on the 11th day of October, 1887, of \$1, 2s. per share, which was not paid; and that in September, 1888, the same was duly forfeited for nonpayment of the call, but the corporate books and records themselves were not offered in evidence on the trial.

The only indebtedness of the appellant to the company was for the call made upon the shares standing in his name, for nonpayment of which they were forfeited more than a year before the commencement of suit, and all previous calls had been paid by appellant. No attempt was made to show the amount realized by the company from forfeiture and re-sale of the stock of appellant, or in what manner it was disposed of, or its value, and the witness, Dun, the secretary, refused to answer cross-interrogatories seeking to ascertain what disposition of the forfeited shares had been made by the company, and how much it had realized from such re-sale.

Objections were duly interposed by the appellant to certain designated portions of the depositions, and the court was asked to suppress the same, on the ground that parol statements of the contents of the corporate books and records were offered in evidence, instead of producing the original books themselves, the minute book itself was not offered in

evidence on the trial, though shown to be in the possession of appellee.

Appellant asked the court to hold propositions of law numbered one to eight inclusive, which was refused, and there was a finding and judgment for the appellee for the sum of twenty-five hundred and seventy dollars and sixty-one cents (\$2,570.61), being the full amount of the call, with interest thereon at six per cent per annum, without any credit for the amount received by the company from the forfeiture and re-sale of the shares.

Motions for a new trial and in arrest of judgment having been overruled by the court, this appeal was prosecuted from the judgment. This suit is instituted by the company itself and the rights of creditors are not involved.

It is urged by appellant that no action can be maintained by a corporation to recover upon a call made upon its stockholders where for the same call the stock has been by resolution of the board of directors of the corporations declared forfeited for nonpayment of that call.

The appellee being a foreign corporation the general rule is that the liability of stockholders in such corporation must be determined by the law of the state which created it. The law of such foreign state cannot operate beyond its own territory, and its right to do business in this state or create relations between itself and citizens of this state as members exists by comity alone.

forfeited stock when imposed by statute of the country where the corporation was organized notwithstanding a provision of the Illinois statute that foreign companies doing business in the state shall be subject to the liabilities, restrictions, and duties imposed upon domestic corporations.

An action under Mass. Rev. Stat., chap. 39, § 53, for a deficiency, is subject to the defense that the defendant never became a stockholder because the condition of subscription was never performed; but such defense was held waived by demurrer in *Troy & G. R. Co. v. Newton* (1854) 1 Gray, 544.

An action for a deficiency after forfeiture of shares of stock under Mass. Rev. Stat., chap. 39, § 53, was upheld against the objection that the directors had not by vote fixed the number of shares, as it was held that the vote to close the subscription book did this. *Lexington & W. C. R. Co. v. Chandler* (1847) 13 Met. 311.

The assignee as well as the original subscriber is liable for the deficiency unpaid after the sale of forfeited shares. *Merrimac Min. Co. v. Bagley* (1866) 14 Mich. 501.

The right to sell shares and hold the owner liable for the deficiency is held in a Tennessee case to be lost by delay when not exercised until after successive calls including all that could be made, and after such remedy is lost by laches chancery cannot relieve the company. *Stokes v. Lebanon & S. Turnp. Co.* (1846) 6 Humph. 241.

Directly to the contrary it is held in Virginia that a statutory right to sell shares of stock and hold the owner liable for deficiency may be exercised after all assessments have become due and the stockholder become liable for the whole deficiency with interest on the installments. *Brockenbrough v. James River & K. Canal Co.* (1839) 1 Patton & H. (Va.) 94. This case was decided without

any published opinion and without any appearance of counsel for the stockholder.

b. As to creditors.

A forfeiture of delinquent stock dissolves the holder's connection with the company and terminates his liability to creditors of the corporation, when it is subsequently declared insolvent. *Macaulay v. Robinson* (1866) 18 La. Ann. 619; *Allen v. Montgomery R. Co.* 11 Ala. 457.

This is true, although the debts were contracted before the forfeiture. *Mills v. Stewart* (1860) 41 N. Y. 384. But the court declares that if a forfeiture was made by collusion and fraud between the directors of the company and the stockholder, his liability would not cease.

As to creditors of a corporation a resolution authorizing stockholders to forfeit their shares on payment of a certain percentage is invalid, except so far as the creditors give their consent. *Slee v. Bloom* (1832) 19 Johns. 456, 10 Am. Dec. 273.

A resolution authorizing stockholders to submit to a forfeiture of shares on payment of 50 per cent, which is assented to by a creditor of the company, will release from liability to him those stockholders who comply with the provision with reasonable promptness, but will not be operative as to those who claim its benefits long afterwards when the condition of the corporation has become worse. *Ibid.*

An unlawful distribution of assets among stockholders does not work a forfeiture of their stock so as to preclude their individual liability to creditors of the company. *Spear v. Crawford* (1835) 14 Wend. 20, 28 Am. Dec. 513.

A declaration of forfeiture of shares for nonpayment of calls, made under an arrangement between the directors and the shareholder on payment by

The liability of a stockholder to the corporation for calls made has but slight analogy to a debt, but is a statutory liability the form and extent of which is dependent upon the particular phraseology of the statute creating the liability. It is not a penalty but a liability that is contractual and will ordinarily be enforced by the courts of all the states, unless where a wrong or injury will be done to the citizens of the state in which the calls are sought to be enforced, or the policy of the laws of such state will be contravened or impaired.

This rule is so uniformly held that the citation of authorities is unnecessary. The general rule in the states of this country is, where a corporation has a right under the statute creating it to declare a forfeiture of shares for nonpayment of calls, it may exercise its option to forfeit the stock or bring its action to collect the amount of the calls, but cannot forfeit the stock and afterward sue at law, as the exercise of the first option would end the relation between the parties and exclude a resort to the other. *Small v. Herkimer Mfg. & Hydraulic Co.* 2 N. Y. 330; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 533.

But it has never been held that a right to do both cannot be given.

When the act of incorporation gives the right to declare a forfeiture and at the same time reserves to the company the right to collect all calls made prior to such declaration, it must be held that the positive enact-

ment will control, and any principle adopted as a mere equitable rule must yield to such express provision. This corporation in its articles of association expressly provided that "the regulations contained in the table marked 'A' in the first schedule to 'The Companies Act of 1862,' shall not apply to the company." The table marked "A" in the first schedule to the Companies Act is practically a system for the government of a company organized under that act. Section 14 of the Act authorizes incorporators thereunder by their articles of association to adopt all or any of the provisions contained in the table marked "A" in the first schedule. Section 15 of the Act is as follows: "In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association or in so far as the articles do not exclude or modify the regulations contained in the table marked 'A', in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent, as if they had been inserted in articles of association, and the articles had been duly registered."

Section 17 of Table A. provides if a member fail to pay any call as made the directors may serve a notice on him requiring him to pay such call together with interest and expenses. Section 18 is as to the notice provided for in section 17. Section 19 provides for forfeiture for non-compliance with above notice, whilst section 20 provides that any

him of a certain sum of money, was held on winding up the company twelve years after to be a fraud on the other shareholders and insufficient to relieve him from liability as a contributory. *Stanhope's Case* (1866) L. R. 1 Ch. 161, 19 Jur. N. S. 79, 35 L. J. Ch. 206, 14 Week. Rep. 266, 14 L. T. N. S. 463.

Forfeiture of shares made for his benefit was held insufficient to relieve the shareholder who took them under an invalid arrangement that he should not be liable to make payments on the shares, but merely to complete the necessary subscriptions and with the understanding that these should be got rid of to other persons. *Ex parte Jones* (1856) 27 L. J. Ch. 668, 4 Jur. N. S. 448.

But a compromise agreement adopted at a general meeting of the company offering dissatisfied shareholders the privilege, if accepted before a certain date, of having their shares forfeited on payment of a certain sum for nonpayment of the remainder of a call, was held, even if *ultra vires*, to be beyond impeachment on winding up the company twelve years later. *Brotherhood's Case* (1862) 31 Beav. 365, 8 Jur. N. S. 905, 10 Week. Rep. 705, 31 L. J. Ch. 861, affirmed by 4 De G. F. & J. 506, 8 Jur. N. S. 926, 7 L. T. N. S. 142.

To similar effect it was held in *Belhaven's Case* (1865) 11 Jur. N. S. 572, 12 L. T. N. S. 595, 3 De G. F. & J. 41, 34 L. J. Ch. 503, 13 Week. Rep. 849, that a compromise by this same company with *Lord Belhaven*, releasing him from further liability in respect to his shares on payment of £50, which was agreed to at a meeting of the shareholders, was sufficient to prevent his being put on the list of contributories on winding up the company several years later.

Yet where directors declared shares forfeited for nonpayment of part of a call under a resolution adopted at a meeting of the company, under which any shareholder might on acceptance with-

in a certain time, submit to forfeiture after payment of a certain portion of the call, and the acceptance was made after that time, the forfeiture was held invalid on the ground that the directors had no power to allow him to accept after the expiration of the specified time. *Stewart's Case* (1866) L. R. 1 Ch. 511; *Houldsworth v. Evans* (1868) L. R. 3 H. L. 268, 37 L. J. Ch. 800, 19 L. T. N. S. 211.

And an arrangement between the directors of a company and some of the shareholders for the release of the latter on payment of a fixed sum of money and the cancellation of their shares, which was never sanctioned at a general meeting of the shareholders, was held insufficient to prevent those whose shares were canceled from being placed on the list of contributories, even though none of the creditors were such at the time of the cancellation of the shares. *Spackman v. Evans* (1866) L. R. 3 H. L. 171, 19 L. T. N. S. 151, 37 L. J. Ch. 753, affirming *Spackman's Case*, 11 Jur. N. S. 207, 34 L. J. Ch. 321, 13 Week. Rep. 479, 12 L. T. N. S. 130, which reversed 10 Jur. N. S. 811, 12 Week. Rep. 1133, 11 L. T. N. S. 13.

But where it appeared that the means of notice to all the shareholders of such an arrangement by the directors were sufficient to raise a clear presumption of knowledge and acquiescence, and the arrangement was left unimpeached by any one for a great many years, the forfeiture of the shares under such an arrangement was held sufficient to prevent putting the name of the former holder on the list of contributories. *Evans v. Smallcombe* (1868) L. R. 3 H. L. 249, 37 L. J. Ch. 793, 19 L. T. N. S. 207.

Forfeiture of shares under articles of association will not defeat the liability of the shareholder as a contributory on winding up the company within one year, under the statutory provision that "no past member shall be liable to contribute to the assets of the company if he has ceased to be a mem-

share so forfeited shall be the property of the company. Section 21 is as follows: "Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of forfeiture." Section 34, 35, 36, and 37 of the articles as adopted by this corporation are practically and substantially an adoption of sections 17, 18, 19, and 20 of Table A. of the first schedule to the Act of 1862, whilst in lieu of section 21 the following act of association is adopted as section 39:

Sec. 39. "Any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, installments, interest, and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of five per cent per annum, and the directors may enforce the payment thereof if they think fit."

No provisions of the act are pleaded or offered in evidence which authorize a recovery of calls after a declaration of forfeiture other than section 21 of Table A, and a right of recovery in such case being in conflict with the current of legislation here cannot depend on a by-law merely, but to be enforced must exist in the act authorizing the incorporation of the company.

The provisions of section 21 of the Act authorize a recovery after forfeiture of all calls owing upon such forfeited shares at the time of forfeiture. It has no provision authorizing a recovery for interest and expenses

hereafter accruing. The by-laws adopted at section 39 if it depends for its existence upon some other provision of the "Companies Act of 1862," such provision should have been properly incorporated into the record. There is no provision that authorizes a recovery for calls, installments, interest and expenses, and a judgment for \$2,570.61 on a call of £1, 2s. on 380 shares cannot be sustained even under section 21 of Table A.

Appellants further insist that appellees being a foreign corporation can exercise no rights except such as are conferred on a corporation created by a statute of this state.

Beach in his work on Private Corporations states the rule in reference to stockholders in foreign corporations as follows: "Where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all the laws of the state under which the corporation is organized, and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in the other state, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The validity, inter-

ber for a period of one year or upwards prior to the commencement of the winding up." *Bridger's and Nell's Case* (1890) L. R. 4 Ch. 206, 38 L. J. Ch. 201, 17 Week. Rep. 216, 19 L. T. N. S. 624; *Crayke's Case* (1869) L. R. 5 Ch. 63, 39 L. J. Ch. 124, 21 L. T. N. S. 572, 16 Week. Rep. 108.

After forfeiture for non-payment of calls on shares in a company which is wound up within a year, although a former member is not relieved from liability for calls owing at the time of forfeiture, yet he will not be placed on the list of contributories with present members in respect to those calls, and will be placed on the list of past members only when the liability of the present members is ascertained to be insufficient. *Needham's Case* (1867) L. R. 4 Eq. 136, 16 L. T. N. S. 472, 36 L. J. Ch. 665; *Andrews' Case* (1867) L. R. 4 Eq. 458, L. R. 3 Ch. 161, 37 L. J. Ch. 87, 17 L. T. N. S. 305, 16 Week. Rep. 113.

A forfeiture of delinquent shares declared when they were at a premium will prevent the company or the official liquidator from subsequently asserting its irregularity for the purpose of holding the shareholder liable as a contributory. *Austin's Case* (1871) 24 L. T. N. S. 932.

The liquidators of a company are denied power to cancel a forfeiture of shares which had been validly made before the winding up began, especially when the application was not in reality to cancel the forfeiture but to allow a substitution of shares in a new company to be formed. *Dawes's Case* (1868) L. R. 6 Eq. 222, 37 L. J. Ch. 901, 16 Week. Rep. 905.

The official manager of a company on winding up cannot have placed on the list of contributories the name of a person whose shares the company has forfeited as a penalty for non-payment of calls, even if creditors of the company might have a right to hold him liable. *Webster's Case* (1863) 32 L. J. Ch. 135, 11 Week. Rep. 226, 7 L. T. N. S. 618.

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A postponement of a former declaration of a call for the purpose of permitting a transfer to be made before the call, prevents the effect of such transfer to release the transferring shareholder from liability as a contributory on the winding up of the company which was begun within one year thereafter. *Gilbert's Case* (1870) L. R. 5 Ch. 559, 18 Week. Rep. 688, 28 L. T. N. S. 841, 39 L. J. Ch. 397.

A forfeiture of shares for non-payment of calls after the passing of a preliminary resolution to wind up the company, but before the confirmatory resolution, is held effectual in *Dawes's Case*, *supra*, on the ground that the commencement of the winding up dates from passage of the second resolution.

In case of a forfeiture of shares which was entirely regular and legal unless a prior conversion of shares from one form to another was not legal, the forfeiture was held valid where the shareholder had made no objection to the regularity of the proceedings but had asked a remission of the forfeiture, so that on winding up more than a year thereafter he was held not to be a contributory. *King's Case* (1867) L. R. 2 Ch. 714.

A declaration of forfeiture of the interest of one who has agreed to take share in a company on his refusal to execute the deed of settlement, is held sufficient to prevent him from being chargeable as a contributory, as he never was strictly a shareholder. *Ex parte Beresford* (1850) 2 Macn. & G. 197, 2 Hall & T. 688, 19 L. J. Ch. N. S. 332, 14 Jur. 655.

The mere fact that the name of one whose shares have been forfeited is not erased from the list of members is not sufficient to keep him on the list of contributories. *Lyster's Case* (1867) 36 L. J. Ch. 616, 15 Week. Rep. 1007, 16 L. T. N. S. 824.

A so-called forfeiture though nominally for non-payment of calls, which was in reality a mere machinery to enable the shareholder to get rid of his liability to the company, which he contested on the

pretation, and effect of the act imposing the liability are determined by the law of the state creating the corporation." (sec. 148). And the author cites many authorities which sustain his statement of the rule. The statute of this state which provides that "foreign corporations doing business in this state shall be subject to all the liabilities, restrictions, and duties that may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers," does not prohibit a citizen of this state from becoming a stockholder in a foreign corporation, nor relieve him in any way from a contract liability resulting from his voluntary action in becoming such stockholder. The statute by the term "doing business" has reference to the business for which the corporation was organized, and not to the form of its by-laws with reference to its relations to its own members, or a resort to the courts of this state to recover a contract liability. The principle as announced and the rule as stated, in *Stevens v. Pratt*, 101 Ill. 206; *Granite State Provident Assn. v. Lloyd*, 145 Ill. 620; and *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776,—are not inconsistent with what is here said as in each of those cases active business was entered on of the character for which the corporation was organized. Appellee would not be doing business in this state by resorting to the courts here to enforce a contract liability, nor would the purchase of shares of stock by appellant of one holding such shares and their transfer on the books of the company in a foreign jurisdiction bring such company within this state doing business within the meaning of section 26 of the Act entitled "Corporations."

The contention of appellant that calls could not be made by this corporation until the entire amount of stock had been sub-

scribed cannot be sustained as under the act under consideration it is provided by section 5 of the articles of association authorized by the act of parliament that "the registered holders of shares in the company for the time being, whatever the number issued or subscribed for shall be associated, and shall form the company; and the business of the company may be commenced as soon as the directors think fit."

Under this provision of the articles made in accordance with the act it is not a condition precedent to the right to make a call that all the stock must be subscribed for or the shares allotted. *Buckley, Companies Acts*, 4th ed. 19; *Ornamental Pyrographic Woodwork Co., Limited v. Brown*, 2 Hurlst. & C. 63, 82 L. J. Exch. 190.

There is nothing in the articles of association which states the subscribers shall not be associated for the purpose of the company till a particular event happens, such as a subscription to or the allotment of a particular number of shares, as was the case in *Pierce v. Jersey Water Works Co., Limited*, L. R. 5 Exch. 209, and in *North Stafford Steel Iron & Coal Co., Limited v. Ward*, L. R. 3 Exch. 172.

It cannot be held a defense to an action for a call, here, that the capital is not fully subscribed or allotted. It was not error to refuse to hold as law the propositions submitted by appellant.

Previous to the commencement of the trial a motion was made by appellant to suppress and strike out certain portions of the answers of Finley Dun, Thomas Murray, George Milne, and John Reed, witnesses for appellee. The motion as to Dun's deposition was that in his answer to the 5th and 8th interrogatories he purported to give the contents of the register of members of the company, and the minutes of a meeting of the board

ground of fraud, was held insufficient to relieve him on the winding up of the company, where although a resolution had been passed declaring the forfeiture his name had continued on the register. *Gower's Case* (1868) L. R. 6 Eq. 77, 16 Week. Rep. 751, 18 L. T. N. S. 288.

A declaration of forfeiture of the shares of all persons who had not signed a deed of settlement or attended the meeting of the company, which was made by the directors with the sanction of the shareholder at a general meeting, was held insufficient to discharge a person from liability as a contributory on the ground that the directors had no power to declare the forfeiture where there was no power of forfeiture whatever in the deed of the company. *Ex parte Barton* (1869) 28 L. J. Ch. N. S. 687, 5 Jur. N. S. 420, 4 DeG. & J. 48.

Construing what is called a very irregular constitution of a company the court in *Keik's Case* (1869) L. R. 9 Eq. 107, 18 Week. Rep. 271, 30 L. J. Ch. 231, decided that it provided for no personal liability of the shareholders to pay additional capital created by augmenting the shares, but provided merely for forfeiture in case of nonpayment, and where such forfeiture had been declared the company was denied the right to have the owners of the forfeited shares afterwards placed upon the list of contributories.

A notice sent to a delinquent that if he did not pay within twenty-one days his shares would be irremediably forfeited to the sole and exclusive use

of the company, and that his interest in the same would finally cease, which was treated for three years thereafter as having effected a forfeiture, was held sufficient to prevent placing the shareholder on the list of contributories. *Woolaston's Case* (1869) 4 DeG. & J. 487, 5 Jur. N. S. 853, 28 L. J. Ch. 721, 7 Week. Rep. 645.

Without any declaration of forfeiture it was held that one who fails to pay the second installment on shares, the certificate of which expressly stated that all rights therein should be forfeited on failure to pay that installment, was not liable to be put on the list of contributories on winding up the company nearly two years afterwards. *Ex parte Collum* (1869) L. R. 9 Eq. 238, 18 Week. Rep. 245, 21 L. T. N. S. 350, 30 L. J. Ch. 59.

A deed of release and indemnity given to a shareholder on surrender of his shares was held in *Hall's Case* (1870) L. R. 5 Ch. 707, 30 L. J. Ch. 790, 18 Week. Rep. 1058, 28 L. T. N. S. 331, to be within a prohibition against a dealing by the directors in shares of the company and not an exercise of the power of forfeiture given them by articles.

But the cancellation of the shares of one who denies his liability on the ground that misrepresentations were made to him, which the directors agree to on payment of a certain call then due, was sustained as within the power of the directors to compromise disputes. *Dixon v. Evans* (1872) L. R. 5 H. L. 606, 42 L. J. Ch. 139.

Although articles of association provide that in

of directors and a resolution adopted, and by his answer to the 7th interrogatory he purported to give copies of the books of account and original entries of the plaintiff, and because of his refusal to answer the 3d cross interrogatory. The objections to the depositions of Murray and Milne in their answers to the 7th interrogatory were based on substantially the same causes as were made to the answers of Dun to the 5th and 8th interrogatories, and the deposition of Reed was objected to for the reason that in his answer to the 8th interrogatory he was permitted to give what purports to the contents of the postage book by him referred to, etc.

The motion to suppress depositions was overruled and an objection to the answers made on trial, which objections were also overruled. By section 15 of chapter 57 of Rev. Stat. of Illinois: "The papers, entries, and records of any corporation or incorporated association may be proved by a copy thereof certified under the hand of the secretary, clerk, cashier, or other keeper of the same. If the corporation or incorporated association has a seal the same shall be affixed to such certificate." By section 18 of the same chapter it is provided that "any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses." In addition to the evidence authorized by the statute the original books would be admissible and in case of loss or destruction the contents might be proven and under certain circumstances where there is an omission to make any rec-

ord on the subject parol evidence may be heard. *Ratcliff v. Peters*, 27 Ohio St. 66; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 552.

The original books and the evidence provided for by sections 15 and 18 of the Statute are original evidence, and evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character. Proof of the papers, entries, and records of a private corporation in the possession of that corporation cannot be shown by an opinion or conclusion of a witness. The evidence must be primary original evidence. Certain parts of the depositions of Dun, Murray, and Milne should have been suppressed where they have stated a conclusion as to what is shown by the records.

The evidence of Reed was as to mailing notice and the entries as to his mailing letters, etc., is a mere memoranda to which he could refer to refresh his recollection and not a record of which copies must be made. It was not error to overrule the motion to suppress his deposition.

For the errors indicated, the judgment of the Appellate Court and Circuit Court of Cook County must be reversed and the cause remanded to the Circuit Court of Cook County for new trial.

Baker, J.: I dissent. I think that the judgment should be affirmed.

Rehearing denied.

the event of nonpayment "any share might thereupon be forfeited without any further act to be done by the company," and a shareholder had declared that he should submit to a forfeiture on certain shares, it was held that where the company had not declared a forfeiture of those shares but had forfeited shares of other persons, their intention to retain this shareholder on their list made him liable as a contributory. *Biggs's Case* (1865) L. R. 1 Eq. 309.

The forfeiture of shares for default in payment where the holder never executed the deed of settlement of the corporation was held in *Ex parte Bailly* (1850) 15 Jur. 29, 20 L. J. Ch. N. S. 145, to prevent putting him on the list of contributories.

B. Miscellaneous.

The amount paid in on stock which is forfeited is not converted by the forfeiture into profits to be divided as such. *Gratz v. Redd* (1843) 4 B. Mon. 173.

A corporation holding stock of its own or of another company as pledgee is not bound by implied agreement to pay assessments thereon in order to protect it from forfeiture. *Southwestern Railroad Bank v. Douglas* (1844) 2 Speers, L. 329.

A pledgee of shares whose debt has been paid but who buys them on a sale as delinquent while they are standing in his name, is liable therefor to the

real owner. *Freeman v. Harwood* (1859) 49 Me. 195.

The burden of proving a valid sale of stock is on the party claiming title under the sale where proof is made of general ownership of another person at a former time and that he had never received any notice of sale. *Mitchell v. Vermont Copper Min. Co.* (1876) 8 Jones & S. 406.

An agreement to release directors by forfeiture which the company refused to complete the court refused to compel specific performance of. *Harris v. North Devon R. Co.* (1855) 20 Beav. 344.

The right to cancel shares or surrender them on the request of the shareholder is not within the scope of this note and is not touched upon here except where it was attempted to be done by an apparent forfeiture, which was in fact collusive, or at least for the benefit of the shareholder and not in reality with intent to forfeit any of his rights.

The subject of forfeiture of policies, certificates, or other rights in a mutual benefit society is somewhat different from that of the forfeiture of shares of stock in a corporation, and is not here considered.

The forfeiture of interests in a building and loan association, whether represented by so-called shares of stock or not, is also sufficiently distinct to be treated by itself, and is omitted from this note.

B. A. R.

Francis B. PEABODY *et al.*, Appts.,
v.

Charles P. DEWEY *et al.*

(183 Ill. 687.)

An agreement by one employing another to procure a loan, to give notes and mortgage "in your usual form," does not make a provision of the latter's customary form for payment in gold a part of the contract, so as to exclude evidence that the employer had previously by like application procured loans upon notes and mortgages without such provision, as the expression as to form does not bind him to make payment upon unusual terms and conditions printed in such forms.

(October 22, 1894.)

APPPEAL by plaintiffs from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to recover the commission alleged to have been earned by plaintiffs in negotiating a loan for defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwin Burritt Smith and James D. Andrews, for appellants:

The court erred in admitting evidence of two isolated and remote transactions to establish a course of dealing directly in conflict with the express terms of a written contract, such evidence only being admissible to explain, add to, or modify what is admitted to be a binding contract, and never to contradict its express terms.

Barnard v. Kellogg, 77 U. S. 10 Wall. 388, 19 L. ed. 987; *Gilbert v. McGinnis*, 114 Ill. 28; *Willey v. Chicago*, 103 U. S. 162, 26 L. ed. 377; *Whart. Ev.* § 961.

A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith, is deemed not to be relevant.

Stephen, Digest of Ev. art. 10, chap. 8; Gahagan v. Boston & L. R. Co. 1 Allen, 187, 79 Am. Dec. 724.

All writings to which reference is made in a written contract are parts thereof and binding upon those signing it, even if their terms are not known to them.

Horne Ins. Co. v. Favorite, 46 Ill. 263; *Gallena & S. W. R. Co. v. Barrett*, 95 Ill. 480; *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628; *Kennedy v. Ross*, 25 Pa. 256; *Clinton v. Hope Ins. Co.* 45 N. Y. 460; *Anson, Cont.* 18, 19; *Bishop, Cont.* § 882; *Broom, Legal Maxims*, 678.

Parties dealing with a firm are bound by its usages, if notified of their existence, although they may not know the terms thereof, as it devolves upon them to acquaint themselves with such terms.

NOTE.—While the above case turns directly upon a question of evidence, the effect of the words as to the "form" of notes and mortgages with respect to a provision for payment in gold is an interesting and novel question on which we think there are no precedents very closely applicable.

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Mills v. Bank of United States, 24 U. S. 11 Wheat. 431, 6 L. ed. 513; *Fowler v. Brantley*, 89 U. S. 14 Pet. 818, 10 L. ed. 478; *Renner v. Bank of Columbia*, 22 U. S. 9 Wheat. 582, 6 L. ed. 166.

A contract is not fraudulent or invalid merely because it binds a party to it, to something not intended by him.

Coffin v. Taylor, 16 Ill. 457; *Wood v. Price*, 46 Ill. 439; *Nichols v. Mercer*, 44 Ill. 250; *Broadwell v. Broadwell*, 6 Ill. 599.

Evidence that a party did not acquaint himself with the contents of a contract before signing it is not admissible unless coupled with proof of actual fraud by the adverse party.

Whart. Ev. §§ 1028, 1029, 1243; *Pindar v. Resolute F. Ins. Co.* 47 N. Y. 114; 1 Bigelow, Fr. 526; *Linington v. Strong*, 111 Ill. 153.

A written contract cannot be defeated on the ground of mistake, or that the minds of the parties did not meet, without proof of mutual mistake or of intentional fraud on the part of the party seeking its enforcement.

Broadwell v. Broadwell, supra; Wheeler & Wilson Mfg. Co. v. Long, 8 Ill. App. 463; *Strong v. Linington*, 8 Ill. App. 486; *Linington v. Strong*, 107 Ill. 295, and 11 Ill. 152; *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628.

Messrs. Runyan & Runyan, for appellees:

Until the mind of the lender of the money, and the mind of the borrower of the money, meet and agree upon a proposition as to the loaning of the money and its payment, there can be no contract between the parties, and if no contract was entered into by these two, then the agent who undertook to bring the minds of the parties together failed to earn his money, and having failed to earn their money they are not entitled to recover in this case.

Where persons' attention has been called to a specific thing they have a right to presume that it means the same to-day that it did yesterday, and will mean the same to-morrow that it did six months ago, when their attention was not called to any change, and there was knowledge in the minds of the parties with whom they were dealing, that there had been one, and it was kept from them.

Pittsburg & S. Coal Co. v. Slack, 42 La. Ann. 107; *Hogue v. Mackey*, 44 Kan. 277; *Wagner v. Egleston*, 49 Mich. 222; *Brant v. Gallup*, 5 Ill. App. 265; *Smith v. Crawford*, 81 Ill. 296; *Young v. Farwell*, 146 Ill. 466.

Wilkin, Ch. J., delivered the opinion of the court:

This is an action of assumpsit by appellants against appellees, commenced in the circuit court of Cook county.

The declaration contained the common counts, and one special count. The only cause of action relied on is set forth in the special count, in which it is averred that, on the 23d day of July, 1890, the defendants made and delivered to the plaintiffs the following written agreement:

"We hereby engage your services to procure for us a loan of \$250,000 for five years, with privileges of pre-payment as below stated, at six per cent interest per annum,

payable half yearly, and principal and interest payable at such place as the lender may appoint.

"As security for such loan we will give a joint and several principal note and interest notes, and a mortgage, or trust deed (in your usual form) conveying in fee simple free of incumbrance, and with release of dower and homestead, the following described real estate, situated in the county of Cook and state of Illinois, to wit: . . . We will furnish a complete abstract of title of said premises, continued so as to show said mortgage or trust deed, which shall remain in your hands for the use of the lender until said loan is paid, and then to be delivered to us, our heirs or assigns. We will pay the fee for recording said mortgage or trust deed, and will pay you a commission of 2½ per cent on the amount of said loan for your services in negotiating same.

Chicago, July 23d, 1890.

"J. Nelson Vance, by C. P. Dewey, Atty.
"Charles P. Dewey, Applicant."

The count then concludes with an averment of performance of the agreement on the part of plaintiffs, in procuring the loan for the amount, and upon the terms therein stated, and that the defendants failed and refused to pay them the commission of 2½, amounting to the sum of \$6,250.

The defendants filed a plea of non-assumpsit, and the issue was tried by the court without a jury, and judgment entered against plaintiffs for costs.

The appellate court having affirmed that judgment, this appeal is prosecuted.

There is no disagreement between the parties as to the fact that the contract declared on was signed by Dewey for himself and Vance as shown by the writing, and that appellants soon thereafter negotiated a loan for the required amount.

Under date of August 6, 1890, they caused to be prepared, and presented to appellees for their signatures and acknowledgment, one principal note for \$250,000 and several interest coupons, together with a trust deed securing the payment of the same.

Each of these notes was on a blank form, in which was printed due, "in the gold coin of the United States, of the present standard of weight and fineness."

The trust deed was also on a blank form, in which was printed a description of the notes as above.

Appellees objected to the "gold coin clause" as it is termed, and on that ground alone refused to execute the notes and trust deed.

Plaintiffs insisting that they conformed to the requirements of the agreement contained in the application, refused to furnish the loan on other terms, and it was therefore never made.

Appellants proved on the trial that, on July 23, 1890, and for about nine months prior thereto, the only blank forms of notes and trust deeds used by them for securing loans were like those filed out and presented to the defendants, containing the "gold coin clause," and they insist that the words of the application "as security for such loan, we

will give a joint and several principal note, and interest notes, and a mortgage or trust deed (in your usual form) conveying, etc.," was an agreement to give notes and mortgage or trust deed, providing for payment "in gold coin of the United States of the present standard weight and fineness."

Appellees were allowed to prove over objection that, formerly, and for several years, appellants had used forms without the "gold coin clause;" that on two or three occasions in the years 1885 and 1886, Dewey made loans from them signing applications precisely like the one in question, and executing notes and mortgages therefor in the forms then used, making the last payment thereon to appellants by bank check. Also, that he examined two mortgages executed upon their forms, about two years prior to this application.

On these facts appellees insist that, when Dewey signed the application he understood and was justifiable in understanding that the words meant no more than that the notes were to be payable in the usual way, and so secured by a mortgage or trust deed.

The only question of law raised upon the record is, whether the evidence objected to was competent. It is first said it was inadmissible for want of a sworn plea, denying the execution of the agreement sued on. This is so clearly a misapprehension of the defense relied upon that attention need only be called to the fact that the defendants do not deny the making of the contract as it is set out in the declaration, but insist that it does not bear the construction placed upon it by the plaintiff.

That defense could properly be made under the general issue.

The objection to the testimony on the merits of the case is based on the assumption that, by the use of the words, "in your usual form," the "gold coin clause" in their blank notes and trust deeds became a part of the written application, thereby making it an agreement by the defendants to give notes payable in gold, etc., and parol testimony could not be received to give it a different meaning. The error in the position consists in treating the expression, "*in your usual form*" as being of itself sufficient to import into the contract the "gold coin clause," in the blank forms. The agreement, considered as a whole, bears no such construction. The mere fact that the applicants agreed to give a mortgage, or trust deed in a particular form did not of itself bind them to make payments upon unusual terms and conditions, though printed in those forms.

The application is for "a loan of \$250,000 for five years . . . at 6½ interest per annum, payable half yearly, and principal and interest payable at such place as the lender may appoint." This clearly means, payable in any money which could be legally offered for that purpose. To say that by agreeing to give notes, and mortgage or trust deed in the other party's usual form to secure them, they bound themselves to pay in gold coin of the United States, etc., because that unusual condition was printed in those forms, but unknown to them, is most unreasonable

and can find no support in the law of contracts.

Any one signing this application would reasonably understand the words in parenthesis to refer to the form of the mortgage, or trust deed, and not to the particular kind of money in which the notes were to be payable. In the argument, counsel for appellants treat these words as synonymous with "upon the terms and conditions set forth in your usual form." And they liken it to cases in which a written contract refers to, and makes the terms and conditions of another instrument a part of it. Manifestly there is no analogy between that class of cases and this.

It is undoubtedly the duty of a party to acquaint himself with the terms of a contract to which he is a party before he enters into it, and if other instruments or agreements are made a part of the contract he is bound to know the terms and conditions of such instrument or agreement, but as seen, no such agreement is here shown. In our view of this record before the plaintiff below could recover the burden was on them to show by proof other than the written agreement, and forms used by them at the time that the defendants, or Dewey, who signed the application, knew that their forms contained a provision for payments in a particular kind of money, and entered into the agreement with that understanding.

In other words, their own proof failed to make a case, and even if the testimony offered by the defendants had been incompetent, no injury resulted to them by its introduction.

Leaving all that evidence out of the case, the judgment of the circuit court was clearly right.

The testimony objected to was, in view of the case made by the plaintiffs, unnecessary to the defense, but it tended to support the proper construction of the agreement, viz., that the parties signing it are conclusively presumed to have intended by its mere execution to bind themselves to give notes and mortgage to secure the repayment of the money borrowed, in a particular kind of money.

We entertain no doubt as to the correctness of the judgment below.

The judgment of the Appellate Court will be affirmed.

Rehearing denied.

Francis W. HOLBROOK, Receiver, etc.,
App't.,
v.

J. W. FORD.

(153 Ill. 632.)

1. The rule that a foreign receiver will not be allowed a preference over a

NOTE.—For the whole subject of preferences as between attaching creditors and foreign assignees in insolvency, see note to Long v. Forrest (Pa.) 23 L. R. A. 53.
27 L. R. A.

resident creditor against the assets of an insolvent debtor does not apply to a receiver appointed by the courts of the state and under its laws, in a suit instituted by a nonresident creditor.

2. Previous knowledge on the part of one attaching property in another state in violation of the rights of a receiver, of the appointment of the receiver or of the insolvency of the debtor, is necessary to cause the court to enjoin the suit or commit the plaintiff for contempt.

3. A receiver of the property of a foreign corporation takes no title to debts due it from debtors in another state, although in the ordinary course of business of the corporation the debts would have been payable in the state of his appointment, as the locus of the debt follows the domicile of the owner, and the domicile of a corporation is in the state of its creation.

4. No lien is acquired upon debts due a foreign corporation from residents of a state other than that in which a creditor's bill is brought against such corporation, where there is no service of process upon it.

5. The contempt of a resident creditor of a foreign corporation in attaching in another state debts due such corporation after the appointment of a receiver, and in refusing to dismiss such attachment suits, is waived by the voluntary appearance of such receiver in the attachment suits.

6. Interference with the property of a corporation of which a receiver has been appointed by attaching it is a civil contempt.

7. A court of equity asked to proceed as for a contempt against a creditor who seeks to reach by attachment or garnishment debts due to an insolvent debtor by persons residing out of the state, may inquire which of the parties has a paramount right or superior equity to these debts.

(October 23, 1894.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing an order of the Superior Court for Cook County inflicting punishment upon defendant for contempt in instituting attachment proceedings against property which had been placed in plaintiff's possession as receiver.
Affirmed.

Statement by Magruder, J.:

This is an appeal from a judgment of the appellate court reversing an order or decree of the superior court of Cook county, finding appellee guilty of contempt of court and directing him to be attached and arrested and imprisoned in the county jail, until he should dismiss certain attachment proceedings begun by him in the states of Nebraska and Missouri, as hereinafter stated.

The material facts are as follows:

Charles Palmer, a resident of New York, obtained a judgment for \$20,013.75 on December 7, 1892, in said superior court against the Powerville Felt Roofing Company, Limited, a corporation organized under the laws of the

For rights of receiver in property beyond the jurisdiction of appointment, see note to Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wia.) 23 L. R. A. 52.

state of New York. After execution issued and returned unsatisfied, Palmer on said 7th day of December filed a creditors' bill upon said judgment in said superior court; and on the same day said court appointed the appellant receiver of the books and accounts receivable, notes receivable, debts due and all choses in action of said defendant corporation, or held in trust for it, or in which it had any beneficial interest, with the usual powers and duties of a receiver. Among the accounts due to the defendant corporation were two claims against two firms in Nebraska, and one claim against a manufacturing company in Missouri. The appellee, who is a resident of Lake county, Illinois, but is and has been, for a number of years, engaged in business in Chicago, Cook county, Illinois, being a creditor for about \$15,000 of said defendant corporation, commenced attachment proceedings on the 17th and 19th days of December, 1892, against said defendant corporation in the courts of Nebraska and Missouri and garnished the firms and company in those states who were debtors of said corporation.

On January 7, 1893, the appellant, Holbrook, filed his petition in said superior court in said creditor's bill suit, wherein he had been appointed receiver, setting up his appointment; the debts due to the defendant corporation in Nebraska and Missouri; the commencement and pendency of the attachment and garnishee proceedings by appellee, Ford; that, on December 9, 1892, he had mailed notice to said debtors of his right as receiver to collect the amounts due from them; that on December 30, 1892, he wrote to Ford a letter stating his claim as receiver to said Nebraska and Missouri accounts, and requesting him to withdraw his suits; and that said Ford by attaching and garnisheeing said claims was interfering with property belonging to the receiver, etc. Said petition prayed for an order on Ford to show cause why he should not be attached for contempt. The order was entered on the same day. To this petition Ford filed an answer, and the receiver filed eight exceptions to the answer. All these exceptions were sustained by the superior court except one. Ford elected to stand by his answer; and, the cause coming on to be heard upon the petition of the receiver, answer, replication thereto, the original bill, the order appointing the receiver, etc., the court, on February 7, 1893, entered the order or decree committing said Ford for contempt, as above stated.

The defendant corporation, the Powerville Felt Roofing Company, Limited, had its principal office in New York city, and also a branch office and manufacturing plant in New Jersey; and had property and assets in a number of states, especially in New York and Minnesota. Prior to November 25, 1892, it had maintained a branch office in Chicago, where a part of its business had been transacted, and books of account had been kept. On that day it ceased doing business in Illinois, and its officers turned over its books to said Holbrook, an accountant to collect the accounts. Before December 26, 1892, in a proceeding against the defendant corporation which was insolvent, begun in New York, a man named Jowitt was appointed receiver,

and was acting as such when the present bill was filed. On November 23, 1892, in a proceeding by a stockholder in New Jersey, the said Jowitt was also appointed receiver of the defendant corporation by a chancery court in that state on December 6, 1892. On November 25, 1892, William H. Eberts, the president of the defendant corporation and his brother, residents of Detroit, Michigan, entered up a judgment by confession for \$81,000 against said defendant corporation and caused execution thereunder to be levied upon all of its tangible property in Cook county, Illinois; and on December 7, 1892, one Judson and other creditors of the corporation in Illinois filed a bill in the circuit court of Cook county to set aside said Eberts' judgment as fraudulent and to enjoin the sheriff from selling the property levied upon, in which proceeding the Chicago Title & Trust Company, an Illinois corporation, was on December 18, 1892, appointed receiver by said circuit court, and has possession of all the assets levied upon by said sheriff.

Although a letter was sent to Ford, as above stated, on December 30, 1892, yet Ford did not actually receive notice until January 6, 1893, that the receivers claimed the right to collect said debts under his appointment or requested the withdrawal of said suits and the dismissal of said garnishee proceedings.

On December 30, 1892, the receiver, Holbrook, appeared in the Nebraska courts and moved to be made a party defendant to the suits there pending between Ford, plaintiff, and the said Powerville Felt Roofing Company, Limited, defendant, and the following order was therein entered: "Upon application made by Francis W. Holbrook, receiver, it is hereby ordered and decreed that Francis W. Holbrook, receiver of Powerville Felt Roofing Company, Limited, appointed by the superior court of Cook county, Illinois, be and is hereby made party defendant in the above action, with power to appear and assert rights in said action, to which plaintiff excepts.

The note upon which the judgment in favor of Palmer was entered, was executed on November 25, 1892, by Francis J. Palmer, as treasurer of the defendant corporation, and who was the son of said Charles Palmer.

Messrs. Flower, Smith & Musgrave,
for appellant:

This case is not distinguishable from the case of *Sercomb v. Catlin*, 128 Ill. 556.

Although the Powerville Felt Roofing Company, Limited, was a foreign corporation, it had a branch office and did business in Illinois, and submitted itself to the laws of this state, at least so far as its transactions in this state were concerned. The property in question, for the interference with which Ford was found in contempt, arose out of transactions of the company in this state, and belonged in this state.

These accounts were subject to attachment, or could be reached by a creditor's bill in Illinois.

Harvey v. Great Northern R. Co. 17 L. R. A. 84, 50 Minn. 405; *Green v. VanBuskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Burlington & N. R. R. Co. v. Thompson*, 31 Kan.

180, 47 Am. Rep. 497; *Mooney v. Union Pac. R. Co.* 60 Iowa, 346; *Roche v. Rhode Island Ins. Assn.* 2 Ill. App. 360; *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691; Whart. Conf. L. 1st ed. § 361.

The *situs* of these debts was at the place where they were payable.

Whart. Conf. L. 1st ed. § 365.

The domicile of a corporation, as well as the *situs* of a debt, is to be determined by reference to the matter under consideration and the circumstances of the case. A corporation for many purposes may have more than one domicile.

Atty-Gen. v. Bay State Min. Co. 99 Mass. 148, 96 Am. Dec. 717; *Ricker v. American Loan & T. Co.* 140 Mass. 346; *Glaize v. South Carolina R. Co.* 1 Strobb. L. 70; *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 416.

A corporation may acquire a domicile in a foreign state by doing business there.

Smith v. Pilot Min. Co. 47 Mo. App. 409; *Murfree, Foreign Corp.* § 388; Dicey, Domicil, 110.

A receiver is not an agent or representative of either party to an action, but is uniformly regarded as an officer of the court, and he has only such power as the court gives him.

High, Receivers, §§ 1, 2; *Hooper v. Winston*, 24 Ill. 353.

And before he can intervene in a foreign jurisdiction, he must obtain authority of the court to do so.

Screen v. Clark, 48 Ga. 41; High, Receivers, 208; Beach, Mod. Eq. Jur. § 742; *Battle v. Davis*, 66 N. C. 252; *Green v. Winter*, 1 Johns. Ch. 60, 1 L. ed. 60, 7 Am. Dec. 475; *Tracy v. First Nat. Bank of Selma*, 37 N. Y. 523; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Davis v. Ladoga Creamery Co.* 128 Ind. 322.

Mr. C. B. Sampson, for appellee:

The court could not legally appoint a receiver of the accounts and notes receivable, debts due and all choses in action, without regard to where they were situated, of a corporation organized under the laws of another state, and there engaged in business, such corporation not being then engaged in transacting or conducting any of its business in this state, and when none of its officers or agents were residing in or engaged in business within this state.

Redmond v. Hoge, 8 Hun, 171; *Stettauer v. White*, 98 Ill. 72; 20 Am. & Eng. Encyclop. Law, p. 184.

The receiver has submitted himself to the jurisdiction of a foreign tribunal, and that tribunal has now complete jurisdiction of the parties and the subject-matter in controversy. He has a standing in court and can have presented and litigated whatever rights he has.

United States Exp. Co. v. Smith, 85 Ill. App. 98.

Sercomb's Case, 128 Ill. 556, is not authority for the doctrine that the appointment of a receiver operates *ipso facto* as a restraint upon domestic creditors from pursuing the assets of the insolvent, which are beyond the jurisdiction of the appointing court.

Ibid.

The commencement and prosecution of the
37 L. R. A.

suits was not therefore *ipso facto* a contempt of the superior court.

Smith v. United States Exp. Co. 185 Ill. 379.

The rights of a receiver appointed by one of our courts are no more sacred, nor should be entitled to greater protection or be more jealously guarded, than the rights of a private citizen of this state.

Hurd v. Elizabeth, 41 N. J. L. 1.

Magruder, J., delivered the opinion of the court:

It is claimed that the decree of the superior court is erroneous, because it inures to the benefit of Palmer, the nonresident complainant in the creditor's bill, rather than to the benefit of Ford, the attaching creditor in the foreign states, who is a resident of the state of Illinois. Where the controversy is between a foreign receiver, assignee, or trustee, and an attaching creditor who resides in the state where the attachment proceeding is instituted, the courts of the latter state will protect its own citizen. This doctrine proceeds upon the ground that such an official, appointed under the laws of one state, has no extraterritorial right of action except as a matter of comity, and that, as against its own citizens, no state will extend its comity to a receiver, assignee, or trustee appointed under the laws of another state.

In *Heyer v. Alexander*, 108 Ill. 385, a voluntary assignment for the benefit of creditors, executed by a resident of Missouri in that state and under its laws, and conveying property in Illinois was held not to be operative to convey the title, as against creditors resident in Illinois suing by attachment. The contest there was between an attaching creditor resident here, and an assignee under a foreign assignment.

In *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691, where creditors residing in Pennsylvania brought an attachment suit in Illinois against their debtor also residing in Pennsylvania, and garnished a debt due to said debtor from a firm in Illinois, and trustees, residing in Pennsylvania and appointed by a court in that state and vested by a statute in that state with the title to said debtor's estate, interpleaded in the garnishment proceeding and claimed the property, it was held that the statutory title of the trustees was inoperative as against the attaching creditors, and that the transfer to the trustees, being by mere operation of the Pennsylvania statute, could not have any extraterritorial effect, so as to be operative in this state, either against our own citizens, or the citizens of other states. There, the contest was between a foreign statutory trustee without any conveyance by the owner of the property, and a foreign attaching creditor.

In *May v. First Nat. Bank of Attleboro*, 122 Ill. 551, a New York firm made an assignment for the benefit of creditors executed in conformity with our statute for the conveyance of real estate, and conveying land in Cook county, Illinois, and recorded in the recorder's office of that county on July 28, 1884; on August 22, 1884, a bank in Massachusetts commenced an attachment suit

against said firm in Cook county, and levied the writ upon said land; the assignee interpleaded and set up the deed of assignment; and it was held that the deed of assignment was valid as against the Massachusetts creditor, it not being in contravention of our laws or public policy. There, the contest was between an assignee in a voluntary assignment executed by a nonresident debtor, and a foreign attaching creditor. To the same effect is *Juilliard v. May*, 130 Ill. 87.

In *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 702, creditors living in Pennsylvania brought attachment in Illinois against their debtor who also lived in Pennsylvania and garnished money in Illinois due to said debtor; before the attachment the debtor had made a voluntary assignment for the benefit of creditors valid under the laws of Pennsylvania, and had recorded it in that state; the assignee interpleaded claiming the money in the garnishee's hands; and it was held that, "as a voluntary foreign assignment, valid in the state where made, is enforced in this state as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor; . . . but for all other purposes, and between citizens of the state where the assignment was made, if valid by the *lex loci*, it will be carried into effect by the courts of this state." There, the contest was between a foreign assignee, and attaching creditors resident in the same state with the assignor and where the assignment was made.

In the recent case of *Townsend v. Coze*, 151 Ill. 62, the controversy was between foreign creditors attaching in this state the property of a foreign corporation, and the assignee in a foreign assignment which was not voluntary, but statutory; and it was held that such an assignment was not operative in this state as against the attaching creditors.

In the case at bar, there is no controversy between any foreign receiver or assignee on the one side, and a domestic creditor on the other. The receiver, here seeking to stop the prosecution of the suits in Nebraska and Missouri by a creditor living in Illinois, is an Illinois receiver appointed by an Illinois court in a proceeding pending in Illinois. It is true that Palmer is a resident of New York, but he brought suit and obtained judgment in Illinois, and filed his bill and procured the appointment of a receiver here. But nonresident creditors have the same right to pursue the remedies prescribed by our laws for the collection of debts as resident creditors have. "Once properly in court and accepted as a sutor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own state and that of another." *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867, 88 Am. Rep. 518. A foreign receiver holding his office by operation of a foreign law will not be allowed to maintain a right of action against the assets of an insolvent debtor in this state as against a creditor resident in this state; but no such restriction applies to a receiver appointed by the courts of this state and under its laws, even though such

receiver is appointed in a suit instituted by a nonresident creditor.

It is sought to distinguish the present case from *Sercomb v. Catlin*, 128 Ill. 556, upon the alleged ground that, there, the complainants in the creditor's bill in which the receiver was appointed were either residents of Illinois, or are not shown to have been nonresidents of this state, while here the complainant is a nonresident. We do not think that any such distinction can be drawn, because the residence of the complainant is immaterial where the receiver is the officer of a court in this state.

Nor can any distinction be fairly drawn between this case and the *Sercomb Case*, on the ground that Sercomb, the party enjoined from prosecuting the attachment suit in the District of Columbia, was the representative of a foreign corporation, while here Ford, the creditor enjoined from prosecuting the foreign attachments, is a resident of Illinois. The right of a court of equity to restrain the prosecution of a suit in another state is founded upon the fact that the court is vested with authority over persons within the limits of its jurisdiction and amenable to its process. Here, Ford is a resident of Illinois doing business in Chicago. In the *Sercomb Case*, Sercomb, though the agent of a Connecticut corporation, lived in Illinois, was the business manager of the corporation here, began and controlled the attachment suit in Washington, and was amenable to process in this state. *Dehon v. Foster*, 4 Allen, 545; *Cole v. Cunningham*, 188 U. S. 107, 38 L. ed. 589.

But there are several respects in which the facts here differ from those in the *Sercomb Case*. In the first place, the creditor in that case, who instituted the attachment proceeding in the foreign jurisdiction, had full knowledge, before he did so, of the appointment of the receiver in the creditor's suit in Illinois. Here, although the receiver was appointed ten days before Ford began his attachment proceedings in the foreign jurisdictions, yet Ford had no notice or knowledge of such appointment when he garnished the debts due the judgment debtor in Nebraska and Missouri. Such previous knowledge of the appointment of the receiver, or of the insolvency of the principal debtor, has been deemed material in those cases where courts have enjoined the prosecution of foreign suits, or have committed the creditors so prosecuting them for contempt. *Dehon v. Foster*, *supra*; *Chafes v. Quinick Co.* 18 R. I. 442; *Vermont & C. R. Co. v. Vermont Cent. R. Co.* 46 Vt. 792.

In the second place, the principal debtor in the present case is a foreign corporation. A court in one state may appoint a receiver for a corporation organized in another state and doing business within its own territory and having property there. This may be done, although the courts in the home state of the corporation may have already placed its affairs in the hands of a receiver. *De Bemer v. Drew*, 57 Barb. 488; *National Trust Co. of New York v. Miller*, 83 N. J. Eq. 155; *Hunt v. Columbian Ins. Co.* 55 Me. 290, 92

Am. Dec. 592; *Life Assn. of America v. Fassett*, 102 Ill. 815. The receiver appointed in the foreign state will be regarded as ancillary or auxiliary to the receiver appointed in the state to which the corporation owes its creation. 8 Am. & Eng. Encyclop. Law, p. 408. Hence, we do not consider the fact that receivers were appointed in New York and New Jersey for the Powerville Felt Roofing Company, Limited, the corporation defendant in the present case, as in any way restricting the right of the courts in this state to appoint a receiver for such defendant, if the other necessary conditions to the appointment of such receiver existed here.

The general rule is, that a court of equity will not appoint a receiver for a foreign corporation, where such corporation has no property in the state of the appointing court, and has not appeared or been served with process in the proceeding in which the appointment of the receiver is applied for, and where none of the officers or agents controlling or representing the corporation reside or are to be found in the state of the appointing court. The object of appointing a receiver for a foreign corporation is to preserve its property and effects for the benefit of creditors and shareholders. Wait, Insolvent Corp. § 188; 8 Am. & Eng. Encyclop. Law, p. 408; *Life Assn. of America v. Fassett*, supra; *Redmond v. Hoge*, 3 Hun, 171; *National Trust Co. of New York v. Miller*, supra; *Shaw v. Shore*, 5 L. J. Ch. N. S. 79; *Stafford v. American Mills Co.* 13 R. I. 810; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581.

In the case at bar, it appears that all the tangible property of the Powerville Felt Roofing Company, Limited, in Cook county Illinois, was taken by the sheriff under the Ebert's judgment and is now in the hands of the Chicago Title & Trust Company a receiver appointed in another proceeding; and that the company ceased doing business in this state on November 25, 1892, and that, at the time this creditor's bill was filed, no officer, agent, or employé of said company resided or had any place of business in this state. It furthermore appears from an examination of the record, that the receiver was appointed upon the same day on which the creditor's bill was filed; and that the roofing company, the judgment debtor, was not served with process, nor did it enter its appearance in the cause, either before such appointment or at any time thereafter. We do not deem it necessary, however, to hold that there were no assets of the roofing company in this state, which would justify the appointment of a receiver. As the receiver appointed for a foreign corporation must be appointed to take possession of the assets in the state where he is appointed, and acquires title to such assets only, the question arises whether the debts owing to the roofing company from the parties in Nebraska and Missouri can be regarded as property or assets in Illinois.

In construing the meaning of the words "property in this state," we have held that, "since the only property right which there can be in a debt is the mere right to receive

payment of it, it is impossible that there can be anything of a tangible nature connected with such right which can occupy locality, and, so, the property right must accompany and remain with the person of the owner of the debt, and, therefore it cannot be in this state when the domicile of the owner is in another state." *Cooper v. Beers*, 143 Ill. 25. "Contracts respecting personal property and debts are now universally treated as having no situs or locality, and they follow the person of the owner in point of right." Story, Conf. L. § 362. *Mobilis in haren ossibus domini*. Wharton on Conflict of Laws, at § 363, says: "The remaining theory is that of the *lex domicilii* of the creditor. This theory is now generally accepted in England and the United States. . . . *Mobilis sequuntur personam* is a maxim . . . peculiarly applicable to debts which have no local site, and which therefore follow the owner."

Here, the debts garnished belong to the Powerville Felt Roofing Company, Limited, which is a corporation organized under the laws of New York. A foreign corporation has its domicile in the state from which it derives its existence. 8 Am. & Eng. Encyclop. Law, p. 830, and cases cited. "A corporation is an artificial being, and has no dwelling either in its office, its warehouses, its depots, or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of the residence of its officers, or the place where its business is transacted." *Merrick v. Van Santvoord*, 34 N. Y. 208; *Baltimore & O. R. Co. v. Glenn*, 29 Md. 287, 92 Am. Dec. 688; *Germania F. Ins. Co. v. Francis*, 78 U. S. 11 Wall. 210, 20 L. ed. 77; *State Treasurer v. Auditor General*, 46 Mich. 224. The residence of a corporation is the state which creates it. It cannot change its domicile at will, and, although it may be permitted to transact business in another state, it cannot on that account acquire a residence there. *Germania F. Ins. Co. v. Francis*, supra; *Dacey, Domicil*, p. 112; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 553.

Inasmuch, therefore, as the debts due to the roofing company must be regarded as situated at its domicile, they are located in New York and not in Illinois, and cannot, therefore, be regarded as passing to appellant as receiver. Even if the residence of the debtors should be regarded as the location of these debts, they would not be property or effects in Illinois, but would be located in Nebraska and Missouri.

The commencement of a suit by filing a bill does not constitute *lis pendens* until summons or subpoena has been served. *Grant v. Bennett*, 96 Ill. 518. Accordingly it has been held that the lien created by a creditors' bill only comes into existence by the filing of the bill and service of process. *Hallorn v. Trum*, 125 Ill. 247; *King v. Goodwin*, 130 Ill. 102; *First Nat. Bank of Sioux City v. Gage*, 98 Ill. 172. Here, as there was no service of process upon the roofing company, no lien, equitable or otherwise, could have been acquired upon the debts garnished by appellee.

It is claimed that, in the ordinary course

of the business of the roofing company as conducted at its Chicago branch, these debts would have been payable at the Chicago office, and that their *situs* must be regarded as being in Illinois, because they are thus alleged to have been payable in Illinois. There would be much force in this position if the debts were payable to a domestic corporation, but it cannot be considered as entitled to much weight here, where the debts are payable to a foreign corporation. *Osgood v. Maguire*, 61 N. Y. 524.

In the third place, it appears here, that, before a rule was entered upon appellee requiring him to show cause why he should not be committed for contempt, the appellant as receiver had intervened in the garnishment proceedings in Nebraska, and, upon his own application, had been made a defendant in those proceedings, and had been granted the power to appear and assert his rights therein. The suits which appellee was required to dismiss were suits in which the receiver had voluntarily made himself a defendant. He had, of his own accord, submitted to the jurisdiction of the foreign court with a view of their contesting his rights. It has been held that, where a party has been guilty of a contempt of court by bringing suit against a receiver without leave, the contempt is waived by the appearance of the receiver in the suit. *Mulcahey, Jr. v. Strauss*, 151 Ill. 70.

Contempts have been classified into direct and constructive, the former being those committed in the presence of the court or so near as to interrupt its proceedings, the latter being those which arise from matters not transpiring in court but from refusal to obey its orders and decrees that are to be performed elsewhere. Interfering with property in the possession of a receiver is a constructive contempt. *Rapalje*, Contempts, §§ 22, 24. Contempts have been still further classified into criminal and civil, the former being acts in disrespect of the court or its process, or tending to bring it into disrepute, or obstruct the administration of justice; the latter being "those quasi contempts which consist in failing to do some thing which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court." *Rapalje*, Contempts, § 21. "If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil." *Phillips v. Welch*, 11 Nev. 187. In such case, "the private party alone is interested in the enforcement of the order, and the moment he is satisfied, the imprisonment terminates." *Ibid.* A motion to commit for such a contempt may be answered by showing that the party complaining of it has waived it. "Waiver only applies where the contempt has arisen from breach of an order made in favor of any party—not, of course

to contempts of the court itself." *Oswald*, Contempt of Court, pp. 113, 114.

In the case at bar, the order of committal because of refusal to dismiss the foreign suits was made for the benefit and advantage of Palmer, the complainant in the creditor's bill. A receiver under a creditors' bill is not necessarily a trustee for the benefit of all the creditors, but for the benefit of the creditors in whose behalf he is appointed. *Young v. Clapp*, 147 Ill. 176. In his answer to the petition of the receiver, the appellee set up the order of the foreign court making the receiver a party to the foreign suits at his own request. We are inclined to think that the answer thereby showed, in connection with the other circumstances heretofore mentioned, a good defense to the motion or petition for an attachment, on the ground that the action of the receiver in submitting to the jurisdiction of the foreign court with a view of having his rights determined there amounted to a waiver of the contempt. It is true that the mere pendency of a suit in one state cannot be pleaded in bar or abatement of a second action in another state even between the same parties and for the same cause of action. *Allen v. Watt*, 69 Ill. 655. The reason for this rule is that the defendant would not be obliged to pay the money twice, since payment at least, if not a recovery in the one suit, might be pleaded *puis darrein continuance* to the other suit; and if the two suits should ever proceed *pari passu* to judgment and execution, a satisfaction of either judgment might be shown in discharge of the other. *Bovins v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *Embree v. Hanna*, 5 Johns. 101. But it is manifest that neither the rule, nor the reason for it, has any application here. That may be a good answer to a motion to commit for contempt which may not be a good defense upon the merits. In the *Sercomb Case*, the receiver had not intervened in the foreign suit when the application to commit for contempt was made, and therefore whatever was there said, inconsistent with the proposition that such an intervention as is shown under the circumstances of the present case can be regarded as a waiver, must be modified to accord with the views here expressed. Where a court of equity is asked to proceed as for a contempt against a creditor, who seeks to reach by attachment or garnishment debts due to an insolvent debtor from persons residing out of the state, it is proper to inquire which of the parties has a paramount right or superior equity to those debts. *Dehon v. Foster*, *supra*.

For the reasons here stated, the judgment of the Appellate Court is affirmed, and the decree or order of the Superior Court of Cook County is reversed and the cause is remanded to the latter court for further proceedings in accordance with the views here expressed.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

John F. LANGHAMMER *et al.*, Appts.,

v.

John MUNTER *et al.*, Officers of Registration.

(.....Md.....)

A voter need not have any particular spot which he calls "home" provided he makes his residence (in the sense of having no other home) anywhere or in however many places, for the required times, within the limits of the state and the voting district.

(February 23, 1905.)

A PPEAL by plaintiffs from an order of the Court of Common Pleas refusing to strike from the registry list certain names which had been placed there by defendant, but which plaintiffs alleged were illegally there, by reason of the fact that their owners were not residents at the place from which they registered. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles J. Bonaparte and John C. Rose, for appellants:

A voter "cannot lawfully vote in a ward or election district in which he does not reside, even though that ward or election district be within the legislative district or county where he has his residence; and where he cannot lawfully vote, he is not entitled to register or to remain registered."

Kemp v. Owens, 76 Md. 288.

Under no definition of residence which has ever been given by lexicographers, text-writers, or courts, is it possible to contend that the alleged voters in question had any residence in the fifth precinct of the first ward.

2 Kent, Com. 431, note *F*; *Roosevelt v. Kellogg*, 20 Johns. 208; *Re Wrigley*, 8 Wend. 140; *Long v. Ryan*, 30 Gratt. 720; *Paine, Elections*, § 46; *Johnson v. People*, 94 Ill. 505; *Re Collins*, 64 How. Pr. 65; *Lambe v. Smythe*, 15 Mees. & W. 423; *Dale v. Irwin*, 78 Ill. 182; *Opinion of the Justices*, 5 Met. 588; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; *Spragins v. Houghton*, 8 Ill. 377; *French v. Lighty*, 9 Ind. 477; *Shaeffer v. Gilbert*, 73 Md. 70.

Can it be seriously contended that these alleged voters had any home in the residence of the person who allowed them to sleep for two nights in his kitchen? That house was certainly not their home.

Md. Const. art. 1, § 1; *Kemp v. Owens*, 76 Md. 288.

Every man has had a residence at some period of his life. That residence remains his legal residence until he has acquired another.

Thorndike v. Boston, 1 Met. 242; *McCrary, Elections*, § 71; *French v. Lighty*, 9 Ind. 478;

NOTE.—The above case is a novel one, being discussed without any question as to the existence of another residence outside the voting district but solely with references to the necessity of a place within the district which may be more specifically located as that of the voter's home or residence.

As to effect of residence of voters in schools or public institutions, see *note to Wolcott v. Holcomb* (Mich.) 23 L. R. A. 215.

2; L. R. A.

Paine, Elections, § 45; *Moffett v. Hill*, 181 Ill. 239.

If the last residence acquired by these men was in the state of Maryland, they are entitled, under the provisions of the constitution, to register and vote at that last place of residence until they have acquired a new residence elsewhere.

Thorndike v. Boston, supra; *Shaeffer v. Gilbert*, 73 Md. 71.

A man who sometimes pensioned himself upon a friend in one town, and sometimes upon relatives in another town, and sometimes with different persons living in the district in which he claimed to vote, had no residence in it, and no right to vote therein.

Shepard v. Allen (Ill.) 15 West. Rep. 182; *Behrensmeier v. Kreitz*, 185 Ill. 591; *McCrary, Elections*, § 71; *French v. Lighty, supra*.

A temporary resort to a precinct for no other honest purpose of residence is a fraud, and not residence, and gives no rights.

Warren v. Board of Registration, 2 L. R. A. 203, 73 Mich. 398.

Messrs. Peter J. Campbell, James H. Preston, William S. Bryan, Jr., and Edward D. Fitzgerald, for appellees:

Neither the legislature nor the courts can add to the constitutional qualifications of voters.

Quinn v. State, 85 Ind. 485, 9 Am. Rep. 754; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465.

Page, J., delivered the opinion of the court:

This is an appeal from an order of the court of common pleas of Baltimore City, dismissing the petition of the appellants, praying that the names of James Bosley and Charles Williams be stricken from the registry of voters of the fifth precinct of the first ward of Baltimore city.

At the hearing, the petitioners produced the registry of voters of the precinct and ward, and read in evidence so much of the contents thereof as related to the registration of the persons alleged by the petition to be improperly registered. The appellants' counsel, however, contend that these entries can only be used for the purpose of showing what the appeal is from, and are not evidence to be regarded by the judge in determining whether the register has acted properly. We cannot adopt this view. The duty of a register of voters, under our statute, is not merely ministerial. It is his duty to interrogate the party applying for registration under oath, touching his right to register, and if, after this primary examination of the applicant, and of such other evidence as may be immediately accessible, he is in doubt, he may adjourn his determination to a subsequent day, when he must proceed to determine whether the applicant is a qualified voter, or disqualified. He is thus compelled to take evidence, weigh its force and effect, and finally to "determine," and it is from this determination, that any one who thinks himself aggrieved may appeal to one of the

judges of the supreme bench of Baltimore city (if the election precinct is in Baltimore city). The appeal is by petition, and with it shall be filed certified copies of all the entries in the registry of voters, relating to the subject-matter, and if, in the opinion of the judge the petition and exhibits show a prima facie cause of complaint, he orders the proceedings provided by the act.

After answer is made, and evidence is adduced, the court is required to consider, in making up its determination, the petition (which includes the entries) the answers and such testimony, for or against the petition, as may be offered, and from the whole case thus made up decide whether the party is, or is not a qualified voter. These entries are not only the sworn statements of the applicant but also the deliberate findings of an officer charged with the public duty of determining their correctness; and as such, should not be disturbed until their falsity has been established by sufficient evidence. Adopting this principle in the case we are now considering, what does the proof establish? There is no evidence assailing such entries as show that James Bosley is white, twenty-five years of age, and has resided in Baltimore city twenty-five years, and in the ward four years. There is no sufficient evidence to controvert the entry with respect to his evidence (the nature of which as proven will be hereinafter examined), in the precinct. The proof that his name does not appear upon the police census of registered voters is too uncertain to be entitled to much weight. The fact that Bosley was a sea-faring man might fully account for his absence at the time the census was taken; even if it be assumed that the police performed their work with perfect accuracy.

It was proved by the testimony of Charles A. Eisensick that he resided at 2225 Essex street the place Bosley had stated as his residence in the ward and precinct; that neither of the alleged voters had ever lived there, but that he knew them, and, in the month of August, 1894, had permitted them, at their request, to sleep for two nights in his kitchen; that they had asked him to permit them to register from his house, and he had replied that he did not object, if it was not contrary to law; that the alleged voters were two young men who followed the water, and he supposed they were then down the bay dredging. He did not know whether they had any permanent home; thought they had not, and if they had, he did not know where it was. He had known them for some years, and on one or two previous occasions they had in like manner slept at his house for a night or two at a time, but never longer. It was also shown that subpoenas had been issued for each of the parties, and returned by the sheriff *non est*. This is a full statement of all the evidence in the cause. We have stated it particularly with reference to James Bosley, but what has been said is equally applicable to the case of Charles Williams.

Under these circumstances the appellant contends that neither of these men is a qualified voter and entitled to be registered. This depends on the meaning of the word "resi-

dence," as used in the 1st section of article 1 of the Constitution, when applied to the particular proof in this case. What constitutes "residence," within the meaning of this section and article of the constitution, has frequently been the subject of judicial decision, in this state and elsewhere. It has often been held to be equivalent to the word "home," in the sense of a home, to which one whenever absent intends to return. It undoubtedly carries with it an element of permanence, differing, however, widely in special cases. "The word 'home' suggests relations differing in breadth and strength, though not in kind, when applied, on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and on the other hand to the clergyman whose home may change in two years, or to the railroad laborer whose home may change in two months." *Paine, Elections*, 46; *Chase v. Miller*, 41 Pa. 408; *Story, Confli. L.* § 41.

Temporary absence, with a continuous intention to return, will not deprive one of his residence, though it extend through a series of years (*Cooley, Const. Lim.* 600; *Fry's Election Case*, 71 Pa. 308, 10 Am. Rep. 698); nor will a sojourn, however prolonged, with the purpose of returning, be sufficient to acquire a residence. There must be the act of abiding, without the intention of removing therefrom. *Story, on Conflict of Laws*, section 41, says: "In other words, there must be, to constitute residence, an 'actual home' in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time." *Shaeffer v. Gilbert*, 78 Md. 71. Residence, therefore, is a question depending upon fact and intention, and, if so, it may be applicable to a particular spot or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a resident of that country or locality. Home, domicil or residence, may therefore include a spot or a wide area. Each of these words may be applied "either to a house, a precinct, a ward, a county or a state. *Dicey on the Law of Domicil*, p. 55, says: "It is obvious that . . . state residence and the district residence are of the same nature, and whatsoever is necessary to constitute the one is essential to define the other." *Fry's Election Case*, 71 Pa. 306, 10 Am. Rep. 698.

The framers of our constitution have in the 1st section of article 1 clearly recognized these applications of the word "residence." That section prescribes as the qualification of a voter, that he shall be a resident of the state for one year, and a resident of the district six months. There is no requirement that the proposed voter shall have some particular spot, which he calls his home, provided he makes his home (in the sense of having no other home) anywhere or in however many places, for the required times, within the limits of the state and the voting district.

Probably it was borne in mind that numbers of citizens, through misfortune or otherwise were without dwelling places, but there is no evidence to be found in any part of the constitution, that these were to be denied the privileges of the elective franchise. On the contrary it seems to have been the purpose to confer the right of suffrage upon every male citizen who has attained the age of twenty-one years, only requiring, for wise reasons, that every such person shall have resided in the state one year, and in the voting district six months. When the general assembly came to provide by law for a uniform registration of voters, as required by the fifth section of article 1 of the Constitution, it was careful to prescribe such regulations as should prevent abuse and fraud in the exercise of this great privilege. The city of Baltimore having been divided into small precincts, officers of registration are provided for each, and large powers are given them effectively to discharge the duties imposed upon them.

For the purpose of clearly identifying the person applying to be registered, the officers of registration are to ascertain his name, color, age, place of birth, place of residence by street and number (if any), the time of his residence in city and ward, and enter the same in the proper column of books, prepared by the state, and furnished them for that purpose. Fraudulent conduct on the part of the registers, or of other persons in or about the registration of voters, is made a misdemeanor punishable on conviction, with heavy penalties. And in addition to all this, if any person, whether he be the person applying to be registered or any other person, shall think himself aggrieved by the action of the officer of registration there is given the right to appeal to a judge of the supreme bench. If these safeguards should prove ineffectual to prevent the fraudulent practices which the counsel for the appellant seems to apprehend, it will be for the legislature to devise and enact other provisions to accomplish the most desirable object of securing absolutely pure elections. But whatever may be done, no restrictions can be imposed that will require other or different qualifications for voting than those prescribed by the first article of the Constitution of the state.

Order affirmed.

FIRST NATIONAL BANK OF GRAFTON, WEST VIRGINIA, *Appt.*,

v.

BUCKHANNON BANK.

(.....Md.....)

1. Sending a check by an indirect route will not constitute negligence in presenting it if it reaches its destination as soon as if sent direct, taking the full time allowed by law for mailing it.

NOTE.—The taking of a substituted check considered as a discharge of the maker of the first check is discussed in a note to *Anderson v. Gill* (Md.) 26 L. R. A. 200.

27 L. R. A.,

2. Taking a substituted check from the drawee of a worthless check who cannot cash it, and then failing to use due diligence in presenting the new check on which no amount of diligence could have obtained payment, will not create any liability to the drawer of the original check.

(February 25, 1896.)

A PPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendants in an action brought to recover money which had been due from defendant to plaintiff and for which a draft on a Baltimore bank had been given but which failed of collection because of plaintiff's alleged negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Frank Woods, for appellant:

The plaintiff was not bound by the law to present this check for payment sooner than the close of bank hours on the 14th of January.

2 Dan. Neg. Inst. §§ 1592, 1595, 1598; Story, Prom. Notes, § 493.

The drawees, J. J. Nicholson & Sons, were agents of the defendants to pay its check to plaintiff, and by pretending to pay it as they did, they misled plaintiff's agent and committed a fraud on him, because they had then overdrawn their account with the Western National Bank and must have known they had no funds there to pay their substituted check.

Tiedeman, Com. Paper, § 445, p. 5, par. 10.

No case can be found in the books where under such circumstances the drawer of a bill of exchange was discharged. To establish such a rule would be to hold that the mere receiving of a substituted check by a collector worked the discharge of the drawer of the original bill of exchange, a new doctrine, never before held and nowhere announced.

A banker or other agent holding a bill or note for collection would act at his peril in delivering it up on receipt of a check for the amount; and if the debtor did not pay the amount in money and the drawer and indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent. If, indeed, on the same day that the bill was due the agent received a check for the amount and delivering up the bill, but on presentation of the check at the bank and refusal of payment that very day it had been returned, the bill or note reclaimed and protested and the drawers or indorsers duly notified, then no right would be forfeited, but the liability of all preserved.

2 Dan. Neg. Inst. § 1625; *Burkhalter v. Second Nat. Bank of Erie*, Pa. 42 N. Y. 538; *First Nat. Bank of Meadville*, Pa. v. *Fourth Nat. Bank of New York City*, 77 N. Y. 320, 83 Am. Rep. 618; *Johnson v. Bank of North America*, 5 Robt. 554; *Smith v. Miller*, 6 Robt. 157.

Mr. N. P. Bond, with **Mr. Robert D. Morrison**, for appellee.

McSherry, J., delivered the opinion of the court:

The case of *Anderson v. Gill*, 80 Md. —, 25 L. R. A. 200, is clearly distinguishable from the one now before us. In *Anderson v. Gill* we

held that when the payee of a check drawn on a banker having funds of the drawer available to cash it presents it in due time through his collecting agent, and the latter, instead of receiving money for it, surrenders it and takes in lieu of the money the drawee's own check upon another bank having funds with which to pay the substituted check, and then fails to use proper diligence in presenting the substituted check for payment, which when it is presented is not paid because of the supervening insolvency and suspension of the drawer of the substituted check, the loss must fall, as between the drawer and payee of the original check, upon the latter and not upon the former.

It is not necessary to repeat the reasons or again refer to the adjudged cases upon which the conclusion reached in that case was founded. It is obvious that if the payee's own negligence in not presenting the substituted check in a reasonable time before the suspension of its drawer, has been the direct cause of its non-payment; or, stating it differently, if the substituted check was drawn upon a bank having funds of its drawer, and if it would have been paid had due and proper diligence been used in presenting it, and after the expiration of the time beyond which its presentment would not be within the limits of due diligence, the drawer of it suspends and the substituted check is, in consequence, not paid, this negligence of the payee of the original check in not presenting the substituted check at a time when it would have been paid, cannot be visited upon the drawer of the original check, and he will be discharged. But this doctrine cannot apply where the facts fail to show that the drawer of the original check has been injured by the delay or the want of due diligence of the payee or his collecting agent. If the drawer of the original check has not been injured by the conduct of the payee, he is in no worse position in consequence of that conduct than if due diligence had been used by the payee without securing payment; and if the facts show that the exercise of due diligence in making presentment of the substituted check would have been useless, because of the insolvency of the drawer thereof, and because the drawer thereof was without funds to meet it, then the failure to use such diligence could not prejudice the rights of the drawer of the original check, provided the drawee thereof was insolvent when it was drawn and was unable to cash it when presented.

Assuming always that the original check would have been paid in cash had cash been demanded and insisted on when it was presented; and assuming also that the exercise of due diligence would have secured the payment of the substituted check, then the failure to exert that diligence whereby loss occurs would result in an injury to the drawer of the original check and would discharge him. But injury cannot be predicated of the want of such diligence unless but for the want of due diligence the money would have been paid. Until it is shown that the use of due diligence by the payee or his agent would have resulted in the payment of the substituted check, the first step has not been taken

towards establishing injurious negligence on his part.

Now, in the case at bar, the Buckhannon Bank of West Virginia being indebted to the First National Bank of Grafton, West Virginia, and having on deposit with J. J. Nicholson & Sons, of Baltimore, an amount greater than this debt, gave to the Grafton Bank a check on Nicholson & Sons for the amount of the indebtedness due to the Grafton Bank. This check was dated January 11, 1892, and was on the same day mailed to the Grafton Bank and was received by it on the succeeding day. On that day, the twelfth, the Grafton Bank indorsed the check for collection for its account and forwarded it by mail to its correspondent, the Manufacturer's National Bank of Philadelphia. On the 13th the Manufacturer's Bank received it and at once sent it by mail to its correspondent the National Farmers' & Planters' Bank of Baltimore, for collection. On the next day, the fourteenth, the last-named bank received it and at one o'clock presented it, together with other checks and drafts, at the counter of J. J. Nicholson & Sons for payment. Payment was not made in cash but instead thereof, upon the surrender of these checks and drafts, Nicholson & Sons drew their own check on the Western National Bank of Baltimore for the total amount of this and the other checks and drafts, and delivered it to the messenger of the National Farmers' & Planters' Bank.

In thirty minutes afterwards, Nicholson & Sons, having suspended and being hopelessly insolvent, closed their doors. When the check of Nicholson & Sons to the National Farmers' & Planters' Bank was shortly afterwards, but on the same afternoon, and during banking hours, presented to the Western National Bank, payment was refused. Demand was immediately made for the return by the Nicholson's of the surrendered checks, but admittance to their banking house was not obtained until next day, when the check drawn by the Buckhannon Bank was protested and then recovered by an action of replevin. It is admitted by the agreed statement of facts that had the check held by the Grafton Bank been presented to Nicholson & Sons at any time on the 13th or up to noon on the 14th it would have been paid by them; and it is further admitted that Nicholson & Sons had no funds to their credit with the Western National Bank, but on the contrary were largely indebted to the bank on account of overdrafts when they drew their check in favor of the National Farmers' & Planters' Bank at one o'clock on the 14th of January. It is also distinctly admitted that this check "was in fact of no value."

We are now asked, in the light of these facts, to say that the receipt by the National Farmers' & Planters' Bank of this worthless check and the failure to present it within thirty minutes thereafter, though it is not shown that it would have been paid had it been presented within that time, has resulted in such an injury to the Buckhannon Bank as to discharge the latter's liability to the Grafton Bank; and this, too, though the Nicholson's were utterly unable, by reason of their hopeless insolvency, to pay in cash the

check drawn on them by the Buckhannon Bank when it was presented at one o'clock the same day. That is the appellee's contention and so the court below decided. The position is absolutely untenable.

The Grafton Bank having received on January the 12th the check drawn on Nicholson & Sons was bound to present it for payment in a reasonable time. There being no dispute about the facts, what constituted a reasonable time is a question of law for the court. Whilst it is undisputed that if the check be drawn on a bank located in the place where the check is delivered the holder has until the close of business hours of the next secular day to present it, it is equally the settled law that if the check be drawn on a bank situated in another place it should, at the latest, be mailed for presentment on the day after it is received and should be presented at the place of payment on the day after it reaches there. 3 Randolph, Com. Paper, § 1106; Byles, Bills, 14, 164; Chitty, Bills, 18th Am. ed. 383; *Rickford v. Ridge*, 2 Campb. 537. In the pending case, as already stated, the check was received by the Grafton Bank on January the 12th, and was mailed, not the next day, but the same day to its Philadelphia correspondent for collection and was received in Baltimore on the 14th and was on that day presented for payment. Though the record contains the admission that if the check had been mailed in Grafton on the 12th to Baltimore direct it would in the due course of the mail have reached the latter place on the morning of the 18th, still the Grafton Bank was under no obligation to mail it for collection until the day after it was received by it, that is until the 18th; and had it forwarded it on that day by mail direct to Baltimore, the check would not have been received there until the 14th, the day it was in fact received.

The forwarding of it through Philadelphia did not, therefore, cause it to reach Baltimore later than the Grafton Bank was bound to have it there for presentment. As under the rule above stated the Grafton Bank had, through its collecting agent, until the close of business hours on the 15th to present the check for payment, it was obviously guilty of no negligence in not presenting it prior to noon of the 14th, up to which time, according to the agreed statement of facts, it would have been paid. But the check having been presented an hour later, when confessedly the Nicholsons were unable to pay it over their own counter, and the National Farmers' & Planters' Bank having taken, upon the surrender of this worthless check, an equally worthless one drawn by Nicholson & Sons on a bank in which they had no funds, but to which they were already heavily indebted on overdrafts, no injury was in fact done to the Buckhannon Bank unless it was made to ap-

pear that the Western National Bank would have paid Nicholson & Sons' check within the thirty minutes following its receipt by the National Farmers' & Planters' Bank, even though the drawers of that check had no funds to their credit when they drew it. We cannot assume that the Western National Bank would have paid this check if it had been presented prior to the actual suspension of the Nicholsons; and as there is nothing in the record to show that it would have been paid, there is nothing to indicate that the failure to make the presentment worked any injury to the Buckhannon Bank at all.

As the Nicholsons, according to the conceded facts, were utterly unable to pay the check drawn on them by the Buckhannon Bank when it was presented at their counter, the surrender of the check and the acceptance of the substituted check of itself caused no injury to the Buckhannon Bank; and as, according to the admitted facts, the substituted check was, when drawn, utterly valueless, the mere failure to present it within thirty minutes, produced no injury to the Buckhannon Bank. Neither, therefore, the acceptance of the substituted check, nor the failure for thirty minutes to present it, placed the Buckhannon Bank in a worse position than it occupied at the moment its check was presented to Nicholson & Sons for payment; and that presentment was, in fact, made earlier than, under the law it was necessary to make it. Consequently, no act done by the Grafton Bank, or by its agents, caused any injury to the Buckhannon Bank. In the *Anderson Case* just the opposite facts were presented, and, of course, the opposite conclusion was reached. In that case it appeared that the check drawn by Anderson on Nicholson & Sons would have been paid in cash when presented had cash been demanded; and further, that the substituted check on the Western National Bank would have been paid had due diligence been used in presenting it. It was shown that two other checks drawn by Nicholson & Sons on the Western National Bank after they had drawn and delivered the one given in exchange for the Anderson check were presented and paid. Had the same diligence been used by the holder of the check given in substitution for the Anderson check, that the holders of these two other checks exerted, that check would also have been paid. The failure to use that degree of diligence, under these circumstances, therefore, resulted in injuring Anderson, and he was held to be discharged.

It follows from what we have said that the judgment of the court below was erroneous and it will be reversed that judgment may be entered for the plaintiff.

Judgment reversed and costs remanded with costs above and below.

WASHINGTON SUPREME COURT

Kate DECKER *et al.*, *Appts.*,

v.

August SCHULZE *et al.*, *Respts.*

(.....Wash.....)

Equity will not decree the rescission of an executed sale of land merely because of a breach of covenant as to title in the absence of fraud or other ground of equitable jurisdiction except mutual mistake as to the title, especially where the extent of the failure of title is not shown.

(February 1, 1895.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to rescind a sale of real estate and to procure a return of the purchase money. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. H. Kenyon and Jones, Voorhees & Stephens, for appellants:

For reversal of the judgment in the court below the court relies upon—

Sears v. Stinson, 8 Wash. 615; *Moody v. Spokane & U. H. Street R. Co.* 5 Wash. 699.

Mr. William A. Huneke, for respondents:

Rescission is generally defined as the "avoiding of a voidable contract"—not of a valid or void one.

21 Am. & Eng. Encyclop. Law, p. 27.

The principal grounds for rescission are the following: fraud, inadequacy of consideration, undue influence, mistake, illegality, coverture, infancy, insanity, intoxication, duress, failure of consideration and nonperformance.

21 Am. & Eng. Encyclop. Law, pp. 27 *et seq.*

The general rule is, if there is a total failure of performance rescission will lie—particularly when associated with other equitable grounds.

21 Am. & Eng. Encyclop. Law, pp. 44 *et seq.*; *Moody v. Spokane & U. H. Street R. Co. supra.*

In executory contracts, equity answers with a readier ear, its interference being more feasible; while in executed contracts nothing can induce equity to interfere unless it be strong, equitable grounds.

The complaint in the case at bar alleges a partial failure of performance of a valid, executed contract and alleges neither eviction nor any grounds whatsoever for equitable interference. Appellants could not have chosen a more difficult state of facts upon which to base their prayer for the equitable remedy of rescission.

21 Am. & Eng. Encyclop. Law, p. 46; 2 Parsons, Cont. 7th ed. pp. 812, 818; Rawle, Covenants, 5th ed. §§ 854, 861, 875, 876, and

NOTE.—The distinction between executed and executory contracts when relief against them is sought is very clearly made in the above case. For cases on the general subject of mistake as ground for relief in equity, see notes to *Miller v. Powers* (Ind.) 4 L. R. A. 483; *Page v. Higgins* (Mass.) 5 L. R. A. 152; *Reigel v. American L. Ins. Co.* (Pa.) 11 L. R. A. 867; *Butler v. Barnes* (Conn.) 12 L. R. A. 273.

27 L. R. A.

footnote 3, and 878, footnote 2; *Morris v. Phelps*, 5 Johns. 49, 4 Am. Dec. 323; *Abbott v. Allen*, 2 Johns. Ch. 519, 1 L. ed. 472, 7 Am. Dec. 554; *Stevens v. Cushing*, 1 N. H. 17, 8 Am. Dec. 27; *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721; *Weintz v. Hafner*, 78 Ill. 27; *Leal v. Terbush*, 52 Mich. 100; *Burge v. Cedar Rapids & M. R. R. Co.* 82 Iowa, 101; *Walker v. Wilson*, 18 Wis. 523; *Quill v. Jacoby* (Cal.) August 18, 1894.

Gordon, J., delivered the opinion of the court:

The complaint in this action shows, in substance: (1) That on November 17, 1890, the respondents sold to appellant Kate Decker two adjoining tracts of land in Spokane for \$5,500; giving their deed containing a covenant that they were owners in fee, and with covenants of general warranty, and receiving from appellant Kate Decker part payment of the purchase price in cash, and appellants' mortgage on said land to secure the remainder. (2) That thereafter appellants made payments on said remainder, the last one on December 18, 1891, and that they paid the taxes on said land regularly for three years. (3) That the respondents were not "seised in fee, or possessed of the right to sell and convey, the last-described portion of said property [being a strip lying at the north end of the entire premises] in manner and form as aforesaid." (4) That the remainder of the premises, without the strip, was useless for appellants' purpose. (5) That, prior to bringing suit, appellants tendered deed of said land to respondents, which would have placed them *in statu quo*, and demanded back the purchase money paid, all of which was refused by the respondents. Appellants ask for a rescission of the sale, for the return of the purchase money paid, and for a vendees' lien on said land to secure said purchase money. The complaint is very voluminous, and to set it out in full would occupy too much space. The foregoing statement is sufficient, however, to give a proper understanding of it. Respondents interposed a general demurrer, which was sustained by the lower court; and, appellants electing to stand on their complaint, judgment of dismissal was entered, and from such order and judgment this appeal is prosecuted.

Appellants, for a reversal of the judgment, rely upon the cases of *Sears v. Stinson*, 8 Wash. 615, and *Moody v. Spokane & U. H. Street R. Co.* 5 Wash. 699. In *Sears v. Stinson* the land was sold, and a deed with full covenants given. The purchaser paid the purchase price, and the title failed to a strip. The purchaser in that case brought his action for damages on the breach of the covenant for seisin (strictly an action at law), while in the case at bar the appellants brought this action to rescind the sale (purely an action in equity). In *Sears v. Stinson* the question for determination was whether an action for damages was the proper action, while in the case at bar the question is whether equity will rescind on the facts stated. This court, in the

Sears Case, held that an action at law for damages on the breach of covenant was properly maintainable, and was not called upon to decide any other question in the case; and the language of the court, "There is no doubt but that the plaintiff would be entitled to the equitable relief of a rescission of the contract, if he desire it,"—found on page 616, 3 Wash., was merely an unguarded expression, not at all necessary to the decision of the case, and mere *obiter dictum*. The court, moreover, on page 617, 3 Wash., states forcibly the doctrine upon which the case was decided, viz.: "But in this case the contract, so far as it can be enforced, is already performed, and there is nothing to give a court of equity jurisdiction. Damages for the balance is all that is left." The case of *Moody v. Spokane & U. H. Street R. Co.*, *supra*, is also wholly inapplicable to the case at bar, both upon the facts and the principle involved. In that case the respondent brought suit upon a contract which he himself had not performed. The court said: "If the respondent had not performed his part of the contract . . . he could not commence his action. On the other hand, the appellant would have the right to rescind the contract." The opinion in that case further proceeds as follows: "It is not the ordinary case of a breach of a covenant in a deed, where the remedy would be a suit on the warranty, but the respective contracts here are dependent upon each other." We are entirely satisfied with the result reached by this court in each of those cases, but are unable to conclude that either of them is authority in support of appellants' contention here.

The sole allegation of defect or failure of title is alleged in the complaint (par. 9) to be that "they [the grantors] were not seised in fee, or possessed of the right to sell and convey the last-described portion of said property, in manner and form as aforesaid." This is, at most, equivalent merely to a statement that their interest in the granted premises was less than a fee-simple estate, and cannot be held to be equivalent to an allegation that they had no estate or interest in the premises. We think this is wholly insufficient to constitute good pleading at law or in equity. There are two descriptions in the deed. As to one tract, no question of title is raised. As to the other, it is, in effect, said that the grantors had not a fee-simple estate. And without stating how far their actual estate or interest falls short, and without any statement as to the true condition of the title, from which relief could be afforded at law or in equity, appellants, after a lapse of nearly four years, ask a court of equity to rescind the contract. "It is a dangerous and delicate operation for a court to pass upon a title which nobody is asserting, and no one disputing." *Key v. Jennings*, 66 Mo. 356. For this reason, alone, if no other existed, we would be disposed to affirm the judgment. Assuming the fact to be, however, that title to one of the tracts conveyed has wholly failed, and that it was the design of the pleader to so allege, a very interesting question is presented, concerning which *Chief Justice Sharkey*, in *Purham v. Randolph*, 4 27 L. R. A.

How. (Miss.) 435, 35 Am. Dec. 403, says: "The extent to which courts of chancery will go in giving relief to the vendee of land, by preventing the collection of the purchase money, and rescinding the contract, is a question which is much embarrassed by conflicting adjudications. It has been often litigated but the numerous decisions seem to have increased, rather than diminished, the doubts." Appellants, by their complaint, invoke the equity powers of the court to procure a rescission. Respondents concede that appellants have a right of action, but insist that it must be at law, for damages. Here let us remark that a court of equity is not an appropriate tribunal for the trial of title to land. As is said by *Chancellor Kent* in *Abbott v. Allen*, *infra*: "This court may perhaps try title to land, when it arises incidentally; but it is understood not to be within its province when the case depends upon a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference.

The plaintiff has the means of bringing the legal title to a test whenever he pleases, by an action at law on his covenants of seisin." The complaint in this action nowhere alleges any fraud, concealment, or misrepresentation on the part of the respondents concerning the title to the premises conveyed, unless fraud is to be inferred from their covenant of ownership, coupled with failure of title to a portion of the premises conveyed. It is nowhere charged that they had knowledge of any fact affecting the title which was concealed from appellants, nor is it asserted that the respondents are either insolvent, or nonresidents of this state. It concedes that at all times since the deed was given the appellants have been in possession of the premises, and have paid taxes thereon for years; and neither alleges eviction, nor that they are threatened with suit on the part of any one holding or claiming an older or superior title thereto. And if, as has been sometimes asserted, a covenant in a deed that the grantor is the "owner in fee" differs from the covenants of quiet possession, warranty of title, and the like, and that a breach occurs at once if ownership in fee does not in fact exist, and that the vendee is not required to await eviction before maintaining his action, we are nevertheless unable to conclude that equity has any jurisdiction to afford the relief here prayed. It is fundamental that equity will not interfere where the law affords a plain, adequate, and complete remedy. "The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for, if it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain its full end at law. It must reach the whole mischief, and secure the whole right of party." *Mitford*, Ch. Pl. (6th Am. ed.) note, p. 2. "Covenants for title, like all other covenants, are, of course, mere contracts. . . . For a breach of contract the common law provided a single remedy,—a recompense in damages." *Rawle*, *Covenants*, § 354. Here

is a contract which has been fully executed. Nothing remains to be performed. The consideration has been paid, the conveyance executed, and full covenants have been given and accepted. There is no suggestion of insolvency or nonresidence, or that the plaintiff's remedy at law would not be adequate. Hence, we do not find any good reason for interference by a court of equity.

It seems to us that much of the apparent conflict that is found in the adjudicated cases on this subject is due to a failure to observe the distinction which obtains between the rules applicable to a contract still executory and one actually executed. "The distinctions between the rules which govern the relation of vendor and purchaser before and after the execution of the deed—while the contract is still executory, and after it is executed—are broad and familiar. Although the general principles of the contract of sale of real estate, especially in this country and in England, exact less of a vendor than the rules of the civil law demand, yet, while the contract is still executory, they recognize and enforce the right of the purchaser to a title clear of defects and incumbrances; and this right does not depend upon the terms of the contract, but is given by the law, and is not, except in particular cases, affected by the nature and extent of the covenants for title which the purchaser is to receive." Rawle, Covenants, § 819. "Generally speaking, a purchaser, after a conveyance, has no remedy except upon the covenants he has obtained, although evicted for want of title; and, however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants." 1 Sugden, Vendors, p. 383; *Rawlins v. Tymberlake*, 6 T. B. Mon. 225; *James v. McKernon*, 6 Johns. 548; *Bumpus v. Platner*, 1 Johns. Ch. 213, 1 L. ed. 116. And Lord Campbell, in *Wilde v. Gibson*, 1 H. L. Cas. 605, 1 Clark & F. N. S. 605, says of this distinction: "If there be, in any way whatever, misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase; but, where the conveyance has been executed, I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud." In *Thompson v. Jackson*, 8 Rand. (Va.) 504, 15 Am. Dec. 721, Justice Carr says: "Executory contracts for real property, and some other subjects, offer to the party the alternative of either suing at law for damages, or asking the aid of equity to obtain the specific thing. . . . Very different is the question where a party asks the court to rescind a contract, and especially an executed contract. In the first case, the court merely decides which of two remedies a party shall pursue. In the second, it annihilates a solemn contract, rendered still more solemn by the fact that the parties have carried it into execution. . . . The vendor has parted with the title and possession of his land, and has taken his money, bonds, or other equivalent. The vendee has entered into possession, . . . and, for security of his title, has taken a deed with such covenants and warranty as his contract called for. To

undo all this is a strong-handed measure, and none but a clear and strong case will justify it. Accordingly, we find it laid down in all the equity books that the court is in the daily habit of refusing the specific execution of contracts, which at the same time it just as promptly refuses to rescind. . . . When the application is to rescind an executed contract for land, the English books lay it down as a general rule (admitting of but few exceptions) that, to justify such decree, fraud must appear, and this fraud must be distinctly put in issue by the pleadings. If the charge be a mere failure of consideration, arising from the sale of the defective legal title, unmingled with fraud or *mala fides* of any kind, it is generally laid down that the vendee would be left to the covenants and warranty in his deed." "Where a contract for the sale of land has been executed by the giving of a conveyance, the court of equity will not rescind the contract upon the ground of a mere defect of title, where there has been no fraud on the part of the vendor, but will leave the purchaser to his remedy upon the covenants in his deed." *Woodruff v. Bunce*, 9 Paige, 448, 4 L. ed. 768. In *Denston v. Morris*, 2 Edw. Ch. 37, 6 L. ed. 299, it is said: "It is a well-settled rule of this court that a grantee, to whom possession has been delivered, under covenants of title and warranty, can have no relief in equity against his grantor for a return of the purchase money or security on account of defect or failure of title, because he has taken care to secure himself by covenants, and if evicted, can have an adequate remedy at law. . . . But if fraud is shown, either in making the contract of sale, or in executing it, and whether there be covenants inserted in the deed to secure the title or not, the purchaser, in case of eviction or disturbance of his possession, or whenever it is ascertained that the title is defective, may come into this court to be relieved from his purchase, or to obtain indemnity against the consequences of the fraud. Imposition and fraud upon the purchaser, by any willful misrepresentation or concealment, take the case out of the general rule, and entitle him to be redressed in equity, in addition to and beyond the covenants in the deed." And in *Wiley v. Fitzpatrick*, 8 J. J. Marsh. 584, it is said: "The remedy which a court of law can offer in such cases, unless some extraneous circumstances intervene to prevent it, is fully adequate to all the demands of justice, and that is a sufficient reason why a court of chancery will not interpose." "A purchaser of land, who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in undisturbed possession, will not be relieved against the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor any eviction, but must seek his remedy at law upon the covenants in his deed." "If the purchaser was imposed on by any intentional misrepresentation or concealment, he may have redress [in equity] in addition to and beyond his covenants." *Abbott v. Allen*, 2 Johns. Ch. 519, 1 L. ed. 473, 7 Am. Dec. 554. "It is

requisite that the charge of fraud should be made a distinct ground of allegation by the party in his pleading; otherwise, it is not to be deemed in issue, and cannot affect the contract in question." *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79, 1 L. ed. 1016. In that case, Chancellor Kent says: "A vendor selling in good faith is not responsible for the goodness of his title, beyond the extent of the covenants in his deed." In *Putton v. Taylor*, 48 U. S. 7 How. 150, 12 L. ed. 646, the Supreme Court of the United States, speaking through Mr. Justice Nelson, says: "A purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of the defect of title, there being no fraud or misrepresentation, and that in such a case he must seek his remedy at law, on the covenants in his deed." In *Simpson v. Hawkins*, 1 Dana, 808, it is said that: "A contract for the sale of land, unaffected by fraud, cannot be rescinded in chancery after it has been carried into effect by a conveyance. . . . If the grantee in possession loses part of the land, he may recover, on the warranty, damages commensurate with the loss, but it is not cause for rescinding the whole contract. . . . I regard it [says Judge Underwood in that case] as immaterial whether the vendors had any title at all. If they conveyed with warranty, and put the vendee in possession, I hold that there can be no rescission of the contract, where there has been no fraud, no eviction, and no assertion of an adverse claim." This case is cited approvingly by the Supreme Court of the United States in *Patton v. Taylor*, *supra*. "Where a conveyance of land has been made by a deed executed with covenants of warranty, and a note has been received in consideration of the conveyance, a partial failure of title will not constitute a defense to the note, but the remedy of the party must be by suit on the covenants of his deed." *Chase v. Western*, 12 N. H. 418. In *Knapp v. Lee*, 8 Pick. 452, it is said to be in dispute in Massachusetts whether a total failure of covenants of warranty of land would constitute a defense to a note, but no doubt exists that a partial failure of title is not permissible as a defense. In Maine it has been held that the total failure of title constitutes no defense to a note given for consideration money. *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73; *Jenness v. Parker*, 24 Me. 289. In the case of *English v. Thomason*, 82 Ky. 281, the court says: "It has been repeatedly held by this court that in the absence of fraud, or insolvency or nonresidency of the vendor, that the vendee in the peaceable possession of the granted premises, by virtue of a conveyance containing a covenant of general warranty, is not entitled to a rescission of the contract, when sued for the purchase money, although the vendor may at the time of the sale have represented his title as perfect, when in fact it was not, and that in such a case the vendee must pay the money, and rely upon the covenant of warranty in case of an eviction. . . . A mere mistake or error of opinion as to the validity of his title would not constitute a fraud. The warranty which the

appellant chose to accept was designed to protect him against such a misrepresentation, and is effective for that purpose; and he must await eviction, if it ever occur, and then look to his remedy at law on the covenant in his deed."

We have already suggested in this opinion that a covenant on the part of a grantor that he is the "owner in fee" of premises conveyed, when in fact his title fails or is defective, might give an immediate right of action to his grantee, and unlike covenants of quiet possession, warranty of title, and the like, the grantee would not be obliged to await eviction; but for a breach in either case, in the absence of strong equitable considerations, not disclosed by the bill in this case, we hold that his remedy is at law for the damages sustained. In *Edwards v. McLeay*, 10 Eng. Ch. 807, the bill charged, and the court found the fact to be, that the vendor knew and concealed a fact material to the validity of his title, and that the defect could not have been ascertained from the abstract. A rescission was decreed, the learned master of the rolls holding that if the vendor knows and conceals a fact material to the validity of his title, of which fact the vendee is ignorant, relief in equity is to be afforded to the purchaser. This case has been often cited in support of a view of the law contrary to that we have taken, but it will be observed that the facts there charged and found differ very materially from those alleged in this bill. It was there asserted that the vendor knew at the time of the sale that a large portion of the granted premises was claimed by the parish as a public common. This fact he concealed from the purchaser, and the abstract did not disclose it. The court granted a rescission, holding that the vendor's silence concerning it, when he knew of the assertion of such adverse claim, constituted such fraud as warranted the interposition of equity. And Lord Eldon, in affirming the judgment of the master of the rolls, upon appeal, said "that if one party makes a representation which he knows to be false, but the falsity of which the other party has no means of knowing, this court will rescind the contract." 2 Swanst. 802. It will be observed that the chancellor, in affirming, placed it upon the assumption that the seller knew the representation to be false.

There are cases wherein the jurisdiction of equity has been asserted upon facts similar to those alleged in the complaint in this case. Among the leading cases so holding is *Parham v. Randolph*, *supra*, in which the learned chief justice of Mississippi, in support of the position there taken, quotes Chancellor Kent, as follows: "The good sense and equity of the law on the subject is that if a defect of title, whether of land or of chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchaser, the purchaser should not be held to the contract, but be at liberty to rescind it altogether." 2 Kent, Com. § 475." An examination of the entire section, and particularly that part immediately preceding the language above quoted, makes it manifest, however, that the learned chancellor

was there referring to contracts that are executory merely. The views of that distinguished jurist upon the questions involved in the determination of this case are, to our better satisfaction, found in the cases of *Abbott v. Allen* and *Gouverneur v. Elmendorf*, *supra*. And it seems to us that the reference by the learned judge in *Parham v. Randolph* to the case of *Greenleaf v. Cook*, 15 U. S. 2 Wheat. 13, 4 L. ed. 172, is equally unfortunate. Defendant in that case, in an action on a promissory note given for the purchase price of real property, set up by way of defense a prior outstanding mortgage and a decree of foreclosure, of which mortgage it was shown that he had no knowledge at the time of purchase. Upon these facts the court, speaking through Chief Justice Marshall, says: "The note was given with full knowledge of the case. Acquainted with the extent of the incumbrance, and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and, on receiving it, executes his note for the purchase money. To the payment of the note given under such circumstances, the existence of the incumbrance can certainly furnish no legal objection." This was the sole question determined in that case. *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 812, is another case frequently cited in support of the contrary doctrine. The court there says: "In this deed there is a covenant of seisin, in which the defendant asserts that he has a right to sell and convey the land. Here is an express misrepresentation." In that case the sole representation of title was confined to that expressed in the covenant contained in the deed. There being a superior outstanding title, a rescission was decreed. We think the misrepresentation which will entitle a party to rescind an executed contract must be something more than the statement of the vendor of what he innocently and in good faith believes to be true, without knowledge or notice of any fact affecting his title, and especially where the vendor is not insolvent or a nonresident, and where the vendee has exacted and accepted full covenants. In a note found on page 689 of his work on Covenants for Title, Mr. Rawle says of this case of *Woods v. North*, that "it is believed that there is no well-considered class of cases which give such an interpretation to a covenant." Nor will equity take jurisdiction in this case on the ground of mutual mistake, although there is some authority for the assertion of such jurisdiction. In the case of *Leal v. TerBush*, 52 Mich. 100, the plaintiff purchased of the defendant a parcel of land which had belonged to defendant's husband, and to which she had no title, excepting a life estate under the will; and a deed was given by her, with the usual covenants. The court held that the vendee could not rescind

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on the ground of mistake as to the vendor's title, as the mistake did not go to the entire consideration; the vendee, supposing the vendor had title in fee, simply accepted a mere life estate. In the opinion, Judge Cooley says: "He [plaintiff] appears to have provided against the contingency of her title falling short of the complete fee by requiring of her covenants for his protection. . . . It is certain that the parties took into consideration possible defects in the title, and bargained in respect to them. . . . The conveyance purports to be in fee, and the assurances, we must suppose, are to him, his heirs and assigns. The plaintiff has therefore received value for the money paid, and, if not to the full extent of the payment, the deficiency is uncertain, and dependent on contingencies, and does not go to the entire consideration. If this contract can be rescinded on the ground of mistakes of fact, then every purchase of land, the title to which proves in any respect defective, must be subject to rescission also, unless the parties have expressly bargained with mutual knowledge that defects existed. If this were the law, covenants would be of little importance."

We deem it unnecessary to multiply authorities in support of this position. The complaint in this action does not allege that the respondents knowingly conveyed what they did not own, or that they concealed any fact affecting the title which was within their knowledge, and which they were bound to disclose; and while it is true that the "arm of equity is long and powerful," it is also true, as is tersely said by Lord Nottingham, that the "chancery mends no man's bargain." Willful misrepresentation or concealment is nowhere charged, nor can it be ascertained in what respect or to what extent the title conveyed by the respondents has failed. They may, for aught that appears to the contrary, well have conceived that they were "seised in fee" of the premises, and have acted in good faith in executing the conveyance; and if, in so doing, they have erred in estimating their estate, and the damages flowing from such error are susceptible of definite ascertainment, and the respondents solvent and residents of the state, what occasion is there for the interposition of equity? There are many expressions to be found in the reported cases and in text-books that are seemingly antagonistic to the conclusion we have reached in disposing of this case. Of many of them, however, it may be said that they, at most, are merely "loose dicta, without any fullness of illustration," and want that precision which is requisite to give much force to them.

The judgment appealed from is affirmed.

Hoyt, Ch. J., and Anders, Scott, and Dunbar, JJ., concur.

MINNESOTA SUPREME COURT.

WOODWARD-HOLMES CO., *Appt.*,
v.

Laura NUDD, Impleaded, etc., *Resp't.*

(.....Minn.....)

- *1. **Partnership capital invested in land** for the benefit of the company will be treated as personalty, and not subject to dower or inheritance, until it has performed all its functions to the partnership, and thereby ceases to be partnership capital.
2. **The inchoate right of the wife of a partner** in the real estate of her husband only attaches to such of the real estate as remains *in specie*, unconverted, after the partnership is terminated by judgment or agreement, and its affairs completely wound up and ended.
3. **In an action by one partner against his copartner to dissolve the partnership** and wind up its affairs, the partnership real estate was sold under the order of the court; the proceeds to be applied in payment of the firm debts, and the surplus, if any, divided between the partners according to their respective rights. *Held*, that the purchaser at the sale took the land free from any inchoate interest of the wives of the partners, and that it was immaterial that the land brought a price in excess of the amount necessary to pay the firm debts, or that it might not have been necessary to sell the whole of the property merely to pay the debts.

(July 17, 1894.)

A PPEAL by plaintiff from a judgment of the District Court for Hennepin County in

*Headnotes by MITCHELL, J.

NOTE.—The position of tenants in dower and by the curtesy and of the heirs and personal representatives of a deceased partner in partnership real estate.

I. The widow's right to dower.

- a. *General doctrine.*
- b. *Must yield to partnership claims, liens, and accounts.*
- c. *When dower attaches.*
- d. *In lands purchased for the purpose of resale.*
- e. *Effect of an agreement converting real estate into personalty.*
- f. *Right to dower in improvements.*
- g. *When widow entitled to an equivalent.*
- h. *Widow's right to retain possession.*
- i. *How affected by husband's private debts.*
- j. *Homestead rights.*
- k. *Right of widow to join in deed, action or suit affecting such estate.*

II. The rights of the heirs.

- a. *The legal estate passes to the heir of a deceased partner.*
- b. *Nature of the title vested in the heirs.*
- c. *The heirs bound to convey the legal title.*
- d. *When a necessary party to suit relating to such lands.*
- e. *When heirs not entitled.*
- f. *As between the surviving partner and the heirs.*
- g. *Power of the heirs as against the surviving partner.*
- h. *As between the heir and personal representatives of such deceased partner.*
- i. *Powers vested in executors and administrators of a deceased partner.*
- j. *Ultimate position of the heirs.*

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favor of defendant Laura Nudd in an action brought to determine adverse claims to certain real estate which had been purchased at a sale under direction of the court as a part of the proceedings for winding up the affairs of the partnership of Nudd & Holmes. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Hale, Morgan & Montgomery, for appellant:

The suit between the partners Nudd and Holmes was to dissolve the partnership, dispose of its assets, pay its debts, and distribute any surplus that might result.

In such cases real estate owned by a partnership, purchased with partnership funds, as is the case here, is, for the purpose of settling the debts of the partnership and of distributing its effects, treated in equity as partnership stock.

Arnold v. Wainwright, 6 Minn. 358, 80 Am. Dec. 448; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90.

And has all the incidents attending or attaching to personal property.

Lindley, Partn. 2d Am. ed. § 833; *Mauck v. Mauck*, 54 Ill. 281; *Barton v. Lovejoy* (Minn.) Feb. 1, 1894; *Story*, Partn. 7th ed. §§ 92-94; 3 Kent, Com. p. 64.

The jurisdiction of courts of equity in settling partnership affairs is of the most comprehensive character and extends to all matters necessary to winding up, including the sale of real estate.

Gen. Stat. 1878, chap. 66, § 207; *Cox v. Volker*, 86 Mo. 505; *Bates*, Partn. §§ 907, 993.

Assuming that in the winding-up suit the court had jurisdiction of the parties, of which

III. English decisions.

- a. *Relating to dower.*
- b. *Position of the heir.*

As to when real estate will be considered partnership property, see note to *Robinson Bank v. Miller*, *Lamport v. Miller* (Ill.), and *National Union Bank of Maryland v. National Mechanics Bank of Baltimore*, post, 476.

Upon the questions of the position and rights of the partners *inter se*, and the rights of creditors and other third parties, see notes to *Galbraith v. Tracy* (1894) (Ill.) and *Goldthwaite v. Jantney* (Ala.) post, 28 L. R. A. 161.

I. The widow's right to dower.

a. *General doctrine.*

The cases below, in so far as they relate to the general principles of the law regarding dower, are only such as refer to or announce such principles in relation to partnership real estate and are not intended to be exhaustive of the general doctrine.

At common law the widow is entitled to dower of all the lands and tenements of which her husband was seised in fee simple or fee tail, at any time during the coverture, and of which any issue she might have had might by possibility have been heir. *Matlock v. Matlock* (1864) 5 Ind. 403.

Her interest in lands thus owned and conveyed by the husband, in the conveyance of which she has not joined, becomes consummate on his death. *Grissom v. Moore* (1898) 106 Ind. 296, 56 Am. Rep. 742.

And her right accrues by virtue of the marital relation. *Ibid.*

But she does not take as heir, in lands so conveyed. *Ibid.*; *Rank v. Hanna* (1864) 6 Ind. 20; *Verry*

no question is made, it follows that the receiver appointed took, by virtue of his appointment, the entire legal and equitable title to the property belonging to the firm of Nudd & Holmes.

Beach, Receivers, §§ 584-587; High, Receivers, 2d ed. §§ 192, 199-598; *Iddings v. Bruen*, 4 Sandf. Ch. 422-427, 7 L. ed. 1158, 1159; *Godfrey v. White*, 48 Mich. 171; *Henning v. Raymond*, 85 Minn. 803; *Evans v. Dunn*, 26 Ohio St. 439.

The necessity and propriety of ordering sale of the partnership property in the winding-up suit at the instance of Nudd was a matter addressed solely to the judgment of the court trying that issue.

Hersey v. Walsh, 88 Minn. 521; 20 Am. & Eng. Encyclop. Law, p. 145; *Hotchkiss v. Cutting*, 14 Minn. 538; *Brande v. Bond*, 68 Wis. 140; *Gardner v. Maroney*, 95 Ill. 552; *Koonts v. Northern Bank of Kentucky*, 88 U. S. 16 Wall. 196, 21 L. ed. 465.

It is, the right of the partner, in whose favor the right of action for dissolution accrues, to insist upon a sale of the assets of the firm in order to ascertain their value and the amount of the surplus to be divided in accordance with the right of the partners under the articles.

Story, Partn. § 350.

The fact that there are no debts does not make the parties tenants in common so that a partition of real estate will be ordered, instead of a sale, but the whole will be disposed of if any one insists upon it.

Bates, Partn. §§ 974-976; *Wild v. Milne*, 26 Beav. 504.

Partnership real estate is in equity subjected to all the incidents of partnership property generally.

v. Robinson (1866) 25 Ind. 14, 37 Am. Dec. 848; *May v. Fletcher* (1872) 40 Ind. 575; *Brannon v. May* (1873) 43 Ind. 92; *Bowen v. Preston* (1874) 43 Ind. 367; *Derry v. Derry* (1881) 74 Ind. 560; *Hendrix v. McBeth* (1882) 87 Ind. 287; *Mark v. Murphy* (1881) 76 Ind. 584.

Salein of the husband during coverture is essential, and where the husband was never seised there can be no dower; so held where the husband took only a right in equity to compel a conveyance from his joint owner of his interest, which he never did but declined to take a conveyance when offered, the court in such case declining the widow's right to dower. *Bowman v. Bailey* (1884) 20 S. C. 550.

And a mere technical salein of the husband without any beneficial interest in the estate will not entitle the wife to dower. *Greene v. Greene* (1824) 1 Ohio, 535, 18 Am. Dec. 642.

The inchoate right of the wife attaching as an incident to the salein of the husband during marriage. *Grissom v. Moore*, *supra*.

The right is governed by the law which is in force at the time of the husband's death, and not by that which is in force at the time of the marriage, or which may have been during its continuance. *Ware v. Owens* (1866) 43 Ala. 212, 94 Am. Dec. 642, following *Boyd v. Harrison* (1860) 36 Ala. 533.

Under the Mississippi Dower Act of 1837, the widow is entitled to dower out of the lands of which the husband died seised and possessed. *Sykes v. Sykes* (1873) 49 Miss. 190.

And under section 2440 of the Iowa Code a wife is endowable in all legal or equitable estates, in real property possessed by the husband at any time during the marriage which may have been sold on execution or any other judicial sale, and to 27 L. R. A.

Arnold v. Wainwright, *supra*; *Brown v. Merrill*, 45 Minn. 493; *Hanson v. Metcalf*, 46 Minn. 25; *Barton v. Lovejoy*, *supra*; *Walling v. Burgess*, 7 L. R. A. 481, 123 Ind. 299; *Parsons*, Partn. 8d ed. 408.

The interest of Mrs. Nudd in the partnership real estate owned by the firm, of which her husband was a member, would in any case be confined to what might remain her husband's interest after the final adjustment of the affairs of the partnership, and, if in such adjustment the real estate was sold, there is nothing left to which her inchoate right could attach.

Grissom v. Moore, 106 Ind. 296, 55 Am. Rep. 742.

To the extent to which real estate is converted into partnership stock, all the incidents attach to it which belong to any other stock.

Taylor v. Farmer (Ill.) 6 West. Rep. 710; *Bates*, Partn. § 290; *Valentine v. Wysox*, 7 L. R. A. 481, 123 Ind. 299; *Grissom v. Moore*, and *Walling v. Burgess*, *supra*; *Deeter v. Sellers*, 102 Ind. 458; *Bollenbacher v. First Nat. Bank of Bloomington* (Ind.) Nov. 10, 1893; *Kruschke v. Stefan*, 88 Wis. 373; *Andrews v. Brown*, 21 Ala. 487, 56 Am. Dec. 252.

Messrs. Young, Fish & Dickinson, for respondent:

The lots in question are prima facie real estate and not personality.

The fact that the grantees were partners in business could not work a conversion of the lots from real estate into personality.

Menage v. Burke, 48 Minn. 211.

The fact that the grantees acquired the lots for the uses of the firm in its business did not transform them into personality.

Being in fact real estate the legal title is in

which the wife has made no relinquishment of her right.

Before the revised statutes of New York there was no dower in a mere equitable estate. *Re Ransom* (1883) 17 Fed. Rep. 331.

But a widow is now entitled to equitable dower under the New York statutes. *Hawley v. James* (1886) 5 Paige, 313, 3 L. ed. 734; *Tabele v. Tabele* (1814) 1 Johns. Ch. 45, 1 L. ed. 63.

Dower is an incident of partnership real estate. *Wilcox v. Wilcox* (1866) 13 Allen, 252; *Lenow v. Fones* (1886) 48 Ark. 557.

The estate of inheritance of the husband in which alone the widow can claim dower is what remains after satisfying the partnership debts. *Dawson v. Parsons* (1894) 63 N. Y. S. R. 320. *Greenwood v. Marvin* (1888) 111 N. Y. 423.

Upon the question whether the widow of a deceased partner took her dower in the real estate assets of the firm absolutely, as in personal property, or for life as in real estate, it has been held that, in the absence of an agreement between the partners for the conversion and sale of such real estate up to settlement of the partnership affairs, such widow takes her dower as in real estate, except in leasehold property in which she takes it absolutely as in personal estate. *Lenow v. Fones*, *supra*.

Yet it has been held that when lands are purchased by partners with partnership funds for partnership purposes, the policy of the law and principles of justice are against the right of the wife to dower in partnership lands when required for payment of the firm debts. *Duhring v. Duhring* (1854) 20 Mo. 174; *Willet v. Brown* (1877) 66

the grantees and all the incidents of such estate follow.

Ibid.

The wife's interest having thus vested, it cannot be destroyed except by her consent or by the decree of a competent court by which she is concluded.

Dayton v. Corser, 18 L. R. A. 80, 51 Minn. 406.

Respondent's interest in these lands cannot be cut off in this action.

Barron v. Mullin, 23 Minn. 874.

The doctrine of "absolute conversion" has been held in England, but never in this country.

Darby v. Darby, 8 Drew. 506.

But the doctrine is much questioned even in England.

Story, Partn. 7th ed. § 95, cases cited in *note* 2, par. 7; 1 Bates, Partn. § 297; 17 Am. & Eng. Encyclop. Law, p. 952.

The result of all American cases is simply this: When a partnership invests its funds in land, the title which it takes passes to the grantee or grantees named in the deed subject to the right of present or future creditors of the firm to have it reconverted into money, if necessary, in order to satisfy their demands. No change whatever is wrought in the legal estate or in the nature of the property, but the land represents the money of the firm, and it is held in trust as a sort of security that such money shall be forthcoming in case it is needed to pay firm debts.

Re Codding & Russell, 9 Fed. Rep. 849.

Why is it to be "treated as personality?" Simply because, the facts being shown which create the necessity of reconverting the land into the partnership money which it represents, equity considers that as done which ought to be done; certainly not because any actual

change has been wrought in the character of the property itself.

See *note to Re Codding & Russell, supra; Foster's App.* 74 Pa. 891; Story, Partn. § 94, p. 141; *Dayton v. Corser, supra*.

Where one of the partners dies and the personal property of the firm is insufficient to pay its debts, it is held in New York that "the heirs at law of the deceased partner are necessary parties to the action to secure a conveyance of the title to the land" owned by the partnership.

Boggs v. Bird, 38 N. Y. S. R. 992, and cases cited. See also *Galbraith v. Gedge*, 16 B. Mon. 631; *Carter v. Fletner*, 92 Ky. 400; *Andrews v. Brown*, 21 Ala. 437, 56 Am. Dec. 252; *Abernathy v. Moses*, 73 Ala. 881; *Brewer v. Browne*, 63 Ala. 210; *Cole v. Coles*, 15 Johns. 160, 8 Am. Dec. 230; *Free v. Beasley*, 95 Mich. 426; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Smith v. Jackson*, 2 Edw. Ch. 28, 6 L. ed. 295; *Collins v. Warren*, 29 Mo. 236.

The conversion of real estate into personality is worked, if at all, for the purpose of adjusting the affairs of the partnership. It would seem, therefore, that the conversion should be made only when and so far as required for that purpose. To require equitable interference to go further, and convert all real estate into personality, for the mere purpose of division, seems to us to be an unnecessary invasion of the right of the copartners.

Shearer v. Shearer, 98 Mass. 107.

Mitchell, J., delivered the opinion of the court:

The effect of the findings of the trial court is that the real estate which is the subject of this action was formerly the property of a manufacturing copartnership composed of defendant's husband and one Holmes, having

Mo. 138, 27 Am. Rep. 265, where dower was denied the real estate being required to pay the partnership debts.

In the citation of the first-named case in *Willet v. Brown, supra*, the words "where they are necessary to pay the demands of the firm" are omitted and the opinion there reads as though there was an absolute denial of dower under all circumstances, which was not the point decided in *Duhring v. Duhring, supra*.

Such property being considered personal estate in equity is not subject to dower in equity. *Re Ransom* (1883) 17 Fed. Rep. 331.

A widow coming into a court of equity and claiming dower in partnership lands, when it appears that she has no equitable claim thereto, will not be permitted to invoke the aid of a court of conscience, to give her that to which she has no equitable title. *Simpson v. Leech* (1877) 86 Ill. 286.

It can only be barred by a conveyance in which she joins, or by some proceeding to which all estates are subject, such as the power of eminent domain and the like. *Grissom v. Moore* (1896) 108 Ind. 296, 55 Am. Rep. 742.

And cannot in Indiana be divested or defeated by any act or charge of the husband, nor of the wife, except in the manner provided by the Indiana revised statutes. *Ibid.*

No act of the husband can impair the widow's right to legal or equitable dower without her concurrence. *Smith v. Jackson* (1833) 2 Edw. Ch. 28, 6 L. ed. 295; *Titus v. Neilson* (1821) 5 Johns. Ch. 452, 1 L. ed. 1139.

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Thus, a husband seized of real estate during marriage cannot defeat the inchoate right of his wife to dower by an agreement to devote the property for the purposes of a partnership, nor by any other agreement short of a conveyance in which she joins. *Grissom v. Moore, supra*.

The Indiana Revised Statutes of 1843, changed the nature and estate of the widow in some respects. By section 80 thereof, page 428, the widow, subject to the provisions and restrictions of law, is endowable of one full and equal third part of all the lands, the legal title to which was in her husband, or in any person to and for his use and benefit, at any time during the coverture, and also of any lands in which, or in any part of which he had an equitable interest at the time of his death, unless her right thereto has been legally barred. *Matlock v. Matlock* (1864) 5 Ind. 403.

And by section 84 of the same statutes, the widow is not endowable of any estate or interest which the husband has in any trust estate, unless he has a beneficial interest therein, in which case she is endowable in proportion to the extent of the estate or interest, if such estate or interest would go to the heirs. *Ibid.*

So the Revised Statutes of Indiana of 1881, section 2491, secure to the wife, at the death of her husband, one third in fee simple in all the real estate of which the husband may have been seized during the marriage, in the conveyance of which she may not have joined in due form of law, and section 2499 provides that no act or conveyance performed or executed by the husband without

been purchased, paid for, and used by the firm as a site for its manufacturing plant, the title being taken in the individual names of the partners; that, in an action brought by one partner against his copartner to dissolve the partnership and wind up its affairs, the property was ordered sold as one parcel, the proceeds to be applied in payment of the firm debts, and the surplus, if any, divided between the partners according to their respective rights; that at such sale it was sold to plaintiff's grantor for an amount somewhat in excess of the sum required to pay the debts of the firm; that this surplus was distributed between the partners, no part of it being paid to defendant; that defendant was not a party to the action, and has never joined in any conveyance of the property. The defendant, as wife of one of the partners, claimed an inchoate interest in an undivided half of the premises, and this action was brought to determine this adverse claim.

It is well known that the English doctrine was that partnership real estate is considered as personal property for all purposes. The doctrine of the American courts on the subject is more restricted. Some of the earlier decisions in New York and Massachusetts went almost to the length of entirely subverting the equity doctrine prevalent in England; but, as remarked by *Chancellor Kent*, the other American decisions are not inconsistent with the more correct and improved view of the English law. It is now held with practical unanimity by the American courts that, if partnership capital be invested in land for the benefit of the company, all the incidents attached to it which belong to any other stock, so far as consistent with the statute of frauds and the technical rules of conveyancing, and that it will be treated as personal estate until

it has performed all its functions to the partnership, and thereby ceases to be any longer partnership property, and until then it is not subject to either dower or inheritance, but that, after all the purposes of the partnership have been thus accomplished, whatever land remains *in specie* will be regarded as real estate. The question is, At what precise moment is it reconverted into real estate, or, to speak more accurately, does it resume all the attributes and incidents of real property? We think the answer is, the moment the partnership is terminated and wound up by judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. When a partnership is dissolved and its affairs wound up and completely ended, and any land remains *in specie*, unconverted, this must be deemed a determination that it is no longer a part of the copartnership stock, and an election to hold it thereafter, individually, as real estate. During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personality, or ceased to be partnership property.

the assent of his wife evidenced by her acknowledgment thereof, in the manner required by law, shall prejudice or extinguish the right of the wife to her third of his lands. *Grisson v. Moore* (1886) 106 Ind. 226, 55 Am. Rep. 742.

The mortgage of a wife attaches to the interest of her husband in the land, even by a partition and the *dation en paiement* to her in satisfaction of her claim for paraphernalia property, received by the husband as authorized by law under sections 2387, 2421, 2402, of the Louisiana Civil Code. *Pecot v. Armelin Bros.* (1869) 21 La. Ann. 607.

By section 1, volume 1, of the Revised Statutes of New York, p. 740, a widow is endowable of a third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, and other provisions of the same statute provide for dower in certain equitable interests. 2 Rev. Stat. §§ 63, 64, p. 374, §§ 71, 72, p. 113.

But it must appear that such equitable estate is valid and recognizable. *Re Ransom* (1888) 17 Fed. Rep. 331.

A claim that the property was bought by the deceased and the survivor as partners the deed being in the firm name, the survivor paying his share as partner and remaining in possession as such, having paid a large amount in improvements, is good as against the widow's claim for dower and parol evidence of the facts is admissible. *Thompson v. Egbert* (1874) 3 Thomp. & C. 474.

A husband who in his wife's right is a partner in certain real estate, and in the management of its business, and as such shares the profits from the 27 L. R. A.

time his wife's interest accrued until her decease is entitled to an estate by the courtesy, the wife's seisin being sufficient. *Buckley v. Buckley* (1850) 11 Barb. 42.

A widow is entitled to dower out of real estate held in trust for the benefit of the partners and conveyed to others, who subsequently execute a declaration of trust specifying the proportions belonging to each of the *cestui que trust*, the property being considered as no longer personal estate but as real estate, vesting in the *cestui que trust* an equitable title. *Nicoll v. Ogden* (1832) 29 Ill. 323, 31 Am. Dec. 311.

But it has been held that a widow of a deceased partner is not dowerable in real estate purchased with partnership funds and held in the name of the partners, or on their behalf. *Richardson v. Wyatt* (1807) 2 Desaus. Eq. 471.

b. *Must yield to partnership claims, Moneys, and accounts.*

Real estate purchased with partnership funds and used for partnership purposes must be applied to the payment of partnership debts and the adjustment of the accounts as between the partners when the personal property of the firm is not sufficient for the discharge of the same, before the right of a widow of a deceased partner to dower can attach thereto. *Andrew v. Brown* (1853) 21 Ala. 437, 56 Am. Dec. 222; *Espy v. Comer* (1864) 70 Ala. 501; *Lenow v. Fones* (1896) 48 Ark. 557; *Drewry v. Montgomery* (1861) 28 Ark. 266; *Gray v. Palmer* (1858) 9 Cal. 616; *Loubat v. Nourse* (1853) 5 Fla. 360;

And what the partners may thus do voluntarily the court may do for them, in an action brought to dissolve the partnership and wind up its affairs. As the defendant was not a party to the former action, she is, of course, not estopped by it, nor is it evidence against her of anything except of the fact of its own rendition. But the material fact remains that in the process of the dissolution of the firm, and the winding up of its affairs, in an action for that purpose, the land was sold and converted into money, and the money distributed among the creditors and partners according to law. Upon these facts, under the rules already announced, the land in the hands of the purchaser is not subject to any inchoate interest of the wives of the partners. The error which lies at the foundation of the whole argument of defendants' counsel is in the assumption that, at the time of the purchase of this property, it became the individual real estate of the husband, and that the inchoate right of the wife under the statute immediately attached, subject only to a lien for the payment of partnership debts. This is not correct, and none of the authorities that we have found so hold. The fact is that only so much of it becomes the individual real estate of the partner as remains *in specie*, unconverted, after all the purposes of the partnership have been entirely fulfilled, and it is only to such of it that any inchoate

interest of the wife ever attaches. If counsel's contention is correct the partners could never, even during the active life of the copartnership, convey perfect title to partnership land without their wives joining, except to the extent actually necessary to pay existing debts of the firm. This would practically involve, in every case where one of the wives refused to join in a conveyance, the necessity of a suit to which she is made a party, in order to determine whether the sale was necessary to pay debts. Any such rule would hamper the business of the firm to an extent that might practically defeat the purposes of the partnership.

The court below seems to have laid special stress upon the fact that it was not made to appear on the trial that it was necessary to have sold all this property to pay the debts of the firm, but this is immaterial, either under the view of the law which we have taken, or under that urged by counsel. In fact, we understood counsel to frankly concede this on the argument.

Upon the facts found, judgment ought to have been ordered in favor of the plaintiff, adjudging that defendant has no interest, inchoate or otherwise, in the land. Cause remanded, with directions to the court below to render judgment accordingly.

Buck, J., absent, sick, took no part.

Price v. Hicks (1874) 14 Fla. 585; Bopp v. Fox (1872) 63 Ill. 540; Trowbridge v. Cross (1886) 117 Ill. 100; Simpson v. Leech (1877) 86 Ill. 286; Smith v. Ramsey, (1844) 6 Ill. 373; Pepper v. Pepper (1837) 24 Ill. App. 318; Matlock v. Matlock (1854) 5 Ind. 408; Huston v. Neil (1878) 41 Ind. 504; Cobble v. Tomlinson (1875) 50 Ind. 550; Grissom v. Moore (1886) 106 Ind. 286, 55 Am. Rep. 742; Paige v. Paige (1887) 71 Iowa, 318, 60 Am. Rep. 799; Van Staden v. Kline (1884) 64 Iowa, 180; Galbraith v. Gedde (1855) 16 B. Mon. 631; Sherry v. Thomasson (Ky.) Sept. 25, 1886; Cornwall v. Cornwall (1869) 6 Bush, 369; Dyer v. Clark (1843) 5 Met. 562, 39 Am. Dec. 697; Shearer v. Shearer (1867) 96 Mass. 107; Wilcox v. Wilcox (1869) 13 Allen, 252; Burnside v. Merrick (1842) 4 Met. 537; Howard v. Priest (1843) 5 Met. 532; Robertshaw v. Hanway (1876) 52 Miss. 715; Sykes v. Sykes (1873) 49 Miss. 190; Holmes v. McGee (1859) 27 Mo. 597; Collins v. Warren (1859) 29 Mo. 236; Duhring v. Duhring (1854) 20 Mo. 174; Willet v. Brown (1877) 65 Mo. 138, 27 Am. Rep. 265; Priest v. Chouteau (1884) 85 Mo. 407, 55 Am. Rep. 373; Cilley v. Huse (1880) 40 N. H. 358; Uhler v. Sempie (1869) 20 N. J. Eq. 238; Safe v. Sherman (1849) 2 N. Y. 417; Buchan v. Sumner (1847), 2 Barb. Ch. 167, 5 L. ed. 600, 47 Am. Dec. 305; Williams v. Walker (1845) 2 Sandf. Ch. 325, 7 L. ed. 611; Buckley v. Buckley (1850) 11 Barb. 43; Smith v. Danvers (1852) 5 Sandf. 609; Chester v. Dickerson (1868) 52 Barb. 349; Everett v. Schepmoes (1876) 6 Hun, 479; Garrett v. Scheffer (1872) 47 N. Y. 666; Hiscok v. Phelps (1872) 49 N. Y. 108; Greenwood v. Marvin, (1868) 111 N. Y. 423; Dawson v. Parsons (1864) 63 N. Y. 8, R. 320; Smith v. Jackson (1853) 2 Edw. Ch. 23, 6 L. ed. 296; Stroud v. Stroud (1868) 61 N. C. 525; Sumner v. Hampson (1838) 8 Ohio, 328, 32 Am. Dec. 722; Greene v. Greene (1824) 1 Ohio, 535, 18 Am. Dec. 642; Mowry v. Bradley (1876) 11 R. I. 370; Lyon v. Lyon (1873) 1 Tenn. Ch. 225; Martin v. Smith (1885) 25 W. Va. 579; Pierce v. Trigg (1839) 10 Leigh, 406; Holton v. Guinn (1895) 65 Fed. Rep. 450; *Re Farmer and Exporte Griffin* (1878) 18 Nat. Bankr. Reg. 207; Hiscok v. Jaycox (1875) 12 Nat. Bankr. Reg. 507; *Re Ransom* (1868) 17 Fed. Rep. 351; Clay v. Field (1888) 34 Fed. Rep. 375; Clay v. Freedman (1866) 118 U. S. 97, 30 L. ed. 104; Riddell v. Riddell (1895) 38 N. Y. Supp. 99.

The widow of a deceased partner cannot claim

dower in partnership real estate as such. *Mowry v. Bradley, supra.*

If it was acquired as partnership property with partnership funds, or with funds which went to make up the capital stock of the partnership, then the widow would not be entitled to dower until the creditors and partners were satisfied. *Drewry v. Montgomery, supra.*

And this is the case even though the estate is conveyed in such a form as to render the partners tenants in common, provided it be so purchased and used, equity deeming the partners as trustees in such a case for the partnership. *Cilley v. Huse* (1880) 40 N. H. 358.

Or where it is taken in their individual names. *Willet v. Brown, supra.*

The right of the widow not being distinguishable from that of the creditors and heirs of the deceased partner. *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697.

And so far as the real estate is held in trust by a deceased husband she will not be entitled to dower but beyond that she is entitled unless she has released her right. *Ibid.*

The partnership having no beneficial interest in the property distinct from partnership purposes. *Trowbridge v. Cross* (1886) 117 Ill. 100.

The widow's estate being derived from her husband, and as such subject to all incumbrances existing against it at the acquisition of his title. *Sumner v. Hampson* (1838) 8 Ohio, 328, 32 Am. Dec. 775.

The derivative right, in equity extending no further in behalf of the wife and children than that of the partner from whom it is derived. *Howard v. Priest* (1843) 5 Met. 532.

The trust reposed in the partners in favor of the firm creditors and the partners themselves, must be fully executed and fulfilled. *Bopp v. Fox* (1872) 63 Ill. 540; *Howard v. Priest, supra*; *Burnside v. Merrick* (1842) 4 Met. 537.

Charges upon partnership real estate, being prior to the claims of the representatives of the deceased partner, override the widow's title to dower. *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252.

A conveyance by a surviving partner of the en-

the equitable estate, and also of the legal estate vested in him as trustee for the partnership, for the purpose of payment of the partnership debts and settlement of the partnership accounts, is valid against any claim by the widow or heirs of the deceased partner. *Mowry v. Bradley* (1876) 11 R. I. 370.

And the wives of surviving partners having no interest in the land are not necessary parties to complete the title, although they united with their husband in a bond for a conveyance. *Galbraith v. Gedge* (1856) 16 B. Mon. 631.

The lands being necessarily taken for the payment of the debts, they have no future interest. *Ibid.*

And any mode of sale that passes the title to the property for such purposes will bar dower. *Simpson v. Lech* (1877) 86 Ill. 236; *Dubring v. Dubring* (1854) 20 Mo. 174.

It is also subservient to the lien of an unpaid vendor. *Sherley v. Thomason* (Ky.) Sept. 25, 1836.

And also to the lien existing in favor of a surviving partner on the partnership real estate as against the debts of the firm. *Dyer v. Clark* (1843) 5 Met. 532, 39 Am. Dec. 697.

Also to his lien for securing moneys due by a deceased partner to the firm, no beneficial interest attaching in favor of the widow and heirs of a deceased partner until such surviving partner is indemnified. *Ibid.*

The equitable lien attaches to the estate at the moment of its acquisition, and each partner and all claiming their estate as the heir or widow, must take subject thereto, and can have only the interest that the deceased partner had. *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 642.

And so where real estate is so purchased under an agreement that at the termination of the partnership the same shall be sold for payment of debts, and the residue of the partnership effects are insufficient to discharge the same, whether it is conveyed to one or all of the partners, it is not subject to dower. *Ibid.*

The equitable interference with partnership real estate is exercised as well against the widow claiming dower as against the heirs. *Wilcox v. Wilcox* (1866) 13 Allen, 253, following *Burnside v. Merrick* (1842) 4 Met. 537; *Dyer v. Clark* (1843) 5 Met. 532, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 532.

And as against a partner holding partnership real estate for partnership purposes, and as against his widow and heirs, equity will interpose to secure to his copartners their actual and beneficial interest. *Shearer v. Shearer* (1867) 93 Mass. 107.

The Illinois statute in regard to homestead was not intended to apply to partnership property. *Trowbridge v. Cross* (1886) 117 Ill. 109.

The widow of a deceased partner, who has received all such partner's share of the proceeds of partnership real estate in excess of the amount necessary to pay the firm's debts is estopped from claiming any interest in the real estate as against the creditors thereof. *Walling v. Burgess* (1890) 7 L. R. A. 481, 123 Ind. 299.

The court will sustain the widow's right to a year's allowance, because the law requires it to be made out of specific property to be designated by the commissioners, and that the husband has no right in the partnership assets until the partnership debts are paid. *Lyon v. Lyon* (1873) 1 Tenn. Ch. 225.

e. When dower attaches.

With respect to the widow's right to dower in real estate purchased with partnership funds and used for partnership purposes the general rule is that a widow of a deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of the firm debts and the adjusting of equitable claims as between

the partners themselves. *Campbell v. Campbell* (1879) 30 N. J. Eq. 415; *Uhler v. Semple* (1869) 20 N. J. Eq. 238; *Buchan v. Smmner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Shearer v. Shearer*, (1867) 103 Mass. 107; *Foster's App.* (1874) 74 Pa. 391; *Galbraith v. Tracy* (1894) 163 Ill. 54, post, —; *Strong v. Lord* (1883) 107 Ill. 25; *Walling v. Burgess* (1890) 7 L. R. A. 481, 123 Ind. 299; *Sykes v. Sykes* (1873) 49 Miss. 190; *Drewry v. Montgomery* (1861) 23 Ark. 256; *kspy v. Comer* (1884) 76 Ala. 501; *Pepper v. Pepper* (1887) 24 Ill. App. 318; *Cornwall v. Cornwall* (1869) 6 Bush, 309; *Grisson v. Moore* (1886) 106 Ind. 296, 55 Am. Rep. 742; *Huston v. Neil* (1873) 41 Ind. 504; *Cobbie v. Tomlinson* (1875) 50 Ind. 550; *Van Staden v. Kline* (1884) 64 Iowa, 318, 40 Am. Rep. 799; *Sage v. Sherman* (1849) 2 N. Y. 417; *Smith v. Jackson* (1833) 2 Edw. Ch. 28, 6 L. ed. 295; *Dawson v. Parsons* (1894) 68 N. Y. S. R. 320, 10 Misc. 428; *Greenwood v. Marvin* (1868) 111 N. Y. 423; *Holton v. Guinn* (1865) 65 Fed. Rep. 450; *Stroud v. Stroud* (1868) 61 N. C. 525; *Mowry v. Bradley* (1876) 11 R. I. 370; *Hiscock v. Jaycox* (1875) 12 Nat. Bankr. Reg. 507; and see further cases cited *supra*, head b.

Where the partners have not, either by an express or implied agreement, indicated an intention to convert their lands into personal estate. *Goodburn v. Stevens* (1847) 5 Gill, 1.

Such real estate being treated in equity, as at law, according to its real nature. *Ibid.*

Her interest is confined to what may remain of the husband's interest. *Grisson v. Moore*, *Huston v. Neil*, and *Cobbie v. Tomlinson*, *supra*.

Under section 2 of chapter 43 of the North Carolina Revised Code. *Stroud v. Stroud* (1868) 61 N. C. 525.

And the widow is entitled to one third of such net proceeds absolutely as a distributee. *Cornwall v. Cornwall* (1869) 6 Bush, 309.

The residuum after satisfying partnership liabilities and equalizing interests, not being personality but retaining all the attributes of realty. *Espy v. Comer* (1884) 76 Ala. 501.

And that as against any new firm. *Hiscock v. Jaycox* (1875) 12 Nat. Bankr. Reg. 507.

By force of the Ohio statute a widow is only entitled to a share of the beneficial interest of her husband in such lands. *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 642.

It will attach in the case of bonds or contracts for the purchase of real estate fulfilled by the surviving partner or specifically enforced. *Shearer v. Shearer* (1867) 93 Mass. 107.

Yet her right to dower will remain unaffected by the firm debts, liabilities, and accounts.

Where there is no agreement that lands purchased by the partners shall be sold for the benefit of the partnership, and be regarded as joint stock, and where there is no application of such lands to the purposes of the concern as evidences an original understanding of the parties that they were to be treated as partnership property and stock, the wife of a deceased partner is entitled to dower. *Woodridge v. Wilkins* (1890) 8 How. (Miss.) 300.

It also attaches where there is an agreement by the partners that upon dissolution from any cause their respective freehold estates and interests shall not be brought into such accounts and valuation, nor be sold, but shall continue to belong to and remain vested in the said partners, their heirs and assigns, in the shares and proportions in which they were respectively entitled, as such property will not then be converted into personality but it will be considered as real estate. *Hughes v. Allen* (1894) 66 Vt. 95.

So the mere fact of the partners agreeing with each other to purchase lands, and so purchasing, each paying his proportion of the purchase money, with the agreement to share the profits and losses equally, not constituting the lands partnership

assets, nor making the parties partners therein, will not bar nor affect the widow's right to dower therein. *Shipp v. Snyder* (1894) 121 Mo. 155.

And so where the fee vested in the husband before the partnership, there being no ground for imposing such a trust on the widow and no room for the application of the equitable doctrine of conversion, she is not deprived either in law or in equity of all beneficial dower. She must have released her dower right to the firm. *Perin v. Megibben* (1882) 6 U. S. App. 848, 53 Fed. Rep. 86.

In the above case, the husband and wife subsequently to the formation of the partnership conveyed a third of the lands held by the husband prior to the formation of the partnership to the partner, and the court stated that even if conceded that a recital in the deed showed that the transaction was in reality intended between the partners to be a transfer of the land, from such grantor as an individual to himself and his partner as a firm, each partner contributing his share of the consideration, yet there was nothing to infer an intention on his part to treat the real estate as personalty, for the purposes of distribution upon death, the wife being dowerable therein as if no partnership had been formed, as on no principle of law or equity could she be deprived of her beneficial interest. *Ibid.*

The same doctrine was applied to a mercantile partnership afterwards extended by mutual consent to the purchase and sale of lands in which there was an extensive business, the purchases not being made for the purposes of the firm according to the original design, and not necessary to enable the parties to carry on the mercantile business, there being no evidence that the lands so purchased were by the contract to be considered as personalty, or that they were treated as either personalty or joint stock, being conveyed, not by the partnership name, but as individual tenants in common, with a relinquishment of dower in every instance, the partners considering it as an ordinary conveyance of land, the purchase with the joint fund constituting them tenants in common, the widow being dowerable out of such lands. *Markham v. Merrett* (1843) 7 How. (Miss.) 497, 40 Am. Dec. 76.

And also to a case in which some of the property was leased by her husband in his lifetime, and a plantation was occupied by the son of the deceased, under an agreement of partnership in planting, which was to continue, notwithstanding the death of the father, and which had then seven years to run, the widow being endowable of a proper proportion of the farm, but not so as to interrupt the partnership arrangement, nor to take effect in possession as admeasured until the occupancy of the son under the articles terminated, she in the meantime to be paid one third of one half of the profits annually; and to be entitled to that proportion of the profits of the farm since the death of her husband, and to one third of the rents of the other real estate from the same date. *Sykes v. Sykes* (1873) 49 Miss. 190.

It has, however, been stated that although the lands may be partnership property, and the transactions relative to their purchase of a commercial nature, and the proceeds liable to be applied to the satisfaction of the joint debts, yet in the strict sense they are real estate and subject to its incidents, the partners being respectively seised of a legal estate of inheritance as tenants in common, notwithstanding the property is to be treated as partnership property, and therefore the right to dower attaches as an incident to the legal title and seisin. *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 236.

A widow is a proper party to a bill for partition, where the partnership debts have been paid and 27 L. R. A.

all accounts settled, as she has a dower interest in an undivided share of the lands belonging to the dissolved partnership in which her husband was a member. *Brewer v. Browne* (1880) 88 Ala. 210; *Coles v. Coles* (1818) 15 Johns. 319.

So the widow is entitled to an assignment of dower. *Loubat v. Nourse* (1853) 5 Fla. 350.

Where dower was actually assigned nearly three years prior to the filing of the bill to enforce the lien for partnership debts, the court refused to disturb the assignment. *Clay v. Freeman* (1886) 118 U. S. 97, 20 L. ed. 104.

And in *Nutt v. Mechanic's Bank* (1830) 4 Cranoh, C. C. 102, where a bill was filed in equity for dower in partnership lands conveyed in trust to secure debts due to the defendant, and sold by the trustee to the bank, the partners having divided their joint property, without any legal conveyance or deed of partition of the real estate, an assignment of dower was decreed.

A wife who, as a necessary party, unites with her husband in the mortgage of partnership lands, still retains a right of dower in the equity of redemption which is not entirely lost by the foreclosure and sale. *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 236.

And the same is the case as against a purchaser of the deceased husband's share in partnership real estate, where there is no controversy or claim by partnership creditors. *Bowman v. Bailey* (1884) 20 S. C. 550.

So where, after dissolution, the husband conveyed his interest in real estate purchased and paid for with partnership funds to his copartners under whom the defendant claimed, the widow is entitled to dower in the one half of which her deceased husband has been seised. *Reed v. Kennedy* (1847) 2 Strobb. L. 67.

Again where partnership real estate is held in trust, a declaration of trust being subsequently executed specifying the proportions belonging to each of the *cestuis que trust*, it will not be considered as personalty, but as realty vesting in each *cestui que trust* an equitable title out of which the widow is dowerable. *Nicoll v. Ogden* (1862) 29 Ill. 323, 31 Am. Dec. 311.

In *Collins v. Warren* (1859) 29 Mo. 236, a house built upon real estate conveyed to two partners and improved with partnership funds was occupied by one partner until his death, his widow afterwards retaining possession, the facts showing a suit for taking the accounts and for a sale of such estate for the payment of the firm debts, alleging that the same was partnership estate, instituted against such partner in his lifetime and revived against his administrator; a purchase of the partner's interest at sheriff's sale prior to his decease, under a mortgage to such purchaser; such purchaser being made a party to the suit upon the ground of notice; that a decree was rendered in the suit by which the mortgagee's interest was postponed until the partnership affairs were settled, the surviving partner being the purchaser at the sale held thereunder who sought to eject the widow, but the widow being no party was held not bound by the decree which was not even evidence against her, and that the surviving purchaser was only entitled to half.

d. In lands purchased for the purpose of resale.

In so far as the cases mentioned under this head relate to the general principles of the law concerning dower, they are not intended to be exhaustive of the doctrine, but are limited to cases of dower in partnership real estate wherein the principles have been set forth as establishing her right to dower in such lands.

The widow of a partner in whose name lands are purchased for a joint undertaking relating to the

proceeds of the sale thereof is not entitled to dower. *Coster v. Clarke* (1841) 3 Edw. Ch. 433, 6 L. ed. 714.

In the above case several persons purchased for their joint benefit, under an agreement that the proceeds and avails of such estate taken in the name of one were for their joint account until the sale and conversion, a bill being filed for partition praying a sale and account, the executors of the deceased partner being joined; an objection taken that the heirs should have been joined was overruled on the ground that the shares lost their quality of land and descended as personal estate, and further that the widow was not a necessary party, having no right of dower. *Ibid.*

The same conclusion was arrived at where the object of the partnership was the buying and selling of real estate, the interest of the individual members being the proceeds of the sales, the written contract expressly providing therefor and vesting the title in a trustee, with express power to sell and convey the same and to distribute the receipts from the sales to the members in proportion to their interests, the contract rebutting the idea that the persons paying the money became seised of an estate in the land. *Mallory v. Russell* (1887) 71 Iowa, 63, 60 Am. Rep. 776. *Hewitt v. Rankin* (1875) 41 Iowa, 35, to the same effect.

e. *Effect of an agreement converting real estate into personality.*

The equitable doctrine of out and out conversion of partnership real estate into personality, under which the widow is deprived of benefit from her dower estate in the land, is worked out on the theory that the land having been acquired with partnership funds, there is imposed on those on whom the legal title is cast a trust to execute the purposes for which the partners bought it, and that if one of such purposes was out and out conversion into personality it would exclude any beneficial dower interest. *Perin v. Meglben* (1892) 6 U. S. App. 343, 53 Fed. Rep. 33.

Partners may by express agreement so convert real estate brought into partnership stock that it will be considered personal property not only as between themselves but as between their heirs, personal representatives, and others. *McDermot v. Laurence* (1821) 7 Serg. & R. 433, 10 Am. Dec. 468; *Ripley v. Waterworth* (1803) 7 Ves. Jr. 424.

But the widow's right to dower upon partnership real estate is inchoate in the absence of an agreement expressly changing its character to personality, where such real estate is not required for the payment of the partnership debts and liabilities, and adjusting the accounts of the partners *inter se*. *Haile v. Plummer* (1855) 8 Ind. 121.

Yet real estate may be so held for partnership purposes as to exclude the widow's right to dower, and it may also be so held as not to exclude it. *Ibid.*

A widow of a deceased partner is not dowerable in lands which the firm owned and regarded as partnership stock. *Johns v. Johns* (1853) 1 Ohio St. 380, 357; *Sumner v. Hampson* (1838) 3 Ohio, 223, 23 Am. Dec. 722.

Where partnership articles stipulate, *inter alia*, that on the dissolution of the firm the property (a portion of which consisted of real estate) shall be sold and the proceeds first applied in payment of the firm debts, she is not entitled to dower, her husband being, at no time during coverture seised of such an estate of inheritance in the lands as is contemplated by the Ohio statute giving the widow dower. *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 643.

1. *Right to dower in improvements.*

The value of land at the time of alienation is the extent to which the widow is endowable. *Mark-*
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ham v. Merrett (1843) 7 How. (Miss.) 437, 40 Am. Dec. 76; *Woodbridge v. Wilkins* (1839) 3 How. (Miss.) 360.

In the improvements, as in all property of a firm, the rights of the widow and heirs are subject to the adjustment of all claims between the partners, and attach only to the surplus which remains when the partnership affairs are wound up. *Grissom v. Moore* (1890) 108 Ind. 236, 55 Am. Rep. 742; *Matlock v. Matlock* (1854) 5 Ind. 403; *Cobble v. Tomlinson* (1875) 60 Ind. 550; *Haas v. Shaw* (1838) 91 Ind. 384, 46 Am. Rep. 607.

And so far as regards an improvement in the value of such lands, by the labor or money of the alienee, the widow cannot have the benefit thereof. *Woodbridge v. Wilkins*, *supra*.

In *Markham v. Merrett*, *supra*, the court approved of the rule as to the allotment of dower in case of improvements, as laid down in *Woodbridge v. Wilkins*, *supra*.

Where under the agreement for partnership, lots and buildings and machinery are contributed and brought into the firm as stock or firm property and improved with partnership funds for the purposes of the partnership, the widow of a deceased partner is not entitled to dower out of such improvements but is entitled to her share as heir. *Grissom v. Moore*, *supra*.

g. *When widow entitled to an equivalent.*

If a partnership is insolvent at the date of its dissolution, the widow will be entitled to a proper allowance out of the proceeds of the sale of the partnership lands, as an equivalent for her dower. *Goodburn v. Stevens* (1847) 5 Gill, 1.

h. *Widow's right to retain possession.*

Where real estate is owned by two partners as tenants in common, and one dies being in possession of the whole at his death, his widow continuing to reside therein, under the sixteenth section of the Missouri Dower Act of 1845, such widow is not entitled as against the survivor, to continue possession until dower is assigned. *Collins v. Warren* (1859) 29 Mo. 236.

i. *How affected by husband's private debts.*

The widow's right to dower in her husband's interest in partnership real estate is not held subject to the payment of his private debts. *Shearer v. Shearer* (1887) 93 Mass. 107; *Lenow v. Fones* (1836) 48 Ark. 557.

1. *Homestead rights.*

The right to a homestead exemption does not place the widow upon any higher ground. *Robertshaw v. Hanway* (1876) 52 Miss. 713.

And her homestead right will not attach to property conveyed by one partner, with the consent and in the presence of the others. *Ferguson v. Hanauer* (1892) 56 Ark. 173.

k. *Right of widow to join in deed, action or suit affecting such estate.*

A widow of the deceased partner has no power as administratrix to join with the survivors in giving a note and mortgage upon partnership real estate, for the debt of the firm. *Robertshaw v. Hanway* (1876) 52 Miss. 715.

Where there is no surplus in the partnership real estate, a widow is not a necessary party to an action to foreclose a mortgage thereon. *Houston v. Niel* (1873) 41 Ind. 504.

The widow of a deceased partner, in her capacity as executrix signing the application of one of the surviving partners for a respite, the schedule embracing as firm property all the immovable property standing in the name of the deceased partner, being told by such partner that it was her interest to do so, she having no appreciation that her signature implied any liability or relinquishment of any right, does not thereby affect her right to

dower, or the heirs' interests. *Hardin v. Jamison* (Minn.) Feb. 25, 1894.

II. The rights of the heirs.

a. The legal estate passes to the heir of a deceased partner.

Land purchased by partners for partnership purposes with partnership funds, used as part of the stock in trade, is considered in equity as partnership property, when the conveyance is made to both partners, and upon the death of one a legal title will pass to his heir. *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Caldwell v. Farmer* (1876) 55 Ala. 405; *Abernathy v. Moses* (1882) 73 Ala. 381; *Roulston v. Washington* (1885) 79 Ala. 529; *Blanchard v. Floyd* (1890) 93 Ala. 58; *Perciful v. Platt* (1880) 36 Ark. 455; *Dupuy v. Leavenworth* (1861) 17 Cal. 262; *Loubat v. Nourse* (1853) 5 Fla. 350; *Baker v. Middlebrooks* (1888) 81 Ga. 491; *Galbraith v. Gedge* (1855) 16 B. Mon. 631; *Cornwall v. Cornwall* (1869) 6 Bush, 369; *Bank of Louisville v. Hall* (1871) 8 Bush, 672; *Lowe v. Lowe* (1873) 13 Bush, 638; *Holmes v. Self* (1881) 79 Ky. 297; *Caskey v. Caskey* (1878) 5 Ky. L. Rep. 775; *Flanagan v. Shuck* (1885) 63 Ky. 619; *Goodburn v. Stevens* (1847) 5 Gill, 1; *Dyer v. Clark* (1848) 5 Met. 552, 39 Am. Dec. 697; *Howard v. Priest* (1848) 5 Met. 552; *Wilcox v. Wilcox* (1866) 13 Allen, 252; *Scruggs v. Blair* (1870) 44 Miss. 406; *Hanway v. Robertshaw* (1874) 49 Miss. 758; *Smith v. Jackson* (1883) 2 Edw. Ch. 23, 6 L. ed. 295; *Buckley v. Buckley* (1860) 11 Barb. 43; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 365, 7 L. ed. 627; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Greene v. Graham* (1881) 5 Ohio, 264; *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22; *Summey v. Patton* (1864) *Winst. Eq.* 52, 36 Am. Dec. 451; *Yeatman v. Woods* (1884) 6 Yerg. 20, 27 Am. Dec. 452; *Piper v. Smith* (1858) 1 Head, 97; *Williamson v. Fontaine* (1874) 7 Bart. 212; *Griffey v. Northcott* (1871) 5 Helsk. 746; *Jones v. Sharp* (1872) 9 Helsk. 600; *McAllister v. Montgomery* (1816) 8 Hayw. (Tenn.) 94; *Murrell v. Mandelbaum* (1892) 85 Tex. 22; *Pierce v. Trigg* (1839) 10 Leigh, 406; *Platt v. Oliver* (1842) 3 McLean, 27; *Logan v. Greenlaw* (1885) 25 Fed. Rep. 299; *Clay v. Field* (1888) 84 Fed. Rep. 375; *Megibben v. Perin* (1892) 49 Fed. Rep. 185; *Perin v. Megibben* (1892) 6 U. S. App. 948, 58 Fed. Rep. 865; *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 635.

Such real estate preserving its distinct qualities, the heir holding in common with the survivor. *Buckley v. Buckley*, *supra*; *Broom v. Broom* (1834) 3 Myl. & K. 443; *Howard v. Priest*, *Buchan v. Sumner*, *Hanway v. Robertshaw*, *Scruggs v. Blair*, and *Loubat v. Nourse*, *supra*.

Exactly as it would were the partners tenants in common. *Perin v. Megibben* and *Greene v. Graham*, *supra*.

In equity as well as at law. *Summey v. Patton*, *supra*.

Though equity will treat it as personal estate. *Buckley v. Buckley*, *Delmonico v. Guillaume* and *Roulston v. Washington*, *supra*.

Under the New York statutes relating to joint tenancies, the several copartners to whom a conveyance of land for partnership purposes is made become tenants in common of the legal title; and upon the death of either the undivided portion of the legal title thus vested in the deceased partner descends to his heir-at-law without reference to the equitable rights of the several partners in the land as a part of the property of the firm. *Buchan v. Sumner*, *supra*.

It so descends, subject to the payment of the firm debts, under the Tennessee Act of 1784. *Griffey v. Northcott*, *supra*.

In *Piper v. Smith*, *supra*, it was held that real estate held for partnership purposes descended to the heir-at-law of a deceased partner, as real estate, by virtue of the case. *McAllister v. Montgomery*, *supra*; *Tennessee Act of 1784*, chapter 28 of section 5.

And in *Yeatman v. Woods* (1884) 6 Yerg. 20, 27 Am. Dec. 452, the court followed the ruling of *McAllister v. Montgomery*, *supra*, holding that on the death of a partner, the real estate of the firm descended to the heirs and was not distributable as other personal stock.

b. Nature of the title vested in the heirs.

The title, legal or equitable, however, to lands owned by a partnership, which descends to the heir of a deceased partner, devolves upon him subject to be converted into partnership effects and used for certain partnership purposes, such as the payment of the partnership debts and the adjustment of the accounts as between the partners themselves. *Abernathy v. Moses* (1882) 73 Ala. 381; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Caldwell v. Farmer* (1876) 55 Ala. 405; *Blanchard v. Floyd* (1890) 93 Ala. 58.

He holds the legal title subservient to or in trust for the surviving partner who is charged with the payment of the debts. *Andrews v. Brown*, *supra*; *Pugh v. Currie* (1843) 5 Ala. 448; *Pierce v. Trigg* (1839) 10 Leigh, 406; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 365, 7 L. ed. 627; *Dyer v. Clark* (1848) 5 Met. 552, 39 Am. Dec. 697; *Ripley v. Waterworth* (1802) 7 Ves. Jr. 425; *Dale v. Huse* (1860) 40 N. H. 358, 360, 16 L. J. Ch. N. S. 123, 11 Jur. 163; *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22; *Loubat v. Nourse* (1853) 5 Fla. 350.

For the equitable purposes of the firm. *Merritt v. Dickey* (1878) 88 Mich. 41; *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

So as to secure the beneficial interest to the firm until the purposes of the partners are accomplished. *Dyer v. Clark*, *supra*; *Goodburn v. Stevens* (1847) 5 Gill, 1; *Cilley v. Huse* (1860) 40 N. H. 358.

No matter whether such demands exist in favor of a stranger or a member of the copartnership. *Rammelsberg v. Mitchell*, *supra*.

He thus holds, having no beneficial interest in the land as land, but only a remote beneficial interest in the surplus of the whole partnership stock; having no greater right than his ancestor had. *Logan v. Greenlaw* (1885) 25 Fed. Rep. 299; *Burnside v. Merrick* (1842) 4 Met. 537; *Priest v. Chouteau* (1844) 85 Mo. 308, 55 Am. Rep. 377; *Rossum v. Sinker* (1880) (Ind.) 12 Cent. L. J. 202.

In trust for the purposes of the partnership, first, for the benefit of the creditors; second, for the members of the firm and their representatives, according to their several interests as fixed by the articles of copartnership. *Scruggs v. Blair* (1870) 44 Miss. 406; *Hanway v. Robertshaw* (1874) 49 Miss. 758; *Megibben v. Perin* (1892) 49 Fed. Rep. 185; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Dupuy v. Leavenworth* (1861) 17 Cal. 262.

And if the title is in the deceased partner alone, his heirs will still be considered as trustees for the surviving partner. *Little v. Snedecor* (1875) 53 Ala. 167.

As respects a settlement of the partnership debts and accounts it partakes of the nature and incidents of personal property and is treated as such in equity. *Roulston v. Washington* (1885) 79 Ala. 529; *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

Until the debts of the firm are satisfied, neither the personal representative nor the heirs of the deceased partner have any beneficial interest in the real estate of the partnership. *Offutt v. Scott* (1872) 47 Ala. 104; *Way v. Stebbins* (1882) 47 Mich. 236; *Priest v. Chouteau*, *supra*; *Gray v. Palmer* (1855) 9 Cal. 616; *Burnside v. Merrick*, *supra*; *Cilley v. Huse* (1860) 40 N. H. 358; *Re Farmer*, *Ex parte Griffin* (1873) 18 Nat. Bankr. Rep. 207.

The legal estate in the survivor remains as before, that of a deceased going to his heirs and each

holding as trustee of the partnership and of each other. *Percifull v. Platt* (1880) 36 Ark. 456.

Where, however, land is conveyed to a partnership but not used in the partnership business, the general law of descent will apply and the share of a decedent partner vests in his heirs subject to satisfying the partnership creditors in preference to individual creditors. *Baker v. Middlebrooks* (1888) 41 Ga. 491; *Platt v. Oliver* (1842) 3 McLean, 27.

Neither the partners nor the heirs of a deceased partner, can acquire any interest in the partnership property, real or personal, adverse to the trust imposed upon it for the payment of the partnership debts. *Robertshaw v. Hanway* (1876) 52 Miss. 715.

The infant heirs of a deceased partner will be bound by a decree, divesting their title to real estate, on a bill filed for sale of such estate, and for the application of the proceeds to the payment of partnership liabilities. *Creath v. Smith* (1854) 20 Mo. 113.

So in the winding up of the affairs of an insolvent partnership, the assignee is entitled to have the partnership real estate vested in him, as against the heirs, widow, and administrator of the deceased partner. *Burnside v. Merrick* (1842) 4 Met. 537.

In the case of a contract of partnership entered into solely for the purpose of purchasing, improving, and equipping of real estate, the profits of the business to consist of lands and not of money, being converted into realty as rapidly as realized by investing them in the improvement and equipment of the estate, the object of the partnership being the ownership of and improving of an arable plantation, the relation of the parties to each other and to the property is analogous to the case of co-ownership of mines worked by the owners as partners, and upon a dissolution, the mine itself not being partnership property, being divided between its several owners and not sold, so that as between the real and personal representatives of a deceased partner his share is real and not personal estate, the court in such case upon a dissolution appointing a receiver to carry on the mine for the benefit of the parties interested. *Berry v. Folkes* (1882) 60 Miss. 577.

In such a case the heirs of a deceased partner were entitled to a partition in kind, if such could be made, such right being dependent upon a final settlement of the partnership accounts, until the payment of which there could be no division of the lands, nor withdrawal of them from the possessor of the firm, without the consent of all parties interested. *Ibid.*

A bill for partition will not lie against a surviving partner during the administration of the partnership estate. *Holton v. Guinn* (1896) 65 Fed. Rep. 450.

c. The heirs bound to convey the legal title.

In case of the death of one of the partners the survivor can sell real estate so situated, and although he cannot convey the legal title which passes to the heir or devisee of the deceased partner, yet his sale invests the purchaser with the equitable ownership of the real estate and the right to compel a conveyance of the title from the heir or devisee in a court of equity. *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 635.

The following cases are to the same effect: *Shanks v. Klein* (1881) 11 Fed. Rep. 767, 104 U. S. 18, 26 L. ed. 635; *Logan v. Greenlaw* (1885) 25 Fed. Rep. 299; *Clay v. Field* (1886) 34 Fed. Rep. 375; *Megriben v. Perin* (1892) 49 Fed. Rep. 183; *Holladay v. Land & River Imp. Co.* (1893) 57 Fed. Rep. 774; *Andrews v. Brown* (1852) 21 Ala. 437, 55 Am. Dec. 252; *Davis v. Smith* (1837) 62 Ala. 198; *Murphy v. Abrams* (1874) 50 Ala. 298; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 553; *Roulston v. Washington* (1885) 79 Ala. 529; *Dupuy v. Leavenworth* (1881) 17 Cal. 262; *Burnside v. Merrick* (1842) 4 Met. 540; *Dyer v. Clark* (1843) 5 Met. 562, 30 Am. Dec. 607; *Howard v. Priest* (1843) 5 Met. 585; *Sullivan v. Smith* (1884) 15 Neb. 488, 48 37 L. R. A.

Am. Rep. 858; Delmonico v. Guillaume (1845) 2 Sandf. Ch. 343, 7 L. ed. 627; *Tillinghast v. Champlin* (1856) 4 R. I. 173, 67 Am. Dec. 510; *McAlister v. Montgomery* (1816) 3 Hayw. (Tenn.) 941; *Barton v. Lovejoy* (Minn.) Feb. 1, 1894.

Even though he be an infant. *Tillinghast v. Champlin, supra.*

Equity will compel the heirs of the deceased partner to convey the legal estate, for the purposes of having the land applied to the payment or in compromise of the partnership debts of an insolvent firm. *Murphy v. Abrams, supra.*

In commenting upon the doctrine laid down by the court in *Andrews v. Brown, supra*, the court in *Lang v. Waring, supra*, stated that such doctrine never was intended as establishing the theory that a court of equity would, in all cases of disposition by a surviving partner of the real estate of the firm, however unfair, incapable, or unauthorized such disposition might be, compel the heirs to convey and thus become the minister of injustice.

If the surviving partner has the power to mortgage, subject to the confirmation of the court of equity, and if the sale be fair and bona fide, such as the court would have sanctioned and sustained if made under its direction, the same would be upheld and the legal title decreed to the purchaser. *Ibid.*

If, however, such sale be for a grossly inadequate consideration, made under circumstances calculated to cause a sale for an almost nominal sum, the court will not lend its aid to perfect such purchase. *Ibid.*

d. When a necessary party to a suit relating to such lands.

The heirs of the deceased partners are necessary parties to a suit to pass title, and therefore the surviving partner cannot convey such property. *Galbraith v. Gedge* (1855) 16 B. Mon. 631.

So they are necessary parties to a bill in equity, foreclosing a mortgage in order to reduce the security to money and to the individual possession of the surviving partner. *Abernathy v. Moses* (1882) 73 Ala. 381. *Andrews v. Brown* (1852) 21 Ala. 437, 55 Am. Dec. 252; *Caldwell v. Parmer* (1876) 56 Ala. 405, followed.

Where part of partnership real estate is sold by the guardian of the heir of the partner in possession, the heir's administrator, in case of his death, is a proper party to the suit relating to such property. *McGuire v. Ramsey* (1849) 9 Ark. 518.

In the case of a partnership formed for the purpose of acquiring lands, and not for the conversion of them into stock in trade, the administrator and heirs of a deceased partner must be made parties to a bill filed by the continuing partners, for the purpose of enforcing a lien upon the partnership lands, and seeking to charge the personal estate of a deceased partner with the payment thereof. *Dilworth v. Mayfield* (1858) 36 Miss. 40.

Upon the death of one partner another covenanting to stand in his place cannot, as to the survivor, object, upon an award and decree declaring a sale of the partnership real estate, that the representatives of a deceased partner are not parties to the bill. *Waugh v. Mitchell* (1837) 21 N. C. 510.

e. When heirs not entitled.

If by the terms of the partnership articles, real estate is purchased with partnership funds, or is otherwise put into partnership stock to be used and held solely for partnership purposes, it is to be regarded as converted out and out into personality so that the heir-at-law takes no beneficial interest therein in any event, but the proceeds not needed for partnership purposes pass to the personal representatives of the partners. *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 23.

So in the case of an arrangement by the shareholders of a land syndicate, to contribute a certain

amount to the purchase of land, in the name of a trustee, to be improved, with power to sell and distribute the proceeds among them, upon the death of a shareholder his heirs are not entitled to partition, the arrangement never contemplating the shareholders taking an interest in the land, but only an interest in the proceeds of the sale thereof. *Kahn v. Central Smelting Co.* (1881) 103 U. S. 641, 26 L. ed. 266.

2. As between the surviving partner and the heirs.

Upon the death of a partner, his share is under the control and disposition of the surviving partner, in the winding up of the firm, and does not vest in his heirs. *Van Aken v. Clark* (1891) 82 Iowa, 256.

And until the close of such administration the possession of the partnership realty by the surviving partner is adverse to and exclusive of the heirs-at-law and for that reason partition will not lie. *Holton v. Guinn* (1895) 65 Fed. Rep. 450; *Holmes v. McGee* (1869) 27 Mo. 597; *Priest v. Chouteau* (1884) 85 Mo. 407, 55 Am. Rep. 373.

But the surviving member and the heirs are tenants in common, the surviving partner having power to dispose of the realty as other assets belonging to the firm. *Jones v. Sharp* (1872) 9 Heisk. 600; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Caldwell v. Farmer* (1876) 56 Ala. 406; *Price v. Hicks* (1874) 14 Fla. 565; *Espy v. Comer* (1884) 76 Ala. 501; *Southern Cotton Oil Co. v. Henshaw* (1890) 89 Ala. 448; *Yeatman v. Woods* (1894) 6 Yerg. 20, 37 Am. Dec. 452; *McCormick's App.* (1888) 57 Pa. 54, 36 Am. Dec. 191; *Clay v. Field* (1888) 34 Fed. Rep. 876; *Wilson v. Soper* (1882) 18 B. Mon. 411, 56 Am. Dec. 573.

Such lands vesting in the surviving partner as against the heir of the deceased partner, in whose name they were purchased, for the payment of debts. *Way v. Stebbins* (1882) 47 Mich. 226.

In equity a surviving partner is treated as a trustee, with the fiduciary relation of trustee and cestui que trust existing between him and the representative of the deceased partner. *Galbraith v. Tracy* (1894) 158 Ill. 54, post, 28 L. R. A. 129.

The equitable right and interest are in the survivor. *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627; *Clay v. Field*, *supra*.

Who has, for firm purposes, the whole beneficial interest. *Pierce v. Trigg* (1839) 10 Leigh, 406; *Price v. Hicks*, *supra*.

And as against heirs and devisees of the deceased partner, full control of the partnership property. *Barton v. Lovejoy* (Minn.) Feb. 1, 1894; *Priest v. Chouteau* (1884) 85 Mo. 398, 55 Am. Rep. 377; *Rossum v. Sinker* (1890) (Ind.) 12 Cent. L. J. 202.

The heir being a mere trustee of the legal estate. *Delmonico v. Guillaume*, *supra*.

For the purpose of executing the trust reposed in him, a surviving partner has a right in equity, as between himself and the heir, to sell the whole beneficial interest in partnership real estate for the payment of the firm debts and adjusting the accounts of the partnership as between the partners. *Tillinghast v. Champlin* (1866) 4 R. I. 173, 67 Am. Dec. 510; *Delmonico v. Guillaume*, *supra*; *Dyer v. Clark* (1843) 5 Met. 576, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 585; *Burris v. Merriok* (1842) 4 Met. 540; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 532; *McAlister v. Montgomery* (1816) 3 Ray. (Tenn.) 94; *Shanks v. Klein* (1881) 104 U. S. 23, 26 L. ed. 636; *Loubat v. Nourse* (1858) 5 Fla. 360; *Price v. Hicks* (1874) 14 Fla. 565; *Clay v. Freeman* (1886) 118 U. S. 97, 30 L. ed. 104; *Re Farmer*, *Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207; *Holladay v. Land & River Imp. Co.* (1898) 57 Fed. Rep. 714.

In the same manner as though it were personal estate. *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

The deed of the surviving partner however will only pass the equitable title. *Megibben v. Perin* 37 L. R. A.

(1892) 49 Fed. Rep. 183; *Andrews v. Brown*, *supra*; *Du-puy v. Leavenworth* (1861) 17 Cal. 282; *Walling v. Burgess* (1889) 7 L. R. A. 431, 122 Ind. 239; *Delmonico v. Guillaume* (1845); *Dyer v. Clark*, and *Holliday v. Land & River Imp. Co.* *supra*; *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 635.

And if specific performance of a contract for the sale of such an estate be decreed, the heir must join in the conveyance. *Delmonico v. Guillaume*, *supra*.

The surviving partner and all others must join in order to convey the legal title to a purchaser, the surviving partner alone having no capacity to transfer a legal title. *Southern Cotton Oil Co. v. Henshaw* (1890) 89 Ala. 448; *Espy v. Comer* (1884) 76 Ala. 501; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Caldwell v. Farmer* (1876) 56 Ala. 405; *Yeatman v. Woods* (1894) 6 Yerg. 20, 37 Am. Dec. 452; *McCormick's App.* (1888) 57 Pa. 54, 36 Am. Dec. 191.

The equitable title vesting in the survivor empowers him to sell to pay partnership debts or settle partnership equities, and enables him to compel, by aid of a court of equity, the heirs of the deceased partner to perfect the sale by deeding such legal title. *Perin v. Megibben* (1892) 6 U. S. App. 343, 53 Fed. Rep. 86. To the same effect, *Galbraith v. Gedge* (1855) 18 B. Mon. 631; *Cornwall v. Cornwall* (1869) 6 Bush. 369; *Bank of Louisville v. Hall* (1871) 8 Bush. 672; *Lowe v. Lowe* (1878) 13 Bush. 688; *Holmes v. Self* (1881) 79 Ky. 237; *Caskey v. Caskey*, 5 Ky. L. Rep. 775; *Flanagan v. Shuck* (1885) 82 Ky. 619; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 27; *Divine v. Mitchum* (1844) 4 B. Mon. 453, 41 Am. Dec. 241; *Spalding v. Wilson* (1883) 80 Ky. 590; *Rammelsberg v. Mitchell* (1875) 20 Ohio St. 53.

It vests beneficially in such survivor in order to compel a sale and disposition of the proceeds, in the same manner as the personal estate of the firm is disposed of. *Pierce v. Trigg* (1839) 10 Leigh, 406.

And see further, cases cited in note to *Galbraith v. Tracy* (Ill.) post, 28 L. R. A. 129, head, *Position of surviving partner*.

The proper disposition of such lands by a surviving partner may be set up as a counterclaim in equity, in answer to an action of ejectment by the heirs or those holding under them. *Weid v. Johnson Mfg. Co.* (1893) 86 Wis. 552; *Blodgett v. Hitt* (1871) 29 Wis. 169; *Jarvis v. Peck* (1885) 19 Wis. 74; *Grignon v. Black* (1890) 76 Wis. 674; *Wilson v. Hooser* (1890) 76 Wis. 387; *Weeks v. Milwaukee, L. S. & W. R. Co.* (1891) 78 Wis. 501.

Where the articles of partnership contain an express provision that real estate purchased for partnership purposes shall "be considered as part of the joint stock and funds of the firm, and as possessing all the incidents and liabilities of partnership funds and personal property, and hereby fully impressed by the partner with such incidents and liabilities" the articles being duly probated as part of the will of a deceased partner, the deed of the surviving partner, though not executed for the purpose of paying the debts of the partnership, will convey a perfect title as against the heirs of the deceased. *Davis v. Smith* (1867) 68 Ala. 196.

Where, however, the articles of partnership substitute a new rule and according to their true import, the whole estate, whether real or personal, passes to the surviving partners, they would be bound to surrender to the representatives of the deceased partner his share of the capital and profits, and in such a case equity would decree a conveyance to the surviving partner. *Robertson v. Miller* (1890) 1 Brook. 466.

Negotiations between the partners for settling of the partnership affairs, carried out by the executor of the deceased partner, and the survivor by conveyance by the former to the latter of the partnership lands, bind the heirs and devisees in the

absence of fraud, when twenty-four years have elapsed and all evidence relating to the partnership affairs has disappeared. *Holladay v. Land & River Imp. Co.* (1898) 57 Fed. Rep. 774.

A surviving partner purchasing outstanding title in order to perfect the firm title, holds as trustee for the heirs upon their paying their proportion of the purchase price. *Forrer v. Forrer* (1877) 29 Gratt. 184.

But land purchased by a surviving partner under an attachment issued by a surviving partner to secure payment of a debt due to the late firm does not become partnership real estate descendible to the heirs, and such surviving partner could convert it into personahty. *Bright v. Land & River Imp. Co.* (1890) 42 Fed. Rep. 479.

Where partnership lands held in cotenancy are sold by the survivor, who describes himself as surviving partner, the conveyance passes only his own interest, and severs his relation as cotenant with the heirs, and as survivor he holds the other moiety in trust for the heirs; and such survivor's heirs take the estate charged with the equities in favor of the heirs and of the firm creditors. *Gillett v. Gaffney* (1877) 3 Colo. 351.

A power given by the heirs of a deceased partner to the surviving partner, constituting him attorney in fact, to "settle up" old firm matters and also the estate of the deceased partner among those entitled thereto, and investing him with authority "to do all acts which might be necessary to accomplish said result," is to be given a strict construction so as to preclude the exercise of all authority not expressly given or necessarily implied, as usual and proper in order to execute the agency, and will not be construed so as to imply that the sale of lands is necessary in order to settle up and divide the estate of the deceased, and therefore a conveyance to a purchaser by the surviving partner is not within the powers of the letter of attorney, and is ineffectual as making no reference to the power and not purporting to be executed under its authority. *Southern Cotton Oil Co. v. Henshaw* (1890) 89 Ala. 448. To the same effect *Cummins v. Beaumont* (1880) 68 Ala. 204; *Dearing v. Lightfoot* (1849) 16 Ala. 228; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Scarborough v. Reynolds* (1847) 12 Ala. 252; *Ashley v. Bird* (1836) 1 Mo. 640, 24 Am. Dec. 318; *Rossiter v. Rossiter* (1832) 8 Wend. 494, 14 Am. Dec. 65, 66; *Hay v. Mayer* (1839) 8 Watts, 205, 34 Am. Dec. 453.

In *Colgate v. Colgate* (1873) 23 N. J. Eq. 372, it was sought to specifically perform a contract entered into by the executor of a deceased partner in a firm, with the firm, of which firm such executor was himself a partner, for the sale of the testator's real estate, and the court held that such contract would not be so specifically performed if the *cestui que trust* objected, neither would it be confirmed.

An agreement that at three months after death an account and valuation of the partnership property shall be taken and the shares ascertained according to the capital invested, and one year be allowed to pay over the value of the share of the deceased partner, part of the capital being invested in real estate used in the business, the valuation being made upon death according to such provisions, is sufficient to entitle the survivor claiming theright to take the valuation to specific performance thereof as against the administratrix, widow, and children of the deceased; the agreement for sale of the interest to the survivor working an equitable conversion of such assets as consist of real estate. *Maddock v. Astbury* (1880) 32 N. J. Eq. 181.

In *Pierce v. Trigg* (1839) 10 Leigh, 406, the court refused to set aside a sale made by the surviving partner under a decree reserving the right to the infant heirs to show cause against it, even though the fact that the land was originally purchased for partnership purposes and with partnership funds was not the ground of the original decree, and did

sufficiently appear at that time, it being then clearly ascertained from the bill, answer, and cross-bill, that such fact, if it had appeared to the court making the decree, would have been sufficient to authorize such decree.

As to the general power of a surviving partner to convey, see note to *Galbraith v. Tracy* (Ill.) post, 28 L. R. A. 129.

g. Power of the heirs as against the surviving partner.

The heirs may hold the surviving partner to a strict account for the execution of the trust. *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 552.

So infant heirs of a deceased partner have power to show cause against a decree made for the sale of partnership real estate, where liberty is reserved to them. *Pierce v. Trigg* (1839) 10 Leigh, 406.

The court will not enforce a contract for the purchase of partnership lands from the surviving partner by the infant heirs, where such contract is not for their benefit. *Derry v. Folks* (1832) 60 Miss. 573.

In his character as tenant in common with the heirs of the deceased partner holding the title subject to the demands of the trust, the surviving partner's account must be with his cotenant, in which case the court of probate has no jurisdiction. *Hartnett v. Fegan* (1876) 8 Mo. App. 1.

Although the surviving partner sell the premises without an order of the court, yet the heirs have no right to come in and defeat the equitable title which passes upon the sale. *Barton v. Lovejoy* (Minn.) Feb. 1, 1894.

A purchaser with notice from a surviving partner of land procured in the name of one partner cannot affect the rights of the heirs where the rights of the partner do not survive. *Hart v. Hawkins* (1814) 3 Bibb, 503, 6 Am. Rep. 663.

Bonds and contracts for the purchase of real estate may properly be fulfilled by the surviving partners, and if so fulfilled by a conveyance according to their terms, or if specifically enforced, the right of the widow and heirs in the land thereby acquired attach in the same manner as if the lands had been conveyed in the lifetime of the deceased partner. *Shearer v. Shearer* (1897) 98 Mass. 107.

The organization of a corporation upon the death of a partner for the purpose of carrying on the partnership business, which includes the whole of the partnership property, real and personal, was held, in a proceeding under section 439 of the Civil Code of Kentucky, on behalf of the infant heirs of a deceased partner, not to devert the beneficial interest of the heirs. *Perin v. Megibben* (1892) 6 U. S. App. 343, 53 Fed. Rep. 85.

The continuance of the business by arrangement with the administrator of a deceased partner under a new title and the purchase of real estate and its improvement with partnership moneys, the deeds being taken in the name of one partner, such partnership being afterwards made a corporation, does not upon the insolvency of such a corporation alter the character of the real estate which continues partnership property devolving upon the heirs subject to the equities of the partnership creditors. *Sprague Mfg. Co. v. Hoyt* (1888) 29 Fed. Rep. 421.

It may be that the purchaser is not bound to ascertain whether as a matter of fact there are debts of the copartnership, for the payment of which it is necessary to sell the real estate, and that the conveyance will transfer to him the equitable ownership of the partnership, even if there are no debts, notwithstanding the general rule that the grantee of an equitable title takes no greater interest than his grantor had the right to convey, and that the remedy of the heir-at-law would be against the surviving partner personally, unless it is shown affirmatively that the purchaser know-

or is chargeable with notice that there are no debts. *Megibben v. Perin* (1882) 49 Fed. Rep. 183.

Where there was no agreement stated as to the mode of disposition of real estate, and no statement of the object of the partnership, beyond that it was "for the purchase of lands," and the bill did not show any agreement or understanding that the lands purchased were to be dealt with as partnership stock in trade, or that they should be sold at all, the bill only showing a partnership for acquisition, it was held that the case did not fall within the rules of conversion, and that therefore the case fell within the rule laid down in *Woodridge v. Wilkins* (1890) 8 How. (Miss.) 60, that when the articles of partnership did not provide that such lands should be sold, or otherwise manifest an intention to consider them part of the effects of the partnership business, the heir was entitled to them, and that therefore the heirs were necessary parties to any judgment or decree intended to affect their interests. *Dilworth v. Mayfield* (1858) 36 Miss. 40.

b. As between the heir and personal representatives of such deceased partner.

As between the personal representatives and heirs-at-law of a deceased partner his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the partnership and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate. *Lenow v. Fones* (1886) 48 Ark. 597; *Buchan v. Sumner* (1847) 2 Barb. Ch. 199, 5 L. ed. 613, 47 Am. Dec. 305; *Foster's App.* (1878) 74 Pa. 391, 15 Am. Rep. 553; *Shearer v. Shearer* (1867) 98 Mass. 107; *Wilcox v. Wilcox* (1866) 18 Allen, 254; *Woodridge v. Wilkins* (1890) 8 How. (Miss.) 673; *Dilworth v. Mayfield* (1858) 36 Miss. 52; *Scruggs v. Blair* (1870) 44 Miss. 406; *Mo-Grath v. Sinclair* (1877) 55 Miss. 89; *Clay v. Freeman* (1886) 118 U. S. 97, 30 L. ed. 104; *Coles v. Coles* (1818) 15 Johns. 319, 1 Am. Lead. Cas. Hare & Wallace Notes, 498; *Uhler v. Sempie* (1860) 20 N. J. Eq. 294; *Tillinghast v. Camplin* (1856) 4 R. I. 173, 67 Am. Dec. 510; *Campbell v. Campbell* (1879) 30 N. J. Eq. 415; *Griffey v. Northcutt* (1871) 5 Helsk. 748; *Jones v. Sharp* (1872) 9 Helsk. 660; *Williams v. Fountain* (1871) 7 Baxt. 212; *Hewitt v. Rankin* (1875) 41 Iowa, 39; *Bopp v. Fox* (1872) 63 Ill. 540; *Simpson v. Leech* (1877) 86 Ill. 286; *Galbraith v. Gedge* (1853) 16 B. Mon. 681; *Lowe v. Lowe* (1878) 13 Bush, 688; *Sherley v. Thomasson* (Ky.) Sept. 25, 1888; *Re Codding & Russell* (1881) 9 Fed. Rep. 849; *Logan v. Greenlaw* (1885) 25 Fed. Rep. 398; *Loubat v. Nourse* (1868) 5 Fla. 363; *Buckley v. Buckley* (1850) 11 Barb. 48; *Fairchild v. Fairchild* (1876) 64 N. Y. 478; *Willett v. Brown* (1877) 65 Mo. 138, 27 Am. Rep. 285; *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 235.

There are no equities between heirs and distributees, which can call into exercise or quicken the powers of the court for the conversion of realty into personalty. *Shearer v. Shearer*, *supra*.

If real estate is purchased by partners with partnership means for partnership purposes; if it be so purchased to be dealt with and disposed of as personalty, it should for commercial convenience partake of the character which the partners have thus impressed upon it, and upon a dissolution of the partnership by death, the interest of a deceased partner ought to belong as personalty to his executor or administrator, and not to descend to the heir, and should be treated in all respects as personal estate. *Galbraith v. Gedge*, *supra*; *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 235; *Davis v. Smith* (1897) 82 Ala. 198; *Thornton v. Dixon* (1791) 3 Bro. Ch. 196; *Ludlow v. Cooper* (1851) 4 Ohio St. 1.

And the administrator may release the surviving partner. *Ludlow v. Cooper*, *supra*.

But rents and profits accruing from partnership

real estate subsequent to the decease of a partner are considered as personal property and pass as such to the personal representatives, the heir being entitled only to the real estate, or its surplus, if sold. *Griffey v. Northcutt*, *supra*.

1. Powers vested in executors and administrators of a deceased partner.

The joint property of a partnership must first be applied to the payment of the joint debts, and therefore the administrator of a deceased partner is not entitled to any part of the fund in court for the benefit of separate creditors of next of kin, and the right to any balance from such real estate would be in the heir-at-law. *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 235.

When there is an express agreement between the partners, or one which can be clearly implied from the circumstances, to consider and treat such real estate as part of the personal property stock of the partnership, then, though the legal title to the deceased partner's interest descends to the heir under the statute of descents, the equitable title and the full beneficial interest, after the payment of the partnership debts and adjustment of the equities between the partners, vests in the personal representatives of the deceased partner for distribution as personal property, and to this end a court of equity may force a conveyance of the legal title from the heir to the vendee of the personal representatives. *Perin v. Megibben* (1892) 6 U. S. App. 348, 58 Fed. Rep. 86; *Galbraith v. Gedge* (1855) 16 B. Mon. 681; *Cornwall v. Cornwall* (1869) 6 Bush, 369; *Bank of Louisville v. Hall* (1871) 8 Bush, 673; *Lowe v. Lowe* (1878) 13 Bush, 688; *Holmes v. Self* (1881) 79 Ky. 597; *Caakey v. Caakey*, 5 Ky. L. Rep. 775; *Flanagan v. Shuck* (1885) 82 Ky. 619.

A bill in equity seeking a settlement of the partnership affairs, should be so framed as to enable a court to take complete cognizance of the subject-matter, and on the theory of a settlement of the accounts between the complainant (the surviving partner) and the intestate, and between them and the creditors, in order that the creditors may have an opportunity of presenting their claims, and that a proper distribution may be made of the moneys arising from a sale of the real estate, the administrator of the intestate and the heirs being joined in the bill. *Whitney v. Cotten* (1876) 53 Miss. 689.

In a suit relating to property in which the partners had a joint interest, such as real estate, the administrator of a deceased partner must make himself a party, so that the interest of the partner in the property shall come within his administration. *Guilbeau Bros. v. Melancon* (1876) 28 La. Ann. 627.

A power of sale given by a testator to his executors to sell and convey his interest in partnership, confers on the executors the right to sell real estate as well of the partnership as of the testator individually, both being embraced under the literal terms of the will, and the one being as much within the intent and meaning thereof as the other. *Davis v. Christian* (1859) 15 Gratt. 11.

A clause in a will authorizing executors to carry on the copartnership business for such length of time as they deem necessary and expedient for the best interests of the estate and partnership business, and giving authority to join with the copartner in the execution of any and all contracts, deeds, mortgages, leases, releases, notes, bonds, and all other papers and instruments necessary for the proper conduct of the business, for the sale or mortgaging of the lands, etc., for the purpose of borrowing money for such business, and renewing and continuing any firm indebtedness that might exist at his decease, and for the doing of such act as they deem necessary and advisable, confers power upon the executor to join with the surviving partner in re-affirming a mortgage already existing over the part-

nership real estate, such mortgage when so rectified dating back to the time of execution of the original. *Grown v. Morrill* (1891) 45 Minn. 483.

A will empowering executors to continue deceased's interest in the partnership business, and to turn the same into a joint-stock company with power to hold stock therein, empowers his executors to continue all the testator's property, including real estate owned by him individually, and as a partner which he held in trust for the firm doing such business. *Ballantine v. Frelinghuysen* (1884), 38 N. J. Eq. 236.

The administrator of a deceased partner has power in his individual capacity to purchase from the surviving partner. Per *Justice Turner* in *Jones v. Sharp* (1872) 9 Heisk. 600.

So the executor of a deceased partner has a right to sell to the surviving partner the interest of the deceased in the partnership lands and other estates, the sale being bona fide, and such sale may also include the profits made by the surviving partner, subsequent to the death of the deceased. *Kimball v. Lincoln*, 99 Ill. 578.

No action will lie against the administrator of a deceased partner for negligence in receiving and accounting for the proceeds of his intestate's share or interest in partnership real estate, required for the purpose of paying the partnership liabilities. *Merritt v. Dickey* (1878) 38 Mich. 41.

Equity will interfere to prevent the administrator of a deceased partner from selling it for the individual creditors, and will control it so as to give a preference to the joint creditors. *Whitney v. Cotten* (1876) 53 Miss. 639; *Winslow v. Chiffelle* (1894) Harp. Eq. 25; *Divine v. Mitohum* (1844) 4 B. Mon. 436, 41 Am. Dec. 241.

The administratrix of a deceased partner has no power to compel a conveyance of partnership real estate as against surviving partners, and the minor children under facts showing that subsequent to the partnership the deceased and one of the partners purchased real estate for partnership purposes under an understanding treating it as partnership property, and that when the new partner was taken in further real estate was acquired, part in the firm's name and part in the name of one partner, all being paid for by the firm, under an agreement that in case of a sale the proceeds should be paid over to the firm and upon dissolution be divided as other personal property of the firm. *Shearer v. Paine* (1866) 12 Allen, 239.

Upon a supplemental bill filed against an executrix of a deceased partner the original bill being filed by such executrix, alleging that the land standing in the name of the individual members was purchased with the individual means of the testator and charging fraud and misconduct in the management of the firm's affairs, both before and since the testator's death, and seeking to enjoin such survivor from exercising power or authority over the partnership affairs, and praying a receiver, such surviving partner being appointed receiver with power to collect and receive partnership moneys, and upon the decree directing the payment of debts and also the payment by such survivor of his indebtedness to the firm: the facts showed an agreement between the partners eliminating it from settlement; with power for the survivor to purchase or sell the same and release the mortgage thereon, depositing the amount in court as firm assets for the court's disposal, such contract upon being accepted by the executrix to whom a deed was tendered and refused a counter proposition by such executrix to indemnify the surviving partner against liability for the same and to charge herself with the amount of the purchase money, on account of her share of the surplus assets of the partnership, being also refused, the surviving partner subsequently petitioning the court for fulfillment of the contract, and pray-

ing a sale charging the loss against such executrix; the relief being refused by the court personal property was sold by the court and two of the mortgages were foreclosed, the loss occasioned being so thrust upon the executrix,—the court held that where there was no unfairness or imposition, equity might enforce a contract entered into between the personal representatives of a deceased partner and the surviving partner for the purchase of the partnership real estate, and might award compensation where performance was impossible or impracticable where the remedy at law was uncertain, but in cases where the plaintiff's action prevented the performance, relief would be refused. *Ludlum v. Buckingham* (1883) 35 N. J. Eq. 71.

3. *Ultimate position of the heirs.*

In the absence of any agreement between the partners, express or implied, to the contrary, both the legal title and the beneficial interest in the surplus of partnership real estate, after the debts and the equities of the partnership are satisfied, descend to the heir-at-law. *Perin v. Megibben* (1892) 6 U. S. App. 343, 58 Fed. Rep. 86. To the same effect, *Houston v. Stanton*, 11 Ala. 412; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Offutt v. Scott* (1872) 47 Ala. 104; *Gray v. Palmer* (1856) 9 Cal. 616; *Galbraith v. Tracy* (1894) 153 Ill. 54, 28 L. R. A. 129; *Pepper v. Pepper* (1887) 24 Ill. App. 516; *Strong v. Lord* (1883) 107 Ill. 25; *Patterson v. Blake* (1850) 12 Ind. 438; *Holland v. Fuller* (1850) 13 Ind. 195; *Huston v. Neil* (1873) 41 Ind. 506; *Rossum v. Sinker* (1880) (Ind.) 12 Cent. L. J. 202; *Walling v. Burgess* (1889) 7 L. R. A. 481, 123 Ind. 299; *Galbraith v. Gedge* (1855) 16 B. Mon. 631; *Cornwall v. Cornwall* (1890) 6 Bush, 399; *Bank of Louisville v. Hall* (1871) 8 Bush, 672; *Lowe v. Lowe* (1873) 12 Bush, 668; *Holmes v. Self* (1851) 79 Ky. 297; *Caskey v. Caskey*, 5 Ky. L. Rep. 770; *Flanagan v. Shuck* (1835) 82 Ky. 619; *Goodburn v. Stevens* (1847) 5 Gill, 1; *Whitman v. Boston & M. Railroad* (1861) 3 Allen, 134; *Wilcox v. Wilcox* (1866) 13 Allen, 253; *Shearer v. Shearer* (1867) 96 Mass. 111; *Scruggs v. Blair* (1870) 44 Miss. 406; *Collins v. Warren* (1859) 29 Mo. 236; *Matthews v. Hunter* (1878) 67 Mo. 293; *Priest v. Chouteau* (1884) 85 Mo. 393, 55 Am. Rep. 877; *Smith v. Wood* (1890) 1 N. J. Eq. 62; *Campbell v. Campbell* (1879) 30 N. J. Eq. 415; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Sears v. Mack* (1848) 2 Bradf. 394; *Buckley v. Buckley* (1850) 11 Barb. 44; *Collum v. Read* (1862) 24 N. Y. 505; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407; *Hanff v. Howard* (1857) 54 N. C. 440; *Sumner v. Hampeon* (1838) 8 Ohio, 358, 32 Am. Dec. 722; *Page v. Thomas* (1835) 43 Ohio St. 36, 54 Am. Rep. 797; *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553; *Tillinghast v. Champlin* (1856) 4 R. L. 173, 67 Am. Dec. 510; *Yeatman v. Woods* (1834) 6 Yerg. 20, 37 Am. Dec. 452; *McAlister v. Montgomery* (1818) 3 Hayw. (Tenn.) 94; *Barcroft v. Snodgrass* (1800) 1 Coldw. 445; *Piper v. Smith* (1858) 1 Head, 93; *Griffey v. Northcott* (1871) 5 Heisk. 746; *Rice v. Barnard* (1848) 20 Vt. 479, 50 Am. Dec. 54; *Martin v. Morris* (1855) 63 Wis. 412; *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 533; *Marratt v. Murphy* (1875) 11 Nat. Bankr. Reg. 123; *Platt v. Oliver* (1843) 8 McLean, 37.

And becomes subject to the rules governing the devolution of real estate. *Greenwood v. Marvin* (1888) 111 N. Y. 433; *Hewitt v. Rankin* (1875) 41 Iowa, 35.

Distributable equally among the surviving partners and heirs. *Way v. Stebbins* (1892) 47 Mich. 296.

And where the partnership lands, or any part of them, are not absolutely necessary for the payment of the debts of the firm, they should be released from the trust as soon as practicable for the heirs' benefit. *Weld v. Johnson Mfg. Co. supra*.

In Tennessee real estate of a partnership which is not needed for the payment of its debts descends as realty to the heirs. *Williamson v. Fountain* (1874) 7 Baxt. 212; *Piper v. Smith* (1859) 1 Head, 97.

A resulting trust in such cases inuring for the benefit of the members of the firm and the heirs of

deceased members, such trust being saved by section 50 of the New York Statute, and the holder of the legal title then becomes a trustee of real estate for the benefit of those interested. *Fairchild v. Fairchild* (1876) 64 N. Y. 471.

And parties claiming the benefit need not bring themselves within the exception contained in section 53 of the New York Statute. *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun. 407.

The only change made by the Tennessee Act of 1784 upon the common-law doctrine was that the surplus or remainder after discharging the lien in favor of the other partners and creditors goes to the heirs and not to the personal representatives. *Solomon v. Fitzgerald* (1872) 7 Heisk. 552.

Section 6 of chapter 22 of the Tennessee Act of 1784 provides that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any other useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner or partners in order to enable him or them to settle and adjust the partnership business, and pay for the debts which may have been contracted in pursuit of such joint business, but as soon as it is effected, the survivor or survivors shall account with the heirs, executors, administrators and assigns respectively, of the deceased partners for all such parts, shares, and moneys as he or they may be entitled to by virtue of the original agreement, if any, or according to his or their share or part in the joint concern, in the same manner as partnership stock is usually settled, between joint merchants or the representatives of their deceased partners.

If a partner died after the payment of the purchase money and before confirmation of the sale, the probate court will direct a conveyance to the heirs of such deceased partner's undivided interest, or the heirs, by application to the court, can obtain the legal title to such interest. *Blanchard v. Floyd* (1890) 98 Ala. 53.

Where lands owned by a decedent have been sold by an order of the probate court and the purchase money paid, the title which passed by operation of law to the heirs on the death of the decedent is not divested until, under the order of the court, a conveyance is executed to the purchaser. *Ibid.*; *Lanford v. Dunklin* (1892) 71 Ala. 504.

Where there is nothing in the facts and circumstances of the case which can take it out of the operation of the principle partnership lands not being required for the payment of the firm's debts and liabilities descended to the heir and are not subject to distribution as personality, and therefore the widow cannot treat them as personality in distributing her deceased husband's estate. *Williamson v. Fountain* (1874) 7 Baxt. 212.

Land purchased on credit for the purposes of cultivating for the joint benefit of the owners, the profits arising therefrom being converted into realty by improving the property, the partnership to be continued until the object is accomplished, is upon the death of one partner partnership property and bound for the firm debts and can be dealt with by the partners within the scope of their authority, passing to the heirs of the deceased partner and not to the personal representatives. *Berry v. Folkes* (1882) 60 Miss. 576.

III. English decisions.

a. Relating to dower.

In *Smith v. Smith* (1800) 5 Ves. Jr. 189, the widow's right to dower was established against the assignees in bankruptcy, upon estates purchased with partnership funds conveyed to one partner, under a specific agreement that such estate should be his and he should be a debtor to the partnership for the money.

Real estate purchased with partnership funds
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descends to the heirs against the residuary legatee, and is therefore real estate sufficient to entitle a widow to a reference being made to the master to settle her right of dower. *Bell v. Phyn* (1802) 7 Ves. Jr. 453.

Where the administrator of a deceased partner assigned all the interest of the deceased in the partnership premises, unto or in trust for the parties entitled, it was held that such assignment did not deprive the administratrix of her right to claim, as part of the deceased partner's estate, an estate in a renewed lease which the intestate's copartner had taken after his decease. *Clegg v. Fishwick* (1849) 1 Macn. & G. 294, 19 L. J. Ch. N. S. 49, 18 Jur. 993, 1 Hall & T. 390.

In *Conger v. Platt* (1868) 25 U. C. Q. B. 277, the court held that a plea on equitable grounds that land was partnership property and stock in trade, owned by the deceased and another in partnership together as merchants purchased by them as such, paid for out of partnership moneys used in the partnership, and that therefore the husband was never seized thereof otherwise than as partner, was a good plea and formed a good defense to a claim by the widow for dower.

Where the parties entered into copartnership without articles, purchased real estate for the purposes of trade, borrowing money therefor, the land being conveyed to them in moieties to uses barring dower; mortgaged to secure a loan; and on the death of one partner leaving the other his heir-at-law, the latter took a third party into partnership, each of the firms having erected buildings for trade purposes, paying for them and the insurance on them, and the interest of the mortgage and ultimately the mortgage out of partnership funds, taking the reconveyance to them as general tenants when the surviving partner of the first partnership died, his heir claiming the land, it was held that such real estate had been converted into personality. *Houghton v. Houghton* (1841) 34 Eng. Ch. 490, 11 Sim. 491, 10 L. J. Ch. N. S. 310, 5 Jur. 523.

b. Position of the heir.

The early English cases relating to the devolution of partnership real estate established the right thereto in favor of the heir-at-law. *Thornton v. Dixon* (1791) 8 Bro. Ch. 199; *Bell v. Phyn* (1802) 7 Ves. Jr. 453; *Balmaim v. Shore* (1844) 9 Ves. Jr. 500.

And that in order to vary such rule there must be a special agreement. *Thornton v. Dixon*, *supra*.

Later cases, however, show that it is the general rule in England that real estate belonging to a copartnership, unless there is something in the partnership articles to give it a different direction, is to be considered in equity as personal property, and upon the death of one of the partners and after the debts of the firm have been paid and the equities have been adjusted between the several members of the firm, it goes to the personal representatives of the deceased partner and not to his heirs. *Townsend v. Devaynes*, *Montague on Partnership*, appendix, 97; *Seikrig v. Davies* (1814) 2 Dow, P. C. 231, 2 Rose, Bankr. Cas. 97; *Phillips v. Phillips* (1832) 1 Myl. & K. 649, 1 L. J. Ch. N. S. 214; *Broom v. Broom* (1834) 3 Myl. & K. 443; *Houghton v. Houghton* (1841) 34 Eng. Ch. 490, 11 Sim. 491, 10 L. J. Ch. N. S. 310, 5 Jur. 523; *Morris v. Kearley* (1836) 2 Younge & C. Exch. 132.

Yet in *Rowley v. Adams* (1844) 7 Beav. 548, 8 Jur. 994, it was treated as realty after a dissolution of the firm by reason of a lease thereof, and as belonging to the heir-at-law. *Randall v. Randall* (1836) 7 Sim. 274, 4 L. J. Ch. N. S. 187.

In a later case, however, it was said that it would be treated as personal estate so far as necessary to carry out the intention of the partners. *Baxter v. Brown* (1845) 7 Mann. & G. 193, 9 Jur. 829, 1 Dutw. Reg. Cas. 120, note, 8 Scott, N. R. 1019, 14 L. J. C. P. 132.

Real estate purchased out of partnership assets and used for the purposes of the firm is held per-

sonal property, both as between the partners and as between the heir and personal representatives of a deceased partner. *Holroyd v. Holroyd* (1859) 28 L. J. Ch. 902, 7 Week. Rep. 423; *Phillips v. Phillips* (1832) 1 Myl. & K. 649, 1 L. J. Ch. N. S. 214.

In an ordinary commercial partnership dissolved by the death of a partner, his heirs have a right to participate with the surviving partners in the liquidation of the partnership affairs till a partition takes place, and if one of the partners sues to recover a debt due to the firm, the others may be made partners for the assurance of their rights. *Morris v. Odgren*, 11 M. R. 435.

Where merchants became partners in buying and selling real estate, some being conveyed to each and some to them jointly, the executor of the deceased partner claiming the legal title in that conveyed to the deceased, contending that the same should be conveyed to himself and the surviving partner jointly and that the heirs were trustees for the same, the court held that the sole purposes of the purchases being the sale of the land as part of the stock trade, the same was personality. *Wylie v. Wylie*, 4 Grant, Ch. (U. C.) 373.

Where two parties seized of real estate carry on the business in partnership on the premises for a number of years, and provide that the survivor shall purchase such real estate at a stated price, and such term having expired, enter into a new parol agreement continuing the partnership on the old terms, the stipulation as to purchase is still binding upon the survivor and such real estate is converted into personality and does not pass to the heir. *Essex v. Essex* (1855) 20 Beav. 443.

In *Balmain v. Shore* (1804) 9 Ves. Jr. 500, where real estate purchased by partners was conveyed to them and their respective heirs equally as tenants in common, the premises being used in the trade as long as the partnership lasted, with covenants against alienation and partition, it was held that the partners could claim nothing as partners except through the covenants in the deed, subject to which it went as real estate and not as personality, the court distinguishing the case from that of *Thornton v. Dixon* (1791) 8 Bro. Ch. 190.

Where partners acquired two denominations of real estate purchased out of partnership assets, one partner farming one portion and residing thereon, the farming accounts being entered in the profit and loss of the firm, the other lands being occupied by tenants, and the rents brought into the same account, money being raised on the security of the land for partnership purposes, it was held upon the death of one partner whose share was not taken by the survivors, that his share became personal property passing to his personal representatives and not to his heirs. *Murtagh v. Costello*, L. R. 7 Ir. Rep. 423. *Waterer v. Waterer*, L. R. 15 Eq. 402, observed upon and distinguished.

In *Townsend v. Devaynes*, 1 Montague on Partnership, appendix 97, cited in *Darby v. Darby* (1856) 3 Drew. 490, 3 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Week. Rep. 413, partners purchased real estate on which they carried on business, part of the purchase money being paid for out of partnership capital and part being left on mortgage, the value of the premises being treated as part of the partnership stock, and as capital in stating the yearly balances of the partnership, one partner dying, his executors sold his interest to the survivors the heir claimed so much as was the value of his share of the real estate and the master having reported in favor of the heir's claim, an exception was subsequently allowed to his report.

Where certain real estate, partly agricultural and partly a quarry, was vested in several co-owners in undivided shares, the quarry being worked and the land let the rents received by one owner on behalf of the others the yearly rents and profits, after paying all outgoings and expenses being divided between them in proportion to their shares, 37 L. R. A.

part of the profits being laid out in other lands, partly agricultural and partly used in connection with the quarry, such latter lands being conveyed to the managing owner and managed by him in the same way as the lands originally belonging to him and his co-owners, it was held that the share of one of such owners, dying intestate, in such purchased lands, descended to the heir-at-law, and did not pass to the personal representatives. *Seward v. Blakeway* (1868) L. R. 6 Eq. 479, 16 Week. Rep. 1104.

Where a party carrying on trade upon real estate owned by him took a son into partnership for a specified term and conveyed to him in fee a certain share of the lands, the articles containing covenants that the land should be held as partnership property and be considered and treated as part of the joint stock, and provided for its purchase at a given sum in case of the death or retirement of either partner during the term, the land being improved out of the partnership funds, and the parties continued after the expiration of the term and until the death of the father to carry on the trade without any new agreement the son's right of pre-emption as to his father's share of the stock including the land, expired with the term specified, and the partnership debts having been paid the father's share of the land retained its original character and descended to his heir. *Cookson v. Cookson* (1897) 8 Sim. 529, 6 L. J. Ch. N. S. 337, 1 Jur. 821.

Where real estate was purchased by the partners out of partnership capital and for partnership purposes; and one partner died leaving a widow and children; the widow administering his estate and selling her interest in the real estate to the surviving partner, who subsequently became bankrupt without paying the purchase money; portions of the estate being purchased at a sale under the order in bankruptcy by the defendants; upon a bill filed by the widow and administratrix against the heir and the assignee in bankruptcy for a confirmation of the sale and for a declaration that the share of the deceased partner became personal assets to be administered by his administratrix, the court held that it followed from the decision in *Phillips v. Phillips* (1832) 1 Myl. & K. 649, 1 L. J. Ch. N. S. 214, that the infant heir was a trustee for the administratrix of the deceased partner. *Broom v. Broom* (1834) 3 Myl. & K. 443; the court following *Fereday v. Wightwick* (1829) 1 Russ. & M. 45, Tam. 250; *Phillips v. Phillips* (1832) 1 Myl. & K. 649, 1 L. J. Ch. N. S. 214; *Broom v. Broom*, and *Cookson v. Cookson*, *supra*; *Townsend v. Devaynes*, cited in 11 Sim. 496.

In *Re Ryan*, 3 Ir. Eq. Rep. 222, where real estate was purchased out of partnership funds, the conveyance being made to the partners and their heirs forever; one of the partners dying leaving heirs; the survivor continuing the business under the style of the old firm until his bankruptcy, mortgaging the premises to a creditor and depositing with him title deeds of other property by way of equitable mortgage, the latter property having been held in the name of the mother of the partners, the partnership business being carried on upon the same, the mother having made an assignment to the continuing partner; partnership moneys being expended upon the same during the life of the deceased partner, it was held, the mortgagees seeking to make both properties liable for the debts of the surviving partner, his claim was discharged by a next friend of the infant, who claimed to be entitled in the right of the deceased partner to a moiety to each of the premises, that the parties so discharging the incumbrance were entitled to a moiety of the first premises purchased out of the partnership funds, but that with respect to the other property assigned by the mother, they had no claim as they had not shown that the mortgagees had notice that such property was partnership.

R.W.

WISCONSIN SUPREME COURT.

Re Leslie WEBB.

(.....Wis.....)

1. The suspension of a sentence already pronounced until further order of the court in case defendant pays the cost that day, is beyond the authority of the court, at least when it is done merely as a matter of leniency to the prisoner.
2. An order committing a defendant to serve out a sentence previously pronounced but suspended, made after the time of imprisonment named in the sentence had expired, is void for want of jurisdiction.

(February 5, 1895.)

PETITION for a writ of habeas corpus to release petitioner from the custody of the sheriff of Grant County to which he had been committed under a sentence punishing him for adultery of which he had been found guilty. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. T. L. Cleary, for petitioner:

The court had no jurisdiction after the term to resentence the defendant, as there had been no legal suspension of sentence.

In *Re Crow*, 60 Wis. 849; *State v. Addy*, 43 N. S. L. 113, 89 Am. Rep. 547; *Whitney v. State*, 6 Lea, 247; *Re Lange*, 85 U. S. 18 Wall. 168, 21 L. ed. 872,—if there was no judgment the power of the court to render it at the subsequent term is equally certain.

Greenfield v. State, 7 Baxt. 18.

The court may suspend the execution of its judgment in a proper case.

Allen v. State, Mart. & Y. 294; *Fultz v. State*, 2 Sneed, 232.

The court which rendered the judgment cannot vacate it, or render a new judgment after the term at which it was pronounced is ended, judgment executed and the punishment properly begun.

Com. v. Foster, 123 Mass. 817, 28 Am. Rep. 826; *State v. Gray*, 87 N. J. L. 868; *People v. Meservey*, 76 Mich. 228; *People v. Kelley*, 79 Mich. 820; *Elsner v. Shrigley*, 80 Iowa, 80; *People v. Monroe County Court of Sessions*, 66 Hun, 550; *Re Fuller*, 34 Neb. 581.

When the court suspends sentence it cannot subsequently revoke suspension and renew sentence.

United States v. Wilson, 46 Fed. Rep. 748; *People v. Blackburn*, 6 Utah, 847; *United States v. Pile*, 130 U. S. 280, 82 L. ed. 904.

Messrs. E. M. Lowry and L. K. Luse, Asst. Atty. Gen., for respondent:

The power to suspend sentence in a criminal case and to suspend execution of the sentence was inherent in all courts at the common law.

People v. Monroe County Court of Sessions, 23 L. R. A. 856, 141 N. Y. 288; Bishop, Crim. Proc. 1st. ed. § 880; Rapalje, Crim. Proc. § 884.

NOTE.—For note as to suspension of sentence, see *People v. Cummings* (Mich.) 14 L. R. A. 285, also the later case of *People v. Monroe County Court of Sessions* (N. Y.) 23 L. R. A. 856.
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The court may suspend the execution of its judgment in a proper case.

Allen v. State, Mart. & Y. 294; *Fultz v. State*, 2 Sneed, 232; *Philpot v. State*, 65 N. H. 250.

If the sentence was erroneous, it could not be attacked upon this proceeding which goes only to the question of jurisdiction.

Re French, 81 Wis. 597; *Re Eckart*, 85 Wis. 681; *Gibson v. State*, 68 Miss. 241; *Ex parte Williams*, 26 Fla. 810.

Pinney, J., delivered the opinion of the court:

The petitioner was convicted of the crime of adultery in the circuit court for Grant county, and on the 16th day of March, 1894, at the request of the attorneys for the state and for the defendant, he was sentenced to pay a fine of \$200, and to pay the costs of the prosecution, taxed at \$400, and stand committed to the common jail of the county until such fine and costs were paid, the period of imprisonment to be limited to six months; and, in case said costs were paid that day, the court directed "that the sentence of imprisonment be suspended until the further order of the court." The defendant paid the costs accordingly. At a succeeding term, October 12, 1894, the defendant being present in court with his counsel, the court made an order reciting the sentence; that the fine had not been paid; and "that there is good reason why further leniency should not be extended to the defendant, but that he should be required to fully comply with said sentence, or be committed to the common jail until said fine is paid;" ordering and adjudging that the defendant "do forthwith pay said fine of \$200, and that he stand committed to the common jail of the county until said fine is paid, the period of imprisonment being limited in accordance with said sentence to the period of six months." A commitment was issued accordingly, under which the defendant was confined in the county jail. These facts appearing by the return of the sheriff to the writ of habeas corpus, the petitioner demurred to the return.

No legal reason appears to have existed to warrant the court in suspending its sentence, in whole or in part, after it had been pronounced, if it be conceded the court had such power. The action of the court seems to have been founded on the joint request of the prosecution and of the defendant, and to have been granted as a matter of leniency to the defendant. While it may be said that the defendant is in no position to complain or take advantage of the clemency of the court, the question at issue is one of power, involving serious considerations of public policy respecting the administration of criminal justice. After the defendant had been convicted, and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the

court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it has been pronounced cannot be sustained, except as incident to a review of the case upon a writ of error, or upon other well-established legal grounds. After sentence given, the matter within these limits would seem to be wholly within the hands of the executive officers of the law. The sole power is vested in the governor "to grant reprieves, commutations, and pardons after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper." Const. art. 5, § 6. And the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power, not judicial, but vested in the executive. When the sentence was pronounced, the defendant was in custody; and it became *eo instanti* his duty to pay his fine, and, for failure to do so, the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he has been committed and is now held in confinement. The sentence had been in part complied with, and the attempted withdrawal indefinitely of the remainder was, we think, without legal warrant and void.

In the case of *State v. Grotikau*, 78 Wis. 589, before execution of a sentence of imprisonment for one year, a stay of execution was granted pending a writ of error; and, after affirmance of the judgment, it was held that the sentence could be rightly enforced, although the year had in the meantime expired. The stay was for a legal cause. *Reines v. State*, 51 Wis. 159. The case of *People v. Monroe County Court of Sessions*, 141 N. Y. 238, 23 L. R. A. 856, was not a case where execution of a sentence had been suspended, but where sentence had been postponed; and the power of the court to delay sentence, in its discretion, was sustained, and numerous authorities were cited to support it. But the present case involves different considerations. Here the execution of a sentence already pronounced is indefinitely suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the "Ticket of Leave System," without any of its safeguards, leaving the convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it, to the great detriment, it may be, of the interests of the public,—a power plainly liable to great abuse. We think, therefore, that the circuit court had no authority to make the order of October 12, 1894. As already observed, the 27 L. R. A.

period of imprisonment, in contemplation of law, commenced March 16, 1894, when the defendant was in custody and failed to pay the fine imposed against him, and he could not be lawfully imprisoned after it had expired. The order of October 12, 1894, was not merely erroneous; in making it, the court exceeded its jurisdiction.

The petitioner's demurrer to the respondent's return must be sustained, and he is entitled to be discharged from custody. It is ordered accordingly.

William BALLIN *et al.*, *Repts.*,
v.

MERCHANT'S EXCHANGE BANK *et al.*,
Impleaded, etc., *Appts.*

(..... Wis.)

1. The mere insolvency of a corporation known to a creditor will not prevent him from obtaining a valid lien by attachment of its property.
2. A charge of fraud and collusion by attaching creditors of a corporation, made by plaintiff in a judgment creditors' action against the corporation and other creditors, having been abandoned by him, a third class of creditors who are among the defendants and who have not attempted to form any issue with their co-defendants cannot litigate that question.

(February 5, 1895.)

A PPEAL by part of the defendants from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in a proceeding brought to sequester and equally distribute among creditors the property of the J. & E. B. Friend Lace Importing Company, an insolvent corporation. *Reversed in part; affirmed in part.*

Statement by Winslow, J.:

Action under section 8216, Rev. Stat., for the sequestration of the property of an insolvent trading corporation, and the distribution of its assets among its creditors. On the 2d of December, 1889, the J. & E. B. Friend Lace Importing Company, a corporation in Milwaukee, was insolvent, having assets composed of a stock of merchandise worth from \$7,000 to \$8,000, and accounts of the nominal value of \$17,000, and having liabilities considerably in excess of its total assets. On that day the defendants and appellants the Merchants' Exchange Bank and the Kalamazoo Knitting Company (hereafter known as the "first class of creditors") levied attachments on the entire stock of goods of the corporation, upon claims aggregating more than the entire value of the stock; and the same day the corporation, by its officers, made assignments of all said accounts to

NOTE—As to preferences among creditors of an insolvent corporation including preferences obtained by attachment or other legal proceedings, see *note to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.)*, 23 L. R. A. 802.

various other creditors, who are defendants in this action (hereafter known as the "second class of creditors"), and whose claims aggregate over \$8,000. On the 8d of December, 1889, the defendants and appellants Mossbacher and others (hereafter known as the "third class of creditors") levied attachments on said stock of goods, on claims aggregating more than \$6,000. Afterwards, the plaintiffs in this action obtained judgment against the corporation for \$2,048.76, and, upon the return of an execution unsatisfied, commenced this action against the corporation, and all of the said creditors, and the sheriff, who then had possession of the stock of goods under the writ of attachment or under executions issued on the action commenced by the attachment. In their complaint the plaintiffs, after setting forth the facts showing the right to sue, and the insolvency of the corporation, allege, in effect, that all of the said attachments, and the assignments of the accounts, were collusively and fraudulently made, at the instance and request of the officers of the corporation, with knowledge by all parties of its insolvency, and with intent to give and secure unjust preference over other creditors. The plaintiffs prayed for sequestration of the property of the corporation, and for the appointment of a receiver, and that the attached property be turned over to such receiver, and that the defendants who had received assignments of accounts should account for the same to the receiver. Upon this complaint an interlocutory order was made, declaring the corporation insolvent, adjudging sequestration of its property, appointing Morris Spelser receiver thereof; also, requiring the sheriff to surrender to the receiver all the property held by him under the defendants' attachment and executions, and restraining all other proceedings in the attachment actions. This order was appealed from, and affirmed by this court in *Ballin v. Loeb*, 78 Wis. 404. Thereafter, the receiver, under the order of the court, sold the stock of goods, and realized the sum of \$7,225. The answer of the first class of creditors admitted the insolvency of the corporation, but denied all collusion or conspiracy to obtain preference, set forth at length their attachment proceedings, and claimed a first lien by virtue thereof on the fund derived from the sale of the stock of goods. No answer by the second class of creditors appears in the printed case. The third class of creditors, in their answer, denied all collusion or conspiracy, and denied knowledge of the insolvency of the corporation when they attached, and claim their attachment to be a first lien on the stock of goods. They also allege a fraudulent conspiracy and combination between the corporation and the first and second classes of creditors, to give them preference over other creditors, by means of collusive attachments and assignments, in fraud of the other creditors of the corporation. This answer is not in form of a counterclaim or cross-complaint, and was served only on the plaintiffs.

When the action came to trial, the plaintiffs moved for judgment upon the pleadings, and, after having taken the matter under

advisement, the trial court made an order providing—First, that there should be an equal and ratable distribution of all the property in the hands of the receiver among all the creditors of the corporation who have proven, or who may prove, their claims; second, that no preference be allowed, and that all other proceedings by the defendants be enjoined until the further order of the court; third, that the action, in so far as it attempts to set aside the assignment of accounts, be dismissed, because the same should be done in a separate action brought by the sheriff; fourth, that the receiver should bring suits against the creditors of the second class to contest the validity of the assignments of accounts, and report the conclusion to the court; fifth, that the distribution to creditors be deferred until the conclusion of such suits, and the filing of the receiver's report. In the reciting clauses of this order, it is said that the plaintiffs "moved the court for judgment upon the pleadings, records, and facts admitted in open court by all parties; that the corporation known as the J. & E. B. Friend Lace Importing Company, at the date mentioned in the amended complaint, was insolvent, and its insolvency was known by the corporation and the defendants." In a subsequent part of the same order, as afterward amended by the court, it is, however, recited that the third class of creditors, represented by Mr. Bloodgood, objected to the rendering of judgment for the plaintiff on the ground "that the final order of distribution to be entered herein should contain a provision that the defendants were entitled to a preference because they had liens by virtue of their attachments set out in their answer herein, and that the insolvency of said defendant company was not known to said defendants, represented by said attorneys Bloodgood, Bloodgood & Kemper, at the time of the issuing and levying of the attachments by said respective defendants." It is further recited in said order that said third class of creditors "offered to prove that the transaction of levying the attachments was a voluntary assignment of the entire property of the corporation defendant, and was brought about by a conspiracy between the attaching creditors and those taking the assignments, and that one feature of the fraud was that those attachments should not be traversed; another, that there was no legal or equitable ground for those attachments; another, that the property, when seized by the sheriff under attachment, was to be immediately sold under an order from the court, to be granted under the statute, in order that the corporation defendant, or its officers, might purchase the same; another, that there was a conspiracy to secure debts or claims in which the officers of the corporation were interested,—which offer was considered immaterial." The first class of creditors, represented by Mr. Flanders, appeal from so much of this order as provides for an equal distribution of property and refuses to allow any preference, and enjoins other proceedings by the defendant. The third class of creditors, represented by Mr. Bloodgood, appeal from the whole order.

Messrs. Winkler, Flanders, Smith, Bottum & Vilas, for appellants:

By the levies of their several attachments and executions, before the commencement of the receivership proceedings, the appellant acquired lawful and valid liens upon the property of said corporation.

The property of an insolvent corporation before proceedings for a sequestration is not a "trust fund" in the ordinary sense of the term.

Hoespes v. Northwestern Mfg. & Car Co. 15 L. R. A. 470, 48 Minn. 174; *Fogg v. Blair*, 133 U. S. 841, 33 L. ed. 724; *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 871, 37 L. ed. 1113; *White, Potter & Paige Mfg. Co. v. Henry B. Pettis Importing Co.* 30 Fed. Rep. 865; *Wait, Insolvent Corp.* § 142; 2 Pom. Eq. Jur. § 1046.

Whether solvent or insolvent the capital stock and property of the corporation is a trust fund created for the payment of the debts of the corporation.

Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57; *Nasro v. Merchants Mut. Ins. Co. of Milwaukee*, 14 Wis. 295, 302; *Wait, Insolvent Corp.* § 142; 2 Morawetz, Priv. Corp. 2d ed. § 780; *Union Nat. Bank of Chicago v. Douglass*, 1 McCrary, 86.

The corporation may employ its property in legitimate channels of business without restriction, notwithstanding it is insolvent, so long as no sequestration proceedings are commenced (*Paulding v. Chrome Steel Co.* 94 N. Y. 384), and this implies the correlative right of creditors to pursue the usual remedies for the collection and security of their claims.

Breens v. Merchants & Mechanics Bank, 11 Colo. 97.

The legal ownership of the assets of the corporation is not altered or impaired by insolvency.

2 Morawetz, Priv. Corp. § 579.

It is not until sequestration proceedings are commenced that the property becomes impressed with a trust, in the full sense of the term, and the ordinary remedies of creditors are suspended.

Brene v. Merchants & Mechanics Bank, supra; *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 871, 37 L. ed. 1113; *Roseboom v. Whitaker*, 133 Ill. 89; *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57; *Nasro v. Merchants Mut. Ins. Co. of Milwaukee, supra*; *Varnum v. Hart*, 119 N. Y. 101; *Throop v. Hatch Lithographic Co.* 125 N. Y. 580; *Hill v. Knickerbocker Electric Light & Power Co.* 45 N. Y. S. R. 761; *Commercial Nat. Bank of Chicago v. Burch*, 40 Ill. App. 505.

The appellants having acquired valid liens upon the property of the corporation by the levies of their attachments and executions, the property in the hands of the receiver is impressed with those liens and they must be recognized in the distribution of said property.

Garden City Bkg. & Trust Co. v. Geilfus, 86 Wis. 612; *Ferd v. Plankinton Bank*, 87 Wis. 368.

Messrs. Bloodgood, Bloodgood & Kemper also for appellants.

Messrs. Miller, Noyes & Miller, with **Mr. Orren T. Williams**, for respondent:

Appellants acquired no liens by virtue of their proceedings in attachment and by garn-

ishment and by execution, taken with the knowledge that the corporation was insolvent.

Preferences by insolvents are allowed by statute only to certain classes of creditors—to a laborer, although a stockholder.

Conlee Lumber Co. v. Ripon Lumber & Mfg. Co. 68 Wis. 481; *Rev. Stat.* § 1698; *Sleeper v. Goodwin*, 67 Wis. 578.

But where the relation of contractor and contractee existed a preference was not allowed.

Lang v. Simmons, 64 Wis. 525; *Campfield v. Lang*, 25 Fed. Rep. 128.

If a creditor could by garnishment or attachment, or by a creditor's bill, obtain a preference, the entire enactment of the statute would be rendered fruitless, because no one would institute proceedings under it. It therefore seems to follow that it was intended to devert all liens of any individual creditors acquired after it became insolvent, and with full knowledge of such insolvency.

Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57; *Ballston Spa Bank v. Marine Bank of Milwaukee*, 18 Wis. 490; *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 873; *Re Waterbury*, 8 Paige, 380, 4 L. ed. 470; *Ford v. Plankinton Bank*, 87 Wis. 871.

The appellants did not acquire liens by said proceedings against the property of the insolvent corporation because the property seized was a trust fund, of which the directors of the corporation were trustees, and to which all the creditors were beneficiaries.

Ford v. Plankinton Bank, supra; *Ballin v. Loeb*, 78 Wis. 404; *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 887; *Haywood v. Lincoln Lumber Co.* 64 Wis. 646; *Powers v. Hamilton Paper Co.* 60 Wis. 28; *Adler v. Milwaukee Patent Brick Mfg. Co. supra*; 27 Am. L. Rev. 848; *Lyons-Thomas Hardware Co. v. Perry Stone Mfg. Co.* 23 L. R. A. 802, 86 Tex. 143; *Duncomb v. New York, H. & N. R. Co.* 88 N. Y. 1; *Currie v. Bowman*, 25 Or. 864; *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 878, 46 Ohio St. 498; *Wood v. Dummer*, 3 Mason, 309; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Curran v. Arkansas*, 56 U. S. 15 How. 812, 14 L. ed. 709; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 208; 2 Pom. Eq. Jur. 1046; *Taylor, Priv. Corp.* 759; *Hopkin's App.* 90 Pa. 76; *Roseboom v. Whittaker*, 133 Ill. 81; 2 Morawetz, Priv. Corp. 808-861; *Lane's App.* 105 Pa. 49, 51 Am. Rep. 166; *Adams v. Kehlor Mill Co.* 85 Fed. Rep. 433.

In the event of the insolvency of a corporation its property becomes a trust fund in the hands of its directors to be administered primarily for the benefit of its creditors and then for the benefit of its stockholders, and in the distribution of this trust fund by the directors, as trustees, all creditors are entitled to share ratably.

Ford v. Plankinton Bank, 87 Wis. 863; *Robbins v. Embry*, 1 Smedes & M. Ch. 207; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 873; *Ballin v. Loeb*, 78 Wis. 404; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *State v. Brockman*, 39 Mo. App. 181; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7; *Lyons-Thomas Hardware Co. v. Perry Stone Mfg. Co.* 23 L. R. A. 802, 86 Tex. 143;

Thompson v. Huron Lumber Co. 4 Wash. 600; *Leipold v. Marony*, 7 Lea, 128; *Shea v. Mabry*, 1 Lea, 319; *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 378, 46 Ohio St. 493; *George T. Smith Midwings Purifier Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346; *Hightower v. Mustain*, 8 Ga. 506.

The doctrine that creditors must share equally is only an example of the well-established rule that equality is equity, and this principle is peculiarly applicable to the assets of a corporation.

2 Morawetz, Priv. Corp. § 808; Pom. Eq. Jur. § 410; Wait, Insolvent Corp. § 162; 27 Am. L. Rev. 346; 88 Cent. L. J. 340; Taylor, Priv. Corp. §§ 668, 758.

No single creditor as *cestus que trust* can show any reason why his share in the trust fund should be greater than that of his fellows, and thus the only rule a court of equity can adopt is that of equality among all creditors.

Richards v. New Hampshire Ins. Co. 48 N. H. 263; *Bradley v. Farwell*, Holmes, C. C. 433; 2 Cook, Stock & Stockholders, 3d ed. § 661, p. 938, note 3.

As the defendant corporation, when insolvent, could not by its own act prefer any single creditor, a creditor could not by any act on his part gain a preference.

Ballin v. Loeb, 78 Wis. 404; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Pierce v. Milwaukee Constr. Co.* 88 Wis. 253; *Powers v. Hamilton Paper Co.* 60 Wis. 23; *Shea v. Mabry*, 1 Lea, 319; *Leipold v. Marony*, 7 Lea, 128; *Hopkins's App.* 90 Pa. 69; *Walker v. Miller*, 59 Fed. Rep. 369; *State v. Brockman*, 39 Mo. App. 131; *First Nat. Bank of Selma v. Colby*, 88 U. S. 21 Wall. 609, 22 L. ed. 637.

Winslow, J., delivered the opinion of the court:

A creditor of an insolvent corporation, knowing its insolvency, attaches its property, without collusion with the officers of the corporation. Afterwards, and while the attached property is in the hands of the officer, another creditor obtains judgment, and commences an action, under section 3216, Rev. Stat., to close up its affairs and sequester its property, making the attaching creditor and the officer parties to the suit. Can the attaching creditor be deprived of his lien upon the property attached, and be compelled to share equally with all other creditors in the property of the corporation? This is the single question which is sharply presented in this case. The complaint charged a fraudulent and collusive attachment by the first class of creditors; and a preliminary order, based on this complaint, requiring the sheriff to surrender the attached property to the receiver, was affirmed by this court. *Ballin v. Loeb*, 78 Wis. 404. The ultimate rights of the attaching creditors were not determined on that appeal, however; but it was held that they must come into this action for any share of the proceeds of the property, or for any remedy against it. The effect of that decision was simply to hold that the receiver was entitled to the possession of the property for the purpose of winding up the affairs of the corporation, and that all claims of liens upon property must be litigated in

this action. On the trial the plaintiffs abandoned all charges of collusion and fraud, and rested solely on the ground of the corporation being insolvent, and that the attaching creditors had knowledge of such insolvency when they attached. And thus the question presents itself, as first above stated. Upon this question, the plaintiffs rest their case upon the so-called "trust-fund doctrine," and take a broad ground that from the moment a trading corporation becomes insolvent its assets become a trust fund for the benefit of its creditors, and that no creditor, knowing of its insolvency, can obtain a valid lien by attachment of any of the property; and they argue that this doctrine has received the express or implied sanction of this court. It must be admitted that there are authorities in other jurisdictions holding this doctrine to its full extent, but it certainly has not been held by this court that a creditor of an insolvent corporation may not obtain a valid lien by attaching its property in a bona fide attempt to collect his debt. The cases which are principally relied upon by the plaintiffs as having sanctioned the trust-fund doctrine, in this court, are *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 378; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Ballin v. Loeb*, 78 Wis. 404; *Ford v. Plankinton Bank*, 87 Wis. 363. A brief review of the questions actually decided in these cases will be useful. In *Haywood v. Lincoln Lumber Co.*, it was held that directors of an insolvent corporation could not lawfully convey or mortgage the corporate property to themselves, to secure their own claims against the corporation. In *First Nat. Bank of Stevens Point v. Knowles*, it was held that a trust deed of an insolvent manufacturing corporation, to secure bonds given to certain creditors, some of whom were directors of the corporation, was void, because made with the intent to hinder, delay, and defraud other creditors, and because it had the effect of a fraudulent preference of certain creditors, to the exclusion of all others. In *Ballin v. Loeb*, it was held, as previously stated in this opinion, that an attaching creditor of an insolvent corporation, whose attachment was charged to have been fraudulent and collusive, must come into this action, and assert his rights to a lien upon the attached property. The same, in principle, was the holding in *Ford v. Plankinton Bank*. In the last-named case it was charged that judgments by confession had been collusively and fraudulently obtained, and levies made thereunder; and it was held that the property levied upon must go into the hands of the receiver, and that a creditor must seek and enforce his lien, if any, in the sequestration action. On the other hand, in *Garden City Bkg. & Trust Co. v. Geilfus*, 86 Wis. 613, it was distinctly held that where an insolvent corporation had made a valid assignment for the benefit of its creditors, under the statute, such assignment was not superseded or affected by the appointment of a receiver in an action against the corporation, under section 3216, Rev. Stat. We believe the foregoing is a fair statement of the questions actually presented and decided in the

cases named, and from this statement it seems very certain that the question here presented has not been foreclosed or decided by this court.

The intangible body known to the law as a "corporation" must necessarily act by its agents, and these agents are its managing officers. An agent who is handling the funds or property of his principal acts in a trust capacity, and is in a sense a trustee. The managing officers of the corporation are therefore at all times trustees for the corporation and its stockholders. It may also be correctly said that the corporate property in the hands of the receiver is a trust fund for the benefit of creditors, in the sense that it is to be applied to the payment of the corporate creditors before it can be applied for the use or benefit of the stockholders. The plaintiff's contention is broader than this, and is to the effect that when a corporation in fact becomes insolvent, though still doing business, the managing directors thereof become "trustees" of the corporate property, in the full and complete sense of the term, and can make no disposition of such property to one creditor to the exclusion of others, nor can a creditor, acting in good faith, acquire a valid lien upon the corporate property by attachment. As to the first branch of this proposition, to the effect that the directors cannot convey or mortgage the corporate property to a creditor, we are not now concerned, because that question does not arise in this case. The sole question here is whether a diligent creditor, knowing of the corporate insolvency, and bringing his attachment proceedings in an honest effort to collect his debt, can acquire a valid lien upon the corporate property, which will be protected upon a subsequent sequestration action. Upon this question we have no hesitation in holding that such a creditor will acquire a valid lien. To hold otherwise is to hold, in effect, that a debt cannot be collected by ordinary processes of law, from an insolvent corporation; that the corporation may buy and sell, make contracts, and transact its ordinary business, but that it enjoys a practical immunity from all the laws for the enforcement of its obligations, until some creditor sees fit to commence an action to wind up its affairs. In other words, it may buy property, but cannot be compelled, by ordinary processes of law, to pay for it; it may contract, but cannot be compelled to perform its contract; it is provided with a shield, which becomes to all intents and purposes, a sword in its hands, against the diligent creditor. Certainly, no such immunity from the ordinary laws governing the rights of creditors is given it by statute. On the contrary, the statute provides (Rev. Stat. § 2739) that any creditor may proceed by attachment against the property of his debtor, "whether a natural person or corporation;" and in vain do we look for any exception in the statute law, such as is claimed here. We shall not attempt to ingraft any such exception on the statute by decision. We see no good reason why a trading corporation, so

long, at least, as it deals with others in its ordinary course of business, should not be subject to the ordinary remedies provided by the law for the collection of debts. Its property is certainly not trust property, in the sense that it cannot be relied on by its creditors to respond to the ordinary processes of the law, sued out in good faith. The following authorities fully bear out these views, and we cite them as sustaining the point now decided, without affirming or denying their correctness in other respects. *White, Potter & Paige Mfg. Co. v. Henry B. Pates Importing Co.* 30 Fed. Rep. 864; *Hospes v. Northwestern Mfg. & Car Co.* 15 L. R. A. 470, 48 Minn. 174; *Fogg v. Blair*, 188 U. S. 584, 33 L. ed. 721; *Hollins v. Briarfield Coal & Iron Co.* 150 U. S. 371, 37 L. ed. 1118; *Roseboom v. Whittaker*, 183 Ill. 81.

From these views, it follows that the first class of creditors was, upon the facts before the court, entitled to have their attachment liens adjudged valid, and to be first paid out of the proceeds of the attached property in the hands of the receiver, and hence that the judgment of the superior court must be reversed.

Another question now arises, on the appeal of the third class of creditors. They claim, in the event of reversal, the case should be remanded for a new trial in order that they may litigate the good faith of the attachment levied by the first class of creditors, which they allege in their answer were collusive and fraudulent. The difficulty is that they are not in a position to litigate the question. It is true they allege bad faith and collusion by the first class of creditors, but they only did so by way of answer to the plaintiff's complaint. They did not even allege the facts as a counterclaim, nor was the answer served on the defendants whose rights they seek to attack. They have neither formed nor attempted to form, any issue with their codefendants. Such a question arising between defendants must undoubtedly be raised by an appropriate pleading which the codefendants whose rights are assailed have an opportunity to answer. It would seem to be necessary to do this by cross-complaint as under the old equity practice. *Trester v. Sheboygan*, 87 Wis. 496; *Van Santvoord*, Eq. Pr. p. 224. Certainly no such issue having been tendered or raised by the third class of creditors, the first class of creditors is not called upon to meet it. They are only required to meet the plaintiffs' claims, and the plaintiffs having abandoned all claims of fraud and collusion, as they had a perfect right to do, that issue has disappeared from the case so far as the first class of creditors are concerned.

So much of the order appealed from as provides for an equal distribution among creditors of all property in the hands of the receiver, and denies any preference, and enjoins further proceedings by the defendants, is reversed, with costs, upon both appeals, and the remainder of the order is affirmed, and the action is remanded for further proceedings in accordance with law.

G. H. SEAMANS, Receiver of Milwaukee Mutual Fire Ins. Co., *Reept.*,
v.
KNAPP, STOUT & CO. COMPANY,
Appt.

(.....Wis.....)

1. A valid contract of insurance may be made in one state upon property located in another although the insurer is not entitled to do business in the state where the property is located.
2. The office of the insurer is the place of contract where it in response to the request of a broker not its agent mails a policy, blank application and premium note to the property owner in another state for him to fill the blanks and return the application and note for the approval of the insurer.
3. A broker is not the agent of the insurer in procuring insurance where, having no authority from or blanks of the insurer, he requests it to write a certain policy, which it does, and for his services allows him a commission on the cash premium received.

(January 8, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to recover an assessment upon an insurance premium note. *Affirmed.*

Statement by Cassoday, J.:

It appears from the record that the Milwaukee Mutual Fire Insurance Company was a corporation duly organized and existing under sections 1941a to 1941f, Rev. Stat., inclusive, during all the times herein mentioned, doing a business of insurance upon the mutual plan; that during all of the same time the defendant herein has been a corporation duly organized and existing under the laws of Wisconsin, with its headquarters or place of business in this state, and doing a lumber business in this and other states; that December 8, 1888, the defendant was the owner of certain lumber, lath, shingles, sash, doors, blinds, timber, and logs in its yard at Ft. Madison, Iowa, and at that date procured a policy of insurance on the same from said Milwaukee Company for \$2,500, to run for a period of five years, mutual in its form, and at the same time gave the Milwaukee Company its premium note for \$250, payable in installments at such times as the directors of said company might order or assess for the losses and expenses of said company, pursuant to its charter and by-laws; that April 28, 1888, the defendant was the owner of certain other lumber, lath, shingles, sash, doors, blinds, timber, and logs situate in its yard at St. Louis, Mo., and at that date procured a policy of insurance thereon from said Milwaukee Company for \$1,500, to run for the period of five years, mutual in its form, and at the same time gave back a premium note

of \$120, payable in installments at such times as the directors of said company might order or assess for the losses and expenses of said company, pursuant to its charter and by-laws; that January 8, 1891, the plaintiff was appointed receiver of said Milwaukee Company, and qualified as such; that July 9, 1892, the plaintiff, under the direction of the court, assessed the defendant on said first-named policy \$125, and on said second-named policy \$60, and the same was confirmed by the superior court for Milwaukee county; that the plaintiff gave due notice of such assessment to the defendant, and demanded payment thereof, as provided by said charter and by-laws of the Milwaukee Company, but the defendant refused to pay the same; that November 14, 1892, the plaintiff commenced this action, alleging the facts mentioned in proper form, and other appropriate facts. The defendant answered said complaint by way of admissions, denials, and allegations to the effect that the policy of \$2,500 was made in Iowa, and in violation of the laws of that state, and was, therefore, void, and that the policy of \$1,500 was made in Missouri, and contrary to the laws of that state, and was, therefore, void; that the parties thereupon waived a jury, and tried said cause before the court upon a written stipulation of the facts as applicable to the first cause of action, to the effect that at the times mentioned W. E. Smith & Co. were insurance brokers in Chicago, and as such solicited insurance of the defendant at its office in St. Louis, to be written upon the mutual plan or in mutual companies; that the defendant thereupon "consented to take insurance in acceptable companies from said William E. Smith & Co., upon the mutual plan, upon its property located at Fort Madison;" that Smith & Co. then applied by letter to the Milwaukee Company at Milwaukee to write a portion of said insurance, whereupon the Milwaukee Company, at its office in Milwaukee, filled out an application with a note at the bottom thereof, except the answers to the questions therein, a copy of which application and note is annexed to the stipulation and in the record, and made a part thereof, together with the policy of insurance upon the property of the defendant at Ft. Madison, bearing date at Milwaukee, December 8, 1888, insuring said property in the sum of \$2,500 for the period of five years, and which policy upon its face states that it was issued in consideration of the assured having paid the cash premium of \$50, and having given its premium note for the sum of \$250, agreeing thereby to pay all such sums as might be assessed on such note by the board of directors of the Milwaukee Company in accordance with the charter and by-laws of said company; that said application, note, and policy of insurance were mailed by the Milwaukee Company to said Smith & Co., and by them were mailed to the defendant at its office in St. Louis; that thereupon the defendant accepted said policy of insurance, and answered said questions contained in said application, and signed said application and accompanying note, and returned the same to said Smith & Co., together with the cash premium of

NOTE.—For the decisions on business by foreign insurance companies, see note to *State v. Ackerman* (Ohio) 24 L. R. A. 298, and as to what constitutes "doing business within the state," see note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 269.

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\$50, and that Smith & Co. receipted therefor and that thereupon Smith & Co. mailed said application and premium note to said Milwaukee Company, and remitted to said Milwaukee Company said cash premium of \$50, less 20 per cent thereof, allowed by said Milwaukee Company to said Smith & Co. as commission in procuring said insurance; that afterwards all transactions relating to said policy and said risk were conducted and carried on by mail directly between the Milwaukee Company and the defendant; that said Smith & Co. were never the regularly appointed agents of the Milwaukee Company, and never had authority to write policies for that company, and never had in their possession any blank policies of said Milwaukee Company, and were never employed by the Milwaukee Company to solicit insurance for it, but that said Milwaukee Company from time to time issued policies on risks that had been procured by said Smith & Co., upon which the insurance company allowed said Smith & Co. a commission of 20 per cent of the first cash premium collected, as compensation for securing the business; that the stipulation as to the second cause of action was substantially the same as the first, except that the date of the policy was April 23, 1888, and for \$1,500, for a period of five years, on property of the same kind, located at St. Louis; and that the Manufacturers' Mutual Fire Insurance Company of St. Louis, Mo., acted as broker in procuring said policy, instead of said William E. Smith & Co. At the close of the trial the court found as matters of fact, in effect, that the allegations of the complaint were true; that the facts contained in said written stipulation were true; (3) that the contracts sued upon were both made and completed within the state of Wisconsin, between corporations organized under the laws of Wisconsin and were valid; (4) that the persons who solicited the insurance in the case of each of said policies were insurance brokers residing outside of Wisconsin, and were not the agents of the Milwaukee Company, and in so far as they acted in procuring said insurance were the agents of the assured; (5) that said policies of insurance and the accompanying notes were legal and valid policies and notes, and were issued and made on due and valid consideration; (6) that the Milwaukee Company had never procured a license, or complied with the laws of the state of Missouri or the state of Iowa; that the Milwaukee Company was duly authorized to make said contracts under and according to the laws of Wisconsin. And as conclusions of law the court found, in effect, that the plaintiff was entitled to judgment upon both causes of action alleged as prayed; that the facts alleged in the answer, as shown by the stipulation, did not constitute a defense to either cause of action; and judgment was thereby ordered against the defendant and in favor of the plaintiff for the amount of said assessments with interest, together with costs. From the judgment entered upon said findings accordingly the defendant brings this appeal.

Messrs. La Boule & Hunt for appellant.
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Mr. George E. Sutherland, for respondent:

There was nothing to be done at the place of delivery to complete the contracts of insurance. They were absolutely completed at the home office of the company in Milwaukee.

When they were mailed at Milwaukee they were valid, subsisting contracts of insurance, then in full force and effect. Under such circumstances the place of the contract is the place where the policy is issued.

Pomeroy v. Manhattan L. Ins. Co. 40 Ill. 398; *Coa v. United States*, 31 U. S. 6 Pet. 173, 8 L. ed. 359; *note to Ford v. Buckeye State Ins. Co.* 99 Am. Dec. 671.

The business of insurance brokers is a distinct line of business, and the insurance broker has a definite standing before the law. He is agent for the insured.

2 Am. & Eng. Encyclop. Law, p. 595.

A contract takes effect as such at the place where it was intended to be delivered and become operative, and the liability of the parties is determined by the law of that place.

Lee v. Selleck, 38 N. Y. 615; *Tilden v. Blair*, 88 U. S. 21 Wall. 246, 22 L. ed. 633.

The place where the acceptance of a proposal is mailed is the place of the contract.

Mactier v. Frith, 6 Wend. 103, 21 Am. Dec. 262; *Vassar v. Camp*, 14 Barb. 841; *Clark v. Dales*, 20 Barb. 42; *Bell v. Packard*, 69 Ma. 105, 31 Am. Rep. 251; *Taylor v. Merchants F. Ins. Co. of Baltimore*, 50 U. S. 9 How. 390, 13 L. ed. 187; *McIntyre v. Parks*, 3 Met. 207; *Adams v. Lidell*, 1 Barn. & Ald. 681.

When application is sent to the home office for approval and issuance of a policy, the contract is complete when the policy is issued and mailed.

Shattuck v. Mutual L. Ins. Co. of New York, 4 Cliff. 598; *Whitcomb v. Phoenix Mut. L. Ins. Co. (Mass.)* 6 Rep. 642; *Northampton Mut. Life Stock Ins. Co. v. Tuttle*, 40 N. J. L. 478; *Smith v. Insurance Co.* 10 Ins. L. J. 180; *Lamb v. Bowser*, 7 Blm. 815; *Huith v. New York Mut. Ins. Co.* 8 Bosw. 538; *Deamazes v. Insurance Co.* 7 Ins. L. J. 926; *Huntley v. Merrill*, 33 Barb. 628; *Western v. Genesee Mut. Ins. Co.* 19 N. Y. 258; *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 17; *Cromwell v. Royal Canadian Ins. Co.* 49 Md. 868, 33 Am. Rep. 253; *Todd v. State Ins. Co. of Missouri*, 11 Phila. 355; *Taylor v. Merchants F. Ins. Co. of Baltimore, supra*; *Midland Co. v. Broot*, 17 L. R. A. 312, 50 Minn. 562; *Brinker v. Scheunemann*, 43 Ill. App. 659; *Armstrong v. Best*, 25 L. R. A. 188, 119 N. C. 59; *Bishop*, Cont. § 1878, *note*, and cases cited.

Policies are binding on the insurance company, even though the company were not licensed to do business in the foreign state.

Therefore, the defendant has received full consideration in valid insurance, and ought to pay for it.

Leonard v. Washburn, 100 Mass. 251; *Hartford Live Stock Ins. Co. v. Matthews*, 103 Mass. 291; *Clark v. Middleton*, 19 Mo. 53; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Connecticut River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61; *Connecticut River Mut. F. Ins. Co. v. Way*, 63 N. H. 632; *Ehrman v. Union Ins. Co.* 9 Ins. L. J. 347; *Watertown F. Ins. Co. v.*

Simons, 93 Pa. 520; *American Ins. Co. v. Wellman*, 69 Ind. 413; *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, 73; *Provincial Ins. Co. v. Lapsley*, 15 Gray, 262; *Ganser v. Fireman's Fund Ins. Co.* 84 Minn. 373; *Phenix Ins. Co. v. Pennsylvania Co.* 20 L. R. A. 405, 134 Ind. 215; *Hyde v. Goodnow*, 8 N. Y. 266; *Western v. Genesee Mut. Ins. Co.* 13 N. Y. 258; *Huntley v. Merrill*, 32 Barb. 626; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Co.* 31 Mich. 346; *Voorheis v. People's Mut. Ben. Soc. of Elkhart*, 91 Mich. 469; *New Orleans v. Virginia Fire & Marine Ins. Co.* 33 La. Ann. 10; *Thornton v. Western Reserve Farmers Ins. Co.* 31 Pa. 529; *Columbia F. Ins. Co. v. Kington*, 37 N. J. L. 33; *Marden v. Hotel Owners Ins. Co.* 85 Iowa, 554; *Lamb v. Bowser*, 7 Biss. 373; *Whitcomb v. Insurance Co.* 7 Ins. L. J. 937; *Criswell v. Riley*, 5 Ind. App. 503.

The validity of a contract is to be determined by the law of the state in which it is made.

Miliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; *Seudder v. Union Nat. Bank of Chicago*, 91 U. S. 406, 23 L. ed. 245.

Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state as administered by its courts will refuse to entertain an action on such contract made by one of its own citizens abroad, in a state the laws of which permit it.

Greenwood v. Curtis, 6 Mass. 353, 4 Am. Dec. 145; *M'Intyre v. Parks*, 3 Met. 207; *Tanner v. Clark*, 13 Ky. L. Rep. 922; *First Nat. Bank of Chicago v. Dean*, 28 Jones & S. 299; *Harrison v. Baldwin*, 5 Ohio C. Ct. Rep. 310; *Fonseca v. Ounard S. S. Co.* 13 L. R. A. 340, 153 Mass. 553; *Story*, Conf. L. §§ 242 et seq.; *Cooley*, Const. Lim. 286; *Cox v. United States*, 31 U. S. 6 Pet. 203, 3 L. ed. 370; *Hyde v. Goodnow*, 8 N. Y. 269.

Cassoday, J., delivered the opinion of the court:

The Milwaukee Company and the defendant corporation were each created and organized under and by virtue of the laws of this state, and exist only by force of the laws of this state. Since such laws, of themselves, have no extraterritorial force, these corporations cannot migrate to other states, but must dwell in the state of their creation. *Larson v. Aultman & Taylor Co.* 86 Wis. 233, 234, and cases there cited. While these corporations can only live and have their being in this state, yet their residence here creates no insuperable objection to their power to contract and be contracted with in other states, provided they do so in accordance with the laws of such other states. *Ibid.* One of the policies issued by the Milwaukee Company covered certain personal property of the defendant located in Iowa, and the other covered certain personal property of the defendant located in Missouri. The authority of each of those states to prescribe the conditions upon which each of said corporations would be allowed to make contracts and do business therein must be conceded. *State v. United States Mut. Acc. Assn.* 67 Wis. 629; *Stanhilber v. Mutual Mill Ins.* 27 L. R. A.

Co. 76 Wis. 291; *State v. Root*, 83 Wis. 680. No question is made as to the right of the defendant to make valid contracts and do business in Iowa or Missouri. But it is conceded that the Milwaukee Company never complied with such conditions so prescribed by those states, respectively, and that by the statutes of each of those states any contracts made by that company therein were absolutely void. But each of the contracts for the insurance of such property against loss by fire was a mere contract for indemnity in case of loss. *Darrell v. Tibbitts*, L. R. 5 Q. B. Div. 560; *Stanhilber v. Mutual Mill Ins. Co.* 76 Wis. 291. Although it related to the loss of such property, yet it in no way attached to or affected the title to such property. *Ibid.* Such being the nature of the contracts sued upon and the residence of the two corporations, there would seem to be no good reason why they could not, within the state of Wisconsin, make valid contracts for indemnity against loss by fire of such properties, notwithstanding the same were located in such other states. This seems to be conceded by counsel for the defendant. The vital question in the case, therefore, is whether these contracts were made in Wisconsin or in the respective states where the properties were located. The negotiation for the insurance upon the Iowa property was commenced by the Chicago brokers, who solicited insurance of the defendant's agent in Missouri, to be written in mutual companies; that the defendant thereupon consented to take insurance in acceptable companies from such brokers upon the mutual plan upon its property located at Ft. Madison, Iowa; that said brokers then, by letter, requested the Milwaukee Company to write a portion of such insurance; that the Milwaukee Company thereupon, at its office in Milwaukee, filled out a blank application for such insurance, with a premium note at the bottom, to be signed by the defendant, and which application contained some twenty questions for the defendant to answer by writing in the several answers; that at the same time, at its office in Milwaukee, that company filled out a policy for such insurance, and which application, note, and policy were each and all dated at Milwaukee, December 8, 1888, and which policy recited that the application and premium note had been given and were on file in the company's office of Milwaukee; that such application was a part of the contract of insurance, and a warranty on the part of the insured; that, if certain conditions existed, the policy should be void; that the charter and by-laws of the company, and the laws of Wisconsin under which it was organized, were thereby declared to be a part of the contract of insurance, and to be resorted to in order to determine the rights and obligations of the parties thereto; that said blank application, blank note, and policy so filled out were thereupon mailed by the Milwaukee Company to the Chicago brokers, and by them mailed to the defendant at its St. Louis office; that the defendant thereupon accepted the policy, answered the several questions contained in the blank application, and signed the same, and signed said blank pre-

mium note, and thereupon returned the application and premium note, so signed, together with the cash premium, to the Chicago brokers, who receipted therefor, and thereupon said brokers mailed said application, note, and cash premium, less 20 per cent thereof, to the Milwaukee Company. The contract to insure the property in Missouri was procured substantially in the same way, except that the brokers were located at St. Louis instead of Chicago. We are constrained to hold that the application, premium note, and policy must be taken and construed together as one instrument, constituting the contract of insurance. *Herbst v. Love*, 65 Wis. 320. This being so, we must hold that the policy, blank application, and blank premium note, so made out by the Milwaukee Company, and mailed as mentioned, was a mere proposition by that company to insure the property in case the cash premium should be paid, the premium note should be signed by the defendant, and the several questions propounded in the application should be answered to its satisfaction. Certainly it was possible that those several questions might have been answered in such a way that neither the Milwaukee Company nor any other company would be justified or expected to insure the property. The trial court rightly held that the persons soliciting the insurance were insurance brokers, and in no sense agents of the Milwaukee Company; that, in so far as they were agents for any one, they were agents of the defendant. This being so, it necessarily follows that the contract of insurance did not become complete and absolutely binding upon both parties until the note and application were filled out and signed, and submitted to, and, in effect, approved by, the Milwaukee Company. The contract, therefore, must be deemed to have been made at Milwaukee, where the final assent was given. *Whiston v. Stodder*, 3 Mart. (La.) 95, 18 Am. Dec. 281; *Ford v. Buckeye State Ins. Co.* 6 Bush, 183, 99 Am. Dec. 668, and notes; *Hamilton v. Lycoming Mut. Ins. Co.* 5 Pa. 389; *Maetzer v. Prith*, 6 Wend. 103, 21 Am. Dec. 263; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. "When a contract is made in one country, to be performed wholly or partially in another, prima facie the contract is to be construed and enforced according to the *lex loci contractus*; but the court will look at all the circumstances, to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law." *Re Missouri S.S. Co.* L. R. 42 Ch. Div. 321. The contract in that case was made in Massachusetts between an American citizen and a British company, for the carriage of cattle from Boston to England in a British ship, and contained a clause void as against public policy by the law of Massachusetts, but valid by the law of England, and it was held that the contract itself showed that the parties intended to be governed by the law of England, giving effect to the clause mentioned. This is upon the well-established principle that when a contract is open to two

constructions, the one lawful and the other unlawful, the former must be adopted. *Hobbs v. McLean*, 117 U. S. 587, 29 L. ed. 940; *United States v. Central Pac. R. Co.* 118 U. S. 236, 30 L. ed. 174. Much of the seeming conflict in the adjudications upon the subject of the *lex loci contractus* will disappear by carefully discriminating as to the precise nature of the issue and matter under consideration. Thus it was held by the Supreme Court of the United States that: "Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought." *Scudder v. Union Nat. Bank of Chicago*, 91 U. S. 406, 28 L. ed. 245. Here the only question presented is as to the validity of the contract, and that is necessarily governed by the law of the place where it was made, which, as observed, is the law of Wisconsin.

The judgment of the Circuit Court is affirmed.

Herman C. BLOCK, *Rept.*,

v.

MILWAUKEE STREET R. CO., *Appl.*

(.....Wis.....)

1. A physician may testify that the condition of an injured person could have been produced by contact with a heavily charged electric wire.
2. A physician's testimony of a patient's statements made for the purpose of receiving advice and treatment is not inadmissible as hearsay.
3. A doctor's opinion of the reasonable probability of the ultimate recovery of a person from injuries is not inadmissible.
4. The testimony of a witness that he received an electric shock at the same time that an injury was received by another person may be competent as bearing on the question whether such injury was caused by an electric shock.
5. Negligence in omitting to place guard wires between trolley wires and telephone wires is a question for the jury.
6. Whether the negligent failure of a trolley railway company to place guard wires between the trolley wires and the wires of a telephone company was or was not the proximate cause of a shock to a traveler from contact with a broken telephone wire which had fallen across the trolley wire, is a question for the jury.
7. The lack of guard wires between trolley wires and telephone wires will render a trolley company liable for injury to a person in a street by contact with a broken telephone wire lying across the trolley wire, if the

NOTE.—For injuries from dangerous electric wires, see *Illingworth v. Boston Electric Light Co.* (Mass.) 25 L. R. A. 552, and cases cited in foot-note thereto.

omission of the guard wires was negligent and was also the proximate cause of the injury.

8. An instruction that there must be a "reasonable probability" of the permanency of a personal injury to justify a recovery therefor, with a refusal to instruct that there must be a "reasonable certainty" thereof, is erroneous.

(February 5, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence in permitting a telephone wire to fall across its trolley wires so as to become dangerous to travelers on the highway. *Reversed.*

Statement by Newman, J.:

This is an action to recover for personal injuries which the plaintiff claims that he received by accidental contact with a telephone wire which had fallen upon the defendant's trolley wire, and so become heavily charged with electricity. The negligence imputed to the defendant is its omission to place guard wires over its trolley wires, so as to prevent the telephone wire from coming in contact with them. The defendant owns and operates an electric railway along Third street in the city of Milwaukee. Third street runs north and south. Green Bay avenue crosses Third street at an acute angle, running northwest and southeast. The tracks of the defendant's road extend northerly on Third street to a point north of its intersection with Green Bay avenue. On the east side of Third street, opposite to the opening of Green Bay avenue, are the defendant's car barns. At this point the overhead trolley wires are supported by cross wires attached to posts on either side of Third street. Near the southwest corner of the car barn, on the east side of Third street, is a telephone pole. From this pole the telephone wire runs diagonally across Third street to a pole standing in the sharp angle between Third street and Green Bay avenue. Thence it runs diagonally across Green Bay avenue to a pole on the west side of the avenue, about 100 yards north of the pole on the sharp angle. These poles carried the wire about 80 feet above the ground, and about 10 feet above the trolley wires. The telephone wire crosses the trolley wires diagonally. There were no guard wires over the trolley wires. At the time of plaintiff's accident the telephone wire was broken, and had fallen upon and lay in contact with the trolley wire, and had become and was charged with electricity by such contact. It does not appear that the fact that the telephone wire was broken was known to any of the defendant's employes, nor that any negligence on their part had caused the breakage. The end of the telephone wire so charged with electricity passed along Green Bay avenue, in some places lying upon and in the street. It was in the evening, and after dark. The plaintiff was driving along the avenue with his horse and vehicle. His horse came in contact with the wire, received a shock, and fell. The plain-

tiff was thrown from his vehicle. He is supposed to have received an electric shock both before and after he left the vehicle. He appears to have received considerable injury. The telephone wire carries so small a current of electricity as not to be, of itself, dangerous. The trolley wires carry a much larger current of electricity. By contact with the trolley wire the telephone wire may become so highly charged as to become dangerous. The telephone wire was not owned by, nor in any manner under the control of the defendant. It is unexplained what occasioned the breaking of the telephone wire. It did not break in the span which carried it over and across the trolley wires, but in the next span beyond. It could not have come in contact with the trolley wires had not the fastening of the telephone wire to its pole become so loosened that the wire slipped, and the portion over the trolley wires sagged, so as to bring it in contact with the trolley wires. There was a special verdict, and judgment for the plaintiff. The defendant appeals.

Messrs. Miller, Noyes & Miller, for appellant:

The injury of the plaintiff, if it can be said actually to have been caused by the failure of the defendant to erect guard wires, was not such as a reasonably prudent person in the conduct of the defendant's business would have anticipated. The accident was unexplained.

Nor could the defendant have anticipated that the plaintiff, or any one else, would suffer injury by reason of fright caused by a spark of electricity escaping from the wires under such conditions. It has been held that fright alone does not form a basis for an action at law and the award of damages.

Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; *Victorian R. Comrs. v. Coulton*, 13 App. Cas. 223; *Wulstein v. Mohlman*, 25 N. Y. S. R. 691; *Lehman v. Brooklyn City R. Co.* 47 Hun, 355.

The cause of the break was purely accidental.

See *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881.

The fact of the occurrence of this accident under these unexplained circumstances furnishes no basis in itself for assuming negligence on the part of the defendant.

Jackson v. Wisconsin Teleph. Co. 26 L. R. A. 101, 88 Wis. 243; *The Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524-537, 21 L. ed. 206-211; *Porter v. Chicago & W. M. R. Co.* 80 Mich. 157; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 852; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, 55 Fed. Rep. 949.

The injury, as a consequence of the act, must be both natural and probable.

Barton v. Pepin County Agr. Soc. 83 Wis. 23.

The defendant in this case is liable only for what might reasonably have been anticipated in view of all the circumstances.

Stewart v. Ripon, 38 Wis. 584; *Cleveland v.*

New Jersey S. B. Co. 68 N. Y. 306; *Flint v. Norwich & N. Y. Transp. Co.* 84 Conn. 554; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522.

And its liability is to be measured by what was known at and before the time of the accident.

Dougan v. Champlain Transp. Co. supra; *Hunt v. New York*, 109 N. Y. 184.

Messrs. W. J. Turner and Moritz Wittig, Jr., for respondent:

The duty of using the most improved plan does not stop or cease with an ordinary instruction. The most approved method and plans must be maintained with a view to public safety.

Fitts v. Cream City R. Co. 59 Wis. 328; *State v. Madison Street R. Co.* 1 L. R. A. 771, 73 Wis. 612; *Oleon v. Chippewa Falls*, 71 Wis. 558; *State v. Janesville Street R. Co.* 23 L. R. A. 759, 87 Wis. 72.

Not having used the most approved method, it was negligence.

Haynes v. Raleigh Gas Co. 26 L. R. A. 810, 114 N. C. 208; *McClure v. Sparta*, 84 Wis. 269; *Gleason v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458; *Kraatz v. Brush Electric Light Co.* 82 Mich. 457; *Central Pennsylvania Teleph. & Supply Co. v. Wilkes-Barre & W. S. R. Co.* 6 Kulp, 385; *United Electric R. Co. v. Shelton*, 89 Tenn. 423; *Fletcher v. Rylands*, 1 Eng. Ry. Cas. 286; *Cleveland v. Bangor Street R. Co.* 86 Ma. 282; *Bourget v. Cambridge*, 16 L. R. A. 605, 156 Mass. 891; *Cohen v. New York*, 4 L. R. A. 406, 113 N. Y. 532; *Fitts v. Cream City R. Co.* 59 Wis. 328; *Booth, Street Railways*, § 292, pp. 395, 396; *Keasbey, Electric Wires*, 154, 155; *Burt v. Douglas County Street R. Co.* 18 L. R. A. 479, 83 Wis. 229.

When two causes combine to produce an injury, both of which are proximate in their character, the one being the result of culpable negligence, and the other an occurrence as to which neither party is at fault,—the negligent party is liable, provided the injury would not have been sustained but for such negligence.

Grimes v. Louisville, N. A. & O. R. Co. 8 Ind. App. 578; *Sellick v. Lake Shore & M. S. R. Co.* 18 L. R. A. 154, 93 Mich. 875; *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, 86 Wis. 340; *McClure v. Sparta*, 84 Wis. 269.

Newman, J., delivered the opinion of the court:

Errors are assigned as follows: (1) In the admission of testimony; (2) in denying defendant's motion for a nonsuit, and in refusing to grant a new trial; (3) in refusing to submit to the jury questions proposed by the defendant for special verdict; (4) in the charge to the jury.

The errors complained of in the admission of testimony relate to the testimony of physicians relative to the physical and mental condition of the plaintiff a year and a half after the accident. The accident happened in February, 1893. In August, 1893, the plaintiff became the patient of Dr. Becker. The doctor was permitted to describe the condition in which he found him, giving both subjective and objective symptoms. So far

as this related to the seriousness of the injury, this was competent. Nor was it liable to the objection that it was hearsay. So far as the knowledge of plaintiff's condition was derived from plaintiff's statements to him as a medical man for the purpose of receiving advice and treatment, the testimony was not incompetent for that reason. *Quais v. Chicago & N. W. R. Co.* 48 Wis. 513, 83 Am. Rep. 821; *Davidson v. Cornell*, 132 N. Y. 228. There is no just ground for claiming that the doctor's relation to the plaintiff was other than as a medical adviser, and not for the purpose of being a witness upon the trial. So the question is not within the principle of *Stewart v. Everts*, 76 Wis. 35, and *Abbot v. Heath*, 84 Wis. 314. It is also claimed as error that Dr. Becker was permitted to testify that plaintiff's condition, as he found it, could have been produced by contact with a wire heavily charged with electricity. The plaintiff's theory was that such was the cause of his condition. There was some testimony tending to establish that theory. Surely, testimony showing that such a cause was sufficient to produce such a condition tended also to establish that theory. The testimony was both relevant and competent. The doctor was permitted to give his opinion of the "reasonable probability" of the plaintiff's ultimate recovery from his injuries. While it is true that the whole testimony must establish, in the minds of the jury, more than a mere "reasonable probability," and must amount to proof to a "reasonable certainty," this ultimate fact is susceptible of proof by items of testimony which do not, separately, fully establish it. The phrase "reasonable probability" is equivocal. It was for the jury to give force to the doctor's testimony in accordance with the intention of the words used, rather than with a strict or technical definition of the words. This was not error. The witness Eggert, who was present at the time of the accident, testified that he received a shock. This was probably competent as tending to show that the wire was charged with electricity, and so as bearing upon the question whether the plaintiff's injuries were caused by an electric shock.

The negligence which is alleged and claimed against the defendant is its omission to place guard wires over its trolley wires in such a way as to prevent the telephone wires, in case of their falling from any cause, from falling upon and coming in contact with the trolley wires. It is claimed that the defendant owes the duty to the public to guard it from the effect of accidents which may happen to the telephone wire, which it neither owns nor controls. The employment of electricity to propel cars along railway tracks in cities is of recent institution. It may well be that the dangers attending its use in that function, and the best modes of guarding against accident in its use, are not yet fully known and understood. Many of the phenomena, and the possibilities of danger attendant upon such use are still subjects of question and experiment. But notwithstanding this condition of imperfect knowledge, the law permits this mysterious and

dangerous power to be used for locomotion in the streets of cities. It is lawfully there. No doubt it is the duty of the defendant to use such customary and approved appliances as are known and used in the business of operating electric railways. So far as reasonable knowledge, in the present state of the science and the practical use of electricity as a motive power for street railways, and reasonable foresight, can go, it is bound to guard the public against the perils attendant upon this use of electricity. But it is liable only for what is known as "reasonable care." The present state of the science, and the present practical knowledge of the most practical and effectual means and methods of guarding against such perils as are incident to its use, are a most important element in the question of what is reasonable care. In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as matter of law, what method of guarding the wires shall be required, nor whether any guards shall be required; for it is not known to the law that any method now known will prove effective. But it is a question for the jury, under all the facts in the case, to determine whether the method actually used was negligent. The trial court treated this question as one of law. He instructed the jury, in effect, that guard wires placed over the trolley wires is the approved method of protecting the telephone wire, in such places, and refused to submit to the jury, in the special verdict, the following question proposed by the defendant: "Did the defendant, in the construction and operation of the street railway in question, exercise such care and prudence for the safety of persons using the highway as men of ordinary intelligence and prudence engaged in operating the railway in question would have exercised at the place in question?" The instruction virtually took the question of the defendant's negligence from the jury. The refusal to submit the question asked withdrew it altogether from the jury. The question of the defendant's negligence is always for the jury, unless the negligence is so clear upon the evidence that intelligent minds cannot fairly form different conclusions upon it. This question was a proper one to be submitted in a special verdict. It related to a material issue of fact, and one upon which the case, in a large measure, turned. Both the charge upon this point and the refusal to submit this question were error. This is in no way inconsistent with what was decided in *State v. Janesville Street R. Co.* 87 Wis. 72, 22 L. R. A. 759. That case was on demurrer to the complaint. The action was mandamus to compel the railway company to put guard wires above its trolley wires at crossings. An ordinance of the city required it. The complaint alleged the ordinance, and that guard wires are the proper and approved method of preventing danger from the falling of the telephone wires upon the trolley wires. These facts were admitted by the demurrer. The case in no way involved the decision of the question whether guard wires are the proper

method, or whether it is negligence to omit the guard wires.

It is claimed that plaintiff's accident was caused, directly, by contact with a telephone wire, belonging to the telephone company, and neither owned nor controlled by the defendant and in a street to which its system did not extend. More remotely, it is supposed to have been caused by the falling of the telephone wire upon the trolley wires, which became a live wire by such contact. There would be no claim against the defendant unless it could be shown that the telephone wire was alive with electricity communicated to it by the trolley wires. The defendant may be liable for the result, if its omission to guard its wires was negligence, and if that negligence was the proximate cause of the plaintiff's damages. The real first cause of the accident is in doubt. The real test of the defendant's liability for the plaintiff's accident is whether the omission to guard its wire, that being found by the jury to be negligence, was the proximate cause of the accident. The negligence is not the proximate cause of the accident, unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 163, 50 Am. Rep. 353; *Barton v. Pepin County Agr. Soc.* 83 Wis. 19. This, too, is always a question for the jury, where the evidence is not clear, or the proper inference from undisputed evidence may be in doubt. The defendant asked to have this question submitted in the special verdict. This was refused, and no instruction was given relating to this element in the question of proximate cause. The defendant's proposed question was as follows: "Ought men of ordinary intelligence and prudence, engaged in operating the street railway in question, to have reasonably expected that the telephone wire in question would be likely to come in contact with its trolley wire at the place in question, and occasion injury to persons lawfully using the highway crossed by said telephone wire?" The refusal to submit this question, in a proper case, has been held by this court to be error. *Atkinson v. Goodrich Transp. Co. supra.* These two special questions, which the trial court refused to submit, cover the whole question of the defendant's liability. Was the defendant negligent? Was the negligence the (proximate) cause of the damages? These are material issuable facts, such as a party has the right, under the statute, to require to be submitted in a special verdict. They should have been submitted, at least in substance. The charge of the trial court was long and copious. It contained a long and able disquisition upon the subject of the uses and purposes of highways, and of the rights of travelers to free and unobstructed passage therein. He said: "The public have the right to the free and unmolested and unobstructed use of the streets, and no

person has the right to hinder and prevent the use of the streets for the purpose of travel," and much more to the same purpose. It would be all very well in a case where questions of that nature were involved. But in this case it tended really to keep out of sight and obscure the real point in controversy. Both the telephone company and the defendant had a perfect legal right to have their wires over the streets. They were no illegal obstruction of the streets. The point involved in relation to them depended on entirely different considerations. It was whether the defendant was negligent in permitting the telephone wire to fall upon its wires. This part of the charge went upon a mistaken theory of the case, and was very likely to mislead the jury by distracting attention from the point of stress in the case.

Relating to the amount of the damages to which the plaintiff might be entitled, and as affected by the permanency of the plaintiff's injuries, the court charged: "I instruct you, gentlemen, that you cannot take into consideration, as an element of damages, any testimony on the subject of the permanency of the injuries, unless you find from the testimony that there is reasonable probability that the injury that he has sustained, and the suffering and disability he is now under, will be permanent and lasting." The criticism is on the phrase "reasonable probability." Because the phrase is equivocal, it is liable to communicate to the jury an erroneous impression that some degree of proof less than of reasonable certainty may be sufficient. It is settled in this court that the degree of proof must amount to reasonable certainty. *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154; *Hardy v. Milwaukee Street R. Co.* (Wis.) decided at this term, but not yet officially reported. The defendant asked for a special instruction to the effect that damages as for permanent injury should not be allowed unless the jury could say from the evidence that it was reasonably certain that the injury would be permanent, and that reasonable probability was not sufficient. This the court refused to give. The instruction given was erroneous, and it was error to refuse the instruction requested. For the errors mentioned, the judgment must be reversed.

The judgment of the Superior Court of Milwaukee County is reversed, and the cause remanded for a new trial.

Richard Carman COMBES, *Respt.*,

v.

MILWAUKEE & MINNESOTA R. CO.
(Dwight W. Keyes, Intervenor), *Appt.*

(.....Wis.....)

1. A corporation organized by pur-

NOTE.—For note upon the dissolution of an insolvent corporation as affecting causes of action, see *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* (Wis.) 15 L. R. A. 667. See also *Nelson v. Hubbard* (Ala.) 17 L. R. A. 375.

The present case seems to be a novel one of the 37 L. R. A.

chasers of a railroad on foreclosure which is afterwards divested of all its property and its franchises for the operation of the railroad by the subsequent foreclosure of prior liens thereon created by the original owner, does not thereafter continue to exist so that it can be sued after a new corporation under legislative authority has acquired the property under the latter foreclosure and operated the road for many years.

2. After the dissolution of a corporation the power to proceed judicially against it is wholly divested except as specially authorized by statute.

3. The secretary of a defunct corporation against which process has been served by publication may be allowed to intervene and inform the court of the facts which work the dissolution and death of the corporation.

(February 5, 1895.)

A PPEAL by intervenor from an order of the Circuit Court for Milwaukee County refusing to set aside an order authorizing service of summons by publication on defendant in a proceeding brought to enforce payment of certain bonds which had been issued by it. *Reversed.*

Statement by Cassoday, J.:

It appears from the record: That for some years prior to June 1, 1858, the La Crosse & Milwaukee Railroad Company was duly incorporated by the legislature of Wisconsin, and organized as such to build and operate a railroad from Milwaukee to La Crosse, and was given the right to mortgage its road by divisions. That it accordingly divided the road into two divisions,—the eastern, extending from Milwaukee to Portage City, a distance of ninety-five miles; and the western, extending from Portage City to La Crosse, a distance of 105 miles. That the eastern division was incumbered by three mortgages, to secure bondholders on that division, and the western division was incumbered by two mortgages, to secure bondholders on that division. That the whole road was incumbered by several judgments, one of which was in favor of Newcombe Cleveland, hereinafter mentioned. That June 1, 1858, that company executed a mortgage to William Barnes, as trustee, to secure an issue of bonds which covered the whole road, and August 11, 1858, executed a mortgage supplemental to said last-named mortgage, by way of further assurance. That the Barnes mortgage, though last, was first foreclosed. That sale under it was made May 21, 1859, to said trustee, who became the purchaser for the bondholders, and the bondholders thereupon, and on May 23, 1859, organized a new company under the general statutes of this state, by the name of the Milwaukee & Minnesota Railroad Company, to which Barnes conveyed the property so purchased by him. That said new com-

termination of corporate existence by implication without any formal dissolution.

For liability of consolidated railway company for debts of its predecessors, see *note* to *Chicago & I. Coal R. Co. v. Hall* (Ind.) 28 L. R. A. 231.

pany was so organized for the purpose of acquiring title to the railroad formerly owned by the said La Crosse & Milwaukee Railroad Company, extending from Milwaukee to Portage City, in the state of Wisconsin, a distance of about ninety-five miles, and for operating said road and paying off said prior incumbrance. That October 24, 1864, for the purpose of raising money to pay off prior incumbrances upon the property of said corporation, and for other purposes of the corporation, the said Milwaukee & Minnesota Railroad Company duly executed, under its corporate seal, a trust deed whereby it conveyed all of its property and franchises to James H. Fonda and G. Hilton Scribner, of New York, to secure certain bonds to be issued by said company to the aggregate amount of \$600,000, each bond to be for \$1,000, payable July 1, 1884, with interest at the rate of 8 per cent per annum, payable semiannually. That October 24, 1864, the defendant, the Milwaukee & Minnesota Railroad Company, duly executed its bond, under its corporate seal, bearing date on that day, whereby it acknowledged itself indebted to the bearer thereof in the sum of \$1,000, which sum it thereby agreed to pay to the bearer thereof on July 1, 1884, at the office of the company in New York, with interest at the rate of 8 per cent per annum, payable at the same place semiannually, on the 1st days of January and July in each year. That said bond was duly registered and countersigned by said trustees November 8, 1864. That annexed to said bond were 89 coupons, for \$40, each of which was payable six months after the date of the preceding one. That annexed to the same bond was one coupon for \$26.67, payable January 1, 1865. That October 24, 1864, the Milwaukee & Minnesota Railroad Company duly executed, under its corporate seal, 881 other bonds, bearing date on that day, and duly registered and countersigned by said trustees, of the same amount, form, tenor, and effect as the bond above described, except that each was designated by a different number, and each had 40 coupons attached, of the tenor and effect of those annexed to said bond so described. That the said 881 bonds were designated by the numbers stated. That December 1, 1864, the said 882 bonds were duly issued by the Milwaukee & Minnesota Railroad Company, and sold and transferred to various third parties, who paid a valuable consideration therefor. That payment of said first series of coupons, when they fell due, was refused. That, upon the organization of the Milwaukee & Minnesota Railroad Company, that company claimed to have succeeded to all the rights, property, and franchises of the La Crosse & Milwaukee Railroad Company, subject to all prior mortgages and judgments. That the first mortgage on the western division was subsequently foreclosed, and that division sold. That the purchasers at such sale thereupon organized a new company, by the name of the Milwaukee & St. Paul Railroad Company, which company went into possession of that division. That subsequently, and on April 18, 1866, Frederick P. James, as the assignee of the said judgment against the La Crosse

Company, in favor of Newcombe Cleveland, mentioned, commenced a suit in equity in the circuit court of the United States for the district of Wisconsin, against the Milwaukee & Minnesota Railroad Company, to enforce the lien of said judgment on the said eastern division. That such proceedings were had in that suit that January 11, 1867, a decree was entered adjudging that there was due to said James on the judgment \$98,801.51, and ordering a sale of the eastern division, subject to all prior liens, for its payment. That, under that decree, the property was, March 2, 1867, sold and conveyed to the Milwaukee & St. Paul Railway Company, for \$100,920.94, and from that time the said last-named company, whose name has since been changed to the Chicago, Milwaukee & St. Paul Railway Company, has been in the possession of said road from Milwaukee to Portage City, as owner, under such sale and purchase. That since the sale of said road under said judgment and decree, as aforesaid (more than 26 years before the commencement of this action), the said Milwaukee & Minnesota Railroad Company has not conducted any of the ordinary business theretofore conducted by said corporation, or any business. That the law governing the election of the directors of said company, to wit, chapter 28, Private & Local Laws 1862, provided, in effect, that the regular annual meeting of the stockholders of the Milwaukee & Minnesota Railroad Company, for the election of directors of said company, should be held on the last Wednesday of May, at 10 o'clock in the forenoon of that day, in each year, in the city of Milwaukee. That the secretary of said company should give 80 days' notice of the place and time of said election, in at least two newspapers printed in Milwaukee, and the other at Madison. That the governor should annually appoint three inspectors for said election, who should take an oath faithfully and impartially to discharge the duties devolved upon them by said act. That the inspectors should meet at the time and place appointed for said election, and proceed to receive such votes for directors of said company as might legally be offered and received under said act. That the board of directors of said company should consist of nine persons authorized to vote at said election, and such nine persons receiving the highest number of votes at said election should be the board until another election should be held and their successors elected. That the said Dwight W. Keyes was elected secretary of the Milwaukee & Minnesota Railroad Company at the time of its organization. That he continued to act as such secretary so long as said company pretended to transact any business in Wisconsin, and was acting as such in 1865 and 1866. That he was never notified of the election of any successor, and never had any knowledge or information that any other person was elected as secretary of said company. That there never was after April, 1867, any meeting of the stockholders of said company, in Wisconsin or elsewhere, for the purpose of electing a board of directors, or for any other purpose. That after that time there never was a meeting of the board of directors. That

no inspectors of election have ever been appointed since 1865. That no notice of the time and place of the meeting of stockholders of said defendant for the election of directors, or for any purpose, was ever published in any newspaper in Milwaukee or Madison since 1865. That no such notice has been published since 1865. That said Milwaukee & Minnesota Railroad Company has not, for more than twenty-six years prior to the commencement of this action, owned, possessed, or had any property within Wisconsin, nor has it been engaged in any business whatever. That April 12, 1893, the plaintiff caused a complaint to be made out and verified against the said Milwaukee & Minnesota Railroad Company, and, in addition to the issuance of said 832 bonds and the mortgage to secure the same and the nonpayment thereof, in effect alleged that, before the commencement of this action, the said 832 bonds were sold and transferred to this plaintiff for a valuable consideration, and he is now the owner thereof. That no part of the principal or interest thereon has been paid to him, and that there was then due to him from said defendant, the Milwaukee & Minnesota Railroad Company upon said bonds, the sum of \$332,000, together with interest thereon from December 1, 1864, and also interest upon each of said coupons from the date of its maturity, and demanded judgment against the Milwaukee & Minnesota Railroad Company for such amount. That thereupon a summons was issued in this action, and delivered to the sheriff of Milwaukee county, who returned the same, with the following indorsement, to wit: "State of Wisconsin, Milwaukee County—ss.: I hereby certify that, after due diligence, search, and inquiry, I cannot find the within-named defendant, the Milwaukee and Minnesota Railroad Company, within my county; and from information obtained, and I believe the information to be true, no officer or agent of said company upon whom to make service can be found within the state of Wisconsin. Michael Dunn, Sheriff, per Henry J. Holle, Under-sheriff. Date Milwaukee, May 4, 1893." That May 5, 1893, the summons and complaint were filed with the clerk of the circuit court for Milwaukee county, and, upon affidavits of the plaintiff and his attorney subsequently made and filed therein, the plaintiff obtained from a commissioner of said circuit court an order for the service of said summons upon the said Milwaukee & Minnesota Railroad Company by publication, and the records show that said summons was published accordingly. That, upon affidavits showing the facts outside of said complaint stated, the said Dwight W. Keyes obtained an order, September 28, 1893, ordering plaintiff to show cause why said order of publication and such service of said summons should not be set aside and held for naught. From an order dismissing said order to show cause, and denying the relief therein prayed for, the said Keyes brings this appeal.

Mr. John W. Cary, with Mr. C. H. Van Alstine, for appellant:

One who is not a party to an action can be
37 L. R. A.

heard upon a motion to dismiss for want of jurisdiction.

Callender v. Painesville & H. R. Co. 11 Ohio St. 516; *Kelley v. Mississippi Cent. R. Co.* 2 Flipp. 581; *Welch v. Ste. Genevieve*, 1 Dill. 130; *First Nat. Bank of Selma v. Colby*, 88 U. S. 21 Wall. 609, 23 L. ed. 687; *Greeley v. Smith*, 3 Story, C. C. 657; *State v. Jefferson Iron Co.* 60 Tex. 812.

Section 20 of chapter 148, Rev. Stat. 1858, provided that whenever a corporation shall have suspended its ordinary and lawful business for one year, it shall be deemed to have surrendered its rights, privileges, and franchises, and shall be adjudged to be dissolved.

The state has thereby evinced a willingness and an intent on its part to accept a surrender of the charter of a corporation when it has ceased to do business for one year. It is also strong evidence of an intent, on the part of the corporation or stockholders, to surrender the charter.

People v. Bank of Pontiac, 12 Mich. 527; *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Goulding v. Clark*, 84 N. H. 148; *King v. Pasmore*, 8 T. R. 199; *Phillips v. Wickham*, 1 Paige, 590, 2 L. ed. 763; 2 Kent, Com. 308; *Angell & A. Priv. Corp.* 787; *King v. Morris*, 8 East, 213, 4 East, 17; *Bruce v. Platt*, 80 N. Y. 379; *Bradt v. Benedict*, 17 N. Y. 98; *Sles v. Bloom*, 19 Johns. 456, 10 Am. Dec. 278; *Penniman v. Briggs*, Hopk. Ch. 300, 3 L. ed. 429; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 478.

The stockholders of a corporation may, by unanimous consent, dissolve the corporation.

Denike v. New York & R. Lime & Cement Co. 80 N. Y. 606; *Cook, Stock & Stockholders*, 2d ed. § 629, note 4.

The franchise of a Wisconsin railway corporation could be sold under foreclosure or execution sale; and on such sale and the operation of the road by the purchasers and a cessation of all corporate business and acts by the old corporation, a surrender of the "franchise of being a corporation," and an acceptance thereof by the state occur.

Memphis & L. R. Co. v. Berry, 112 U. S. 609, 28 L. ed. 837; *State v. Sherman*, 22 Ohio St. 411; *Snell v. Chicago*, 8 L. R. A. 858, 138 Ill. 418.

The Milwaukee & Minnesota Railroad Company, having been dissolved as early as 1868, and more than three years having elapsed since the dissolution, it cannot be sued, and if judgment should be entered against it in this action, such judgment would be void.

Von Glahn v. DeRoset, 81 N. C. 467; *Merrill v. Suffolk Bank*, 81 Me. 57, 50 Am. Dec. 649; *Folger v. Columbian Ins. Co.* 99 Mass. 276, 96 Am. Dec. 747.

Mr. Hugh Ryan, for respondent:

A stockholder or former officer has no authority to appear and defend merely because he might ultimately be held liable for the claim.

Byers v. Franklin Coal Co. of Lykens Valley, 14 Allen, 470.

Although a corporation may forfeit its charter by an abuse or misuse of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal.

Boston Glass Manufactory v. Langdon, 42

Pick, 49, 85 Am. Dec. 292; *Coburn v. Boston Paper Machs Mfg. Co.* 10 Gray, 243; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135.

A corporation should not be permitted to deny its legal existence for the purpose of evading its debts.

Chamberlain v. Huguenot Mfg. Co. 118 Mass. 582.

Cessation of active business does not imply a dissolution of a corporation so as to deprive it of its right of action.

State Nat. Bank of St. Joseph v. Robidoux, 57 Mo. 449; *Kansas City Hotel Co. v. Sawyer*, 65 Mo. 279; *Valley Bank & Sav. Inst. v. Ladies Congregational Sewing Soc.* 28 Kan. 428; *Cochran v. Arnold*, 58 Pa. 899; *Hamilton v. Clarion, M. & P. R. Co.* 144 Pa. 34; *Atlanta v. Gate City Gas Light Co.* 71 Ga. 106; *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *Russell v. McLellan*, 14 Pick. 63; *Oakes v. Hill*, 14 Pick. 442; *Rollins v. Clay*, 88 Me. 182.

A corporation will not be dissolved by a sale of the franchise or of all the corporate property and a settlement of all its concerns and a division of the surplus; or by a cessation of all corporate acts; or by neglect of corporate duty; or any abuse of corporate powers; or by doing acts which cause a forfeiture of the charter, without a judgment declaring such forfeiture.

Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; *Hodsdon v. Copeland*, 16 Me. 814; *Baptist Meeting-House Proprs. v. Webb*, 66 Me. 398.

A corporation does not become dissolved by the sale of all its property.

Reichwald v. Commercial Hotel Co. 106 Ill. 489; *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 580; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516.

A claim of forfeiture of a franchise cannot be raised collaterally.

Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *Day v. Opdenburgh & L. C. R. Co.* 107 N. Y. 129; *Mickles v. Rochester City Bank*, 11 Paige, 118, 5 L. ed. 77, 42 Am. Dec. 108; *Kincaid v. Duinelle*, 59 N. Y. 548; *Moseby v. Burrow*, 52 Tex. 396; *Jeffersonville R. Co. v. Applegate*, 10 Ind. 49; *Bohannon v. Binns*, 81 Miss. 855; *Revers v. Boston Copper Co.* 15 Pick. 851; *Allen v. New Jersey Southern R. Co.* 49 How. Pr. 14; *Everts v. Killingworth Mfg. Co.* 20 Conn. 447; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28; *King v. Amery*, 3 T. R. 515; *Slee v. Bloom*, 5 Johns. Ch. 366, 1 L. ed. 1111; *Terrett v. Taylor*, 18 U. S. 9 Cranch, 51, 3 L. ed. 653; *Com. v. Union Fire & Marine Ins. Co. in Newburyport*, 5 Mass. 230, 4 Am. Dec. 50; *Sleeper v. Goodwin*, 67 Wis. 577; 2 Kent, Com. 859; *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *Wilde v. Jenkins*, 4 Paige, 481, 3 L. ed. 524.

Cassoday, J., delivered the opinion of the court:

The Milwaukee & Minnesota Railroad Company was organized, under the General Statutes, May 28, 1859. It thereupon acquired, by conveyance from Barnes, through a foreclosure of the Barnes mortgage and a sale thereon to Barnes, all the rights, property, and franchises of the La Crosse & Mil-

waukee Railroad Company, subject, however, to three mortgages on the eastern division and two mortgages on the western division, and several judgments on the respective divisions, including one in favor of Newcombe Cleveland. Prior to April 18, 1866, the Milwaukee & St. Paul Railroad Company acquired the title and possession of the western division, through the foreclosure of the first mortgage thereon and a sale thereunder. The La Crosse & Milwaukee Railroad Company was expressly authorized by its charter, and the amendments thereto, to mortgage all of its estate, real, personal, or mixed, "together with the functions appertaining to said railroad, and all corporate and other franchises, rights, and privileges" of said company; and hence, by that foreclosure and sale, the same were vested in the Milwaukee & St. Paul Company. March 2, 1867, the Milwaukee & St. Paul Railway Company acquired the title and possession of the eastern division, under and by virtue of a marshal's sale and conveyance to it on a decree entered in the federal court, January 11, 1867, as mentioned, in a suit in equity in favor of the assignee of the Cleveland judgment, and against the Milwaukee & Minnesota Railroad Company, to enforce that judgment as a lien thereon. Since March 2, 1867, the name of the Milwaukee & St. Paul Company has been changed to the Chicago, Milwaukee & St. Paul Railway Company, and the same has ever since been in possession and operated said railroad as owner thereof. Prior to the marshal's sale and conveyance mentioned, the Milwaukee & Minnesota Railroad Company had a board of directors, who had severally been elected, at the time and place and in the manner prescribed by the statutes of this state, and such board had elected a president, secretary, and treasurer of that company, who had, respectively, acted as such officers, down to the time of the marshal's sale and conveyance mentioned. Independently of statute, it was the duty of that company, during its existence, to have an office and officers within this state. *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 579.

It appears that no notice of the election of any such directors for that company was ever given, and no appointment of any inspectors of any such election was ever made as prescribed by statutes, after 1866, and that after April, 1867, there never was any meeting in Wisconsin of the stockholders or directors of said company for any purpose; that since that time said company has neither owned, possessed, nor had any property in this state, nor been engaged in any business therein, and at the time of the commencement of this action it had no agent nor officer therein. The question recurs whether the Milwaukee & Minnesota Railroad Company has any legal existence in this state, so as to entitle it to sue and be sued. That company was incorporated and organized under and by virtue of the laws of this state over thirty-five years ago, and existed only by force of the laws of this state. Since such laws, of themselves, had no extraterritorial force, that corporation could not migrate to some other state or country, but during its existence was bound

to dwell in this, the state of its creation. *Seamans v. Knapp, Stout & Co. Company* (Wis.; not yet officially reported) *ante*, 362; *Larson v. Aultman & T. Co.* 86 Wis. 283, 284; *Bank of Augusta v. Earle*, 88 U. S. 13 Pet. 589, 10 L. ed. 307; *Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771. While it could only live and have its being in this state, yet its residence here created no insuperable objection to its power to contract and be contracted with in other states, and having its legal existence recognized in such other states. *Ibid.* But any exercise of its corporate franchises in such other states was merely permissible by virtue of the comity of such states. *Ibid.*; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 71 U. S. 10 Wall. 566, 19 L. ed. 1029. Such being the law, it is very manifest that, if the Milwaukee & Minnesota Railroad Company had any legal existence at the time of the commencement of this action, such existence was confined within the limits of this state. And yet the sheriff's return is to the effect "that, after due diligence, search and inquiry," he could not find that company within his county, nor any officer or agent of the same within the state. The same condition of things, as to that company in this state, had existed ever since April, 1867. If, during those twenty-six years, it existed in this state at all, such existence was without any definite location, intangible, and unascertainable. The case is not one of a defendant whose "residence is unknown," or who "keeps himself concealed" within the state, with the intent to "avoid the service of a summons," within the meaning of the statute (sec. 2639). The service of the summons by publication in this case is sought to be justified upon the sole ground that the defendant is a "private corporation organized under the laws of the state, and the proper officers on whom to make service . . . cannot be found." *Ibid.* The statute declares, in effect, that whenever any corporation shall have neglected or refused to pay and discharge its debts, "or shall have suspended its ordinary and lawful business for one whole year, it shall be deemed to have surrendered the rights, privileges, and franchises granted or acquired under any law, and shall be adjudged to be dissolved." Section 1763. But this court has repeatedly held that such neglect, refusal, or suspension "for one whole year" does not *ipso facto* operate as a dissolution of such corporation, but simply declares an efficient cause for adjudging a dissolution in a proper action. *Strong v. McCagg*, 55 Wis. 624; *Sleeper v. Goodwin*, 67 Wis. 577. The statute also prescribes, in effect, that where the existence of a corporation expires by its own limitation, or is voluntarily dissolved in the manner provided by law or by its articles of association, or is annulled by forfeiture or otherwise, nevertheless it shall continue to exist for three years for certain purposes. Section 1764. *Sleeper v. Goodwin*, 67 Wis. 584. So the statute authorizes the dissolution of a corporation by a written resolution in certain cases. Section 1769.

It must be remembered that the Milwaukee & Minnesota Railroad Company acquired the

rights, property, and franchises of the La Crosse & Milwaukee Railroad Company by virtue of the foreclosure and sale of the Barnes mortgage; that it took such rights, property, and franchises subject to the prior mortgages and prior judgments mentioned; that the purpose of its incorporation and organization was to operate the railroad thus acquired between the points mentioned; that prior to April, 1867, it had been completely ousted and dispossessed of the entire railroad, and every part thereof, under and by virtue of the foreclosure and sale and the decree in equity and sale mentioned; that all such rights, property, and franchises thereby and thereupon became vested in the St. Paul Company, which for more than twenty-six years prior to the commencement of this action, and since, has had the possession and control of the entire line of railroad, and every part thereof, and during all that time operated the same as a railroad, with the repeated express or implied sanctions of the legislature of this state; that during the same time the Milwaukee & Minnesota Railroad Company has not owned nor possessed any railroad, nor does it appear that it has attempted to construct any. The contention of counsel for the plaintiff seems to be to the effect that while the Milwaukee & Minnesota Railroad Company had, by virtue of the sales and conveyances mentioned, been deprived of the entire railroad and its property, and its franchises, as a corporation, to maintain and operate the same, yet that it still possesses a franchise to be a corporation, and hence may still sue and be sued. Conceding that a franchise to be a corporation may, under certain circumstances, and for certain purposes, and for a limited time, exist without any franchise to maintain and operate such corporation, still the question here presented is whether any such franchise, to be a corporation, survived to the Milwaukee & Minnesota Railroad Company after the transfers made, under the circumstances mentioned, and for the length of time named. Undoubtedly, a private corporation may dissolve itself and terminate its corporate existence by a voluntary surrender of its franchises to the state. To make the surrender complete, however, it must be accepted by the state. 4 Am. & Eng. Encyclop. Law, p. 296, and cases there cited. It would seem that after such corporation had been stripped of all its property, and for 26 years had failed to exercise any corporate franchise or elect any officer in this state or keep any office therein, such surrender would be presumed. *Brandon Iron Co. v. Gleason*, 24 Vt. 228. And so it would seem that, where a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. *Sles v. Bloom*, 19 Johns. 456, 10 Am. Dec. 278; *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454. It has been held that a seizure and sale of the franchises of a corporation effect its dissolution. *Vincennes Bank v. State*, 1 Blackf. 267, 12 Am. Dec. 234. So it has frequently been held that the consolidation of two or more railway companies, in pursuance of a statute, operates as a dissolution of the old corporations, and the

merger of the franchises and privileges of each of them into the new corporation. *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 857; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 873; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 801, 38 L. ed. 450. It is certainly within the power of a legislature which creates a corporation, and grants franchises to it, to authorize it to sell or mortgage those franchises. *Willamette Woolen Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 30 L. ed. 384. Here the franchises were mortgaged by express legislative authority, and hence were transferred through the foreclosure and sale pursuant to law. Besides, the statute in this state declares, in effect, that any person or association of persons which shall have or may hereafter become the owner or assignee of the rights, powers, privileges, and franchises of any corporation created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings in any court in this state, including the courts of the United States sitting herein, "may, at any time within two years after such purchase or assignment," organize anew, as provided by the statutes, and shall thereupon have the same rights, privileges, and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by the statutes applicable thereto. Rev. Stat. § 1788. That section is in effect the same as chapter 115, Laws 1872. The Milwaukee & St. Paul Company became such purchaser, and so organized anew, within two years after such purchase and assignment, although about five years prior to that enactment. The manifest intention of the act was to ratify and confirm all such prior transfers, and to accept all such prior surrenders of corporate rights. The two years mentioned was merely to limit the time within which any purchasers or assignees, subsequently to the enactment, might so organize anew. After careful consideration, we are constrained to hold, upon the showings made, that, prior to the commencement of this action, the Milwaukee & Minnesota Railroad Company had voluntarily surrendered all of its corporate franchises, and that the same had been accepted by the state.

After the dissolution of a corporation, the power to proceed judicially against it in an action is wholly devastated, except as especially authorized by statute. "A defunct corporation, like a natural person who dies, cannot be brought into court by process served upon persons who were officers or agents when the corporation was in existence." *Waterman, Corp.* § 484. "Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the legislature, it becomes defunct, and the suit abates, unless the legislature, by some act, saves the right of action against the corporation." *Greely v. Smith*, 3 Story, C. C. 657, Fed. Cas. No. 5,748. In *Mumma v. Potomac Co.* 88 U. S. 8 Pet. 281, 8 L. ed. 945, it was held that "there is no pretense to say that a *scire facias* can be maintained and a judgment had thereon against a dead corporation, any more than against a dead man." In that case the attorneys of record for the corporation, at the time of the rendition of the original judgment, appeared and suggested the death of the corporation, after the rendition of such judgment, and alleged the same by way of a plea in abatement. The facts being admitted, the trial court gave judgment that the plaintiff take nothing by his writ of *scire facias*, and that judgment was affirmed by the Supreme Court of the United States. From the very nature of things, the dissolution or death of a corporation defendant like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation. This is obvious from the authorities cited. See also *Welch v. Sta. Genevieve*, 1 Dill. 180, Fed. Cas. No. 17,873; *First Nat. Bank of Selma v. Colby*, 88 U. S. 21 Wall. 609, 611, 614, 22 L. ed. 687, 688; *State v. Jefferson Iron Co.* 60 Tex. 812.

We think it was competent for Dwight W. Keyes, who had been the secretary of the defunct corporation, to intervene and inform the court of the facts which had worked a dissolution and death of the corporation.

The order of the Circuit Court is reversed, and the cause is remanded, with direction to set aside the order of publication and the service of the summons; but, as indicated in the *Potomac Co. Case*, cited, as there is no such corporation *in esse* as the Milwaukee & Minnesota Railroad Company, there can be no costs awarded in its favor.

ILLINOIS SUPREME COURT.

George D. SWEETSER *et al.*, *Plffs. in Err.*,
v.
Canute R. MATSON.

(158 Ill. 568.)

An execution creditor who consents to the postponement of the sale from

time to time for the mere purpose of giving the debtor an opportunity to negotiate with his creditors, so as to secure from them some compromise or other advantage, loses his priority of lien as against a junior execution coming into the hands of the sheriff during the pendency of such postponement, although his motive is that of kindness or leniency to the debtor with no actual intention to hinder or defraud creditors, and the

NOTE—Loss of priority of execution by consent of creditor to delay or postponement of sale.

SWEETSER v. MATSON carries the doctrine which it attempts to apply rather further than the great 27 L. R. A.

body of the decisions have gone. It undoubtedly would not be regarded as sound in some of the states and it is questionable whether it would be followed in more than a very few.

postponements do not in fact hinder, delay, or defraud other creditors.

(October 20, 1894.)

ERROR to the Appellate Court, First District, to review a judgment reversing a judgment of the Superior Court for Cook County in plaintiffs' favor in an action brought to recover damages from defendant, county sheriff, for the false return of an execution. *Reversed.*

Statement by Bailey, J.:

This was an action on the case, brought by George D. Sweetser and others, copartners under the firm name of Sweetser, Pembroke & Company, against Canute R. Matson, sheriff of Cook county, to recover damages for a false return of an execution in favor of the plaintiffs and against the property of Fanton R. Lawlor. At the trial there was little if any controversy as to the material facts, those which the evidence tended to establish being, in substance, as follows:

On the 8th day of January, 1890, nine writs of execution against the property of Lawlor were issued and delivered to the defendant, as sheriff, to execute, viz.: one from the superior court in favor of Nano Murphy for \$1,765.67, and one from the same court in favor of E. W. Price for \$5,160.60, and seven from the circuit court in favor of the Hibernian Banking Association, aggregating \$28,752.08. On the same day an attachment writ, in favor of James H. Walker and

against the property of Lawlor, for \$979.16, was also issued and placed in the hands of the defendant, as sheriff, to execute. These nine executions and the writ of attachment were on the same day levied by the defendant upon a stock of goods at 182 and 184 Wabash avenue, Chicago, the value of which, as shown by the invoice, was about \$55,000, and also upon a stock of goods on Blue Island avenue, which was invoiced at something over \$7,000. After making these levies, the defendant advertised the property levied on for sale, the sale of the Wabash avenue stock of goods to take place January 22, 1890, and the Blue Island avenue stock one or two days later.

On the 17th day of January, 1890, Lawlor, the execution debtor, prepared and sent to each of his creditors the following circular letter:

"Chicago, January 17, 1890.

"Dear Sir:

"All my effects are now under seizure by the sheriff, upon executions amounting to \$41,800. My indebtedness outside of the judgments under which these levies are made amounts to about \$30,000. Effects levied on are fairly and reasonably worth \$80,000, and ought to bring \$70,000 if favorably disposed of.

"It is thought that if the sheriff makes sale under these levies with the usual and ordinary sacrifice attending a sheriff's sale, the proceeds will fall short of satisfying the judgments, and nothing will be left to apply on such other indebtedness.

Execution cannot be used as a cover.

The courts are unanimous in refusing to permit an execution to be used for an ulterior of fraudulent purpose. It cannot be used to aid the debtor in withholding the property from other creditors.

If the first execution was not kept up merely by color and for fraudulent purposes, it will not be postponed to a later one. *Casher v. Peterson* (1816) 4 N. J. L. 817.

The execution is ineffectual if issued with the intent to use it as security. *Baldwin v. Freydenhall* (1881) 10 Ill. App. 103.

An execution is not valid which is issued to acquire a lien. *Karl's App.* (1850) 18 Pa. 493.

Directing a levy simply to retain a priority of lien will not be effectual. *Dunderdale v. Sauvestre* (1861) 13 Abb. Pr. 115.

Any act evincing an intention not to have a sale of the property but to hold a writ for the purposes of a lien is a waiver of the priority of the execution in favor of a writ subsequently coming into the sheriff's hands. *Stroudsburg Bank's App.* (1889) 126 Pa. 523.

When the primary design of the plaintiff in issuing execution is to obtain a lien upon defendant's property and not to sell the same except in the contingency of the subsequent execution being issued, the lien of the execution will be postponed, but if there is nothing but a disposition on the part of plaintiff to treat the family of defendant in the execution with due consideration, by not subjecting them to unnecessary inconvenience or annoyance, the execution will not be postponed. *Landis v. Evans* (1886) 113 Pa. 334.

If the purpose of the levy is to secure a lien it is ineffectual. *Com. v. Stremback* (1832) 3 Rawle, 341. In that case the court says it is not sufficient for creditors at this day, when the condition of the country is so materially changed, to permit the levy

to remain without sale or placing some one in charge so long as it seems to have been authorized by the former cases.

An execution cannot be used to cover property against younger executions. *Matthews v. Warner* (1890) 11 N. J. L. 320.

Using an execution as a cover will destroy its efficacy. *Kellogg v. Griffin* (1820) 17 Johns. 274.

But the intention to use the writ merely as a cover must be established in order to affect its priority. Mere lenceny towards the execution debtor is not sufficient. *Wolf v. Tillinghast* (1894) 3 Pa. Dist. Rep. 338.

Leaving property in debtor's hands.

Most of the cases have discussed the question from the standpoint of presumptive fraud. When there is no positive rule that the property levied upon must be removed from the possession of the debtor the rule in some states is that merely leaving it in his possession until sale is not sufficient to defeat the priority.

In *Levy v. Wallis* (1799) 4 U. S. 4 Dall. 167, 1 L. ed. 785, it appeared that after the levy was made the sales were put off at the request of plaintiffs, and it is stated that the question was whether the priority had been lost by permitting the property to remain in the hands of defendants, and that is the question discussed, the court holding that leaving it so in the possession of the defendant furnished no presumption of fraud and does not consider the question of the effect of postponing the sale.

Leaving the property with the debtor until the time of sale will not postpone the execution if there is no direction to delay the sale. *Rew v. Barber* (1824) 3 Cow. 279. In that case the court says in the cases in which the writ has been held to have been postponed, the creditor had interfered and

"On the other hand it is hoped that, if arrangements can be made to dispose of the property levied upon by private sale, enough can be realized over and above the amount of such judgments to enable me to make a fairly good payment upon my other liabilities.

"To accomplish this will require the consent of all my creditors, and it is to obtain such consent I now write you. The sheriff's sale is advertised to commence the 22d inst. and to answer any purpose I must hear from you immediately. This plan is the only one I can conceive by which something may be rescued for the nonjudgment creditors. Please answer at once.

"Yours truly,
"F. R. Lawlor.

"To....."

With this letter, Lawlor enclosed to each of his creditors a paper to be signed and returned, consenting to the sale or disposition of the property levied upon at private sale, by Lawlor and the parties in whose favor the levies were made, to the end that the largest sum possible should be realized therefrom. The evidence tends to show that this letter before it was sent out was shown to a representative of the execution creditors and approved by him. Before the end of January, Lawlor received favorable replies from eighty-seven out of a total of ninety-six of his creditors. Among those who refused to give the consent requested were the plaintiffs in this suit.

On January 22, 1890, the sale advertised

for that day was, by the direction of the plaintiffs in the executions and with the consent of Lawlor, adjourned to January 29, 1890. On that day, it was by like direction and consent, adjourned to February 8, 1890. On February 5, 1890, the plaintiffs in this suit recovered a judgment against Lawlor for \$1,957.77, and on the same day an execution on their judgment was issued and placed in the hands of the defendant, as sheriff, with directions to levy upon the property of Lawlor and make the amount of the execution as soon as possible. On February 8, 1890, the sale was again adjourned by direction of the plaintiffs in the senior executions and consent of the execution debtor, but without the consent of the plaintiffs in this suit, to February 11, 1890. Between February 8th and 11th, the sheriff was requested by the present plaintiffs not to postpone the sale any longer, and notified that they objected to any further postponement, but notwithstanding this, the sheriff again postponed the sale by direction of the plaintiffs in the senior executions to February 13, 1890. The sale of the Blue Island avenue stock of goods was, in like manner, postponed from time to time, the day to which it was postponed being, in each case, a day or two later than that fixed for the sale of the Wabash avenue stock.

The scheme of having the property sold at private sale having failed to receive the unanimous consent of Lawlor's creditors, arrangements were made by the senior execution creditors for having the stocks of goods

directed a delay of sale and left the goods with the debtor.

In *Cox v. McDougall* (1798) 2 Yeates, 434, it seems to have been held that suffering the goods to remain in the debtor's hands and remaining inactive for some time did not postpone the lien of the execution, and this rule was followed although the goods remained in the debtor's hands for upwards of two years. *Perit v. Wallis* (1799) 2 Yeates, 524.

The property may be left in defendant's possession after levy without the loss of priority, if it is done in good faith, but if it is so left for several years, or an unusual or unreasonable time, and the defendant is permitted to use and enjoy it as before the levy, it may be evidence of fraudulent intent. The plaintiff may consent to reasonable adjournment from time to time or even direct adjournment, if it is done in good faith. The plaintiff may at the time of delivering the writ to the sheriff, direct him not to proceed with the sale without further orders or unless urged by younger executions, if it is done in good faith. But if defendant is permitted to retain possession and use the property the same as before executing an unlimited control over it, selling, exchanging, or consuming it as the owner, it is such evidence of fraud as to postpone the execution to a younger one. *Cumberland Bank v. Hann* (1842) 19 N. J. L. 166; *James v. Burnet* (1846) 20 N. J. L. 636.

But elsewhere, in *Wise v. Darby* (1845) 9 Mo. 131, the court in deciding that the direction not to levy will postpone a lien, says a direction to delay a levy will postpone the lien on the principle that the levy divests the property from the defendant and that to leave such property in possession of defendant by the connivance or at the request of the plaintiff would be a fraud against subsequent executions.

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Instructing the sheriff to permit the property to remain in the debtor's hands will postpone the lien. *Parker v. Waugh* (1864) 34 Mo. 340.

Directing the sheriff to leave the property in possession of the debtor will postpone the lien. *Roberts v. Scales* (1840) 23 N. C. 58.

If the officer is ordered to levy on, but to leave the property with the owner, the order undoes all that the officer does by the seizure; it is no levy as to third persons. It is not necessary that the officer should remove the property or even sell it immediately, if this be done in a reasonable time. *Berry v. Smith* (1811) 3 Wash. C. C. 60. In that case the levy of the second writ was made one day later than that of the first and it was given the preference, the court saying the order of suspension deprives the officer of all its force and effect and if before it is countermanded a second execution is levied, the former must be postponed.

If in addition to leaving the property in the debtor's hands he is permitted to use it as before, this is usually regarded as sufficient to defeat the lien.

Permitting the debtor to retain possession, with the right to consume or sell the property, or to retain possession for an unreasonable time, will postpone the execution. *Swigert v. Thomas* (1836) 7 Dana, 220.

Permitting the debtor to continue selling his goods as usual will postpone the lien although the proceeds are to be paid over to the sheriff. *Bingham v. Young* (1849) 10 Pa. 385.

If the goods are seized and the officer put into possession, but the debtor is permitted to have control over them as before from March until November, the goods will be subject to an execution subsequently issued against them. *Lovick v. Crowder* (1838) 8 Barn. & C. 132, 2 Mann. & R. 84.

Leaving the property in possession of the debtor

sold in bulk and not in parcels, Charles C. Lay being the prospective purchaser to whom it was proposed to have the sale made. With a view to this result, the following instrument was executed the day prior to that on which the sale finally took place:

"Chicago, February 12, 1890.

"We, the undersigned, judgment and lien creditors of Fanton R. Lawlor, hereby authorize and direct the sheriff of Cook county Illinois, to sell in bulk instead of in piecemeal or in parcels, all goods and stock of said Fanton R. Lawlor, heretofore levied upon under executions now in the hands of said sheriff.

"Hibernian Banking Association,

"By J. V. Clare, President.

"Nemo Murphy,

"By Duncan & Gilbert,

"Her Attorneys.

"E. W. Price,

"By Duncan & Gilbert,

"His attorneys.

"James H. Walker & Company.

"I hereby consent to the sale of all my stock of goods levied upon by the sheriff of Cook county, in bulk.

"Fanton R. Lawlor.

"February 12, 1890."

On the following day, and before the sale, the plaintiffs in the senior executions gave to the sheriff an indemnifying bond, in the penal sum of \$50,000, which after reciting that the plaintiffs in those writs had requested the sheriff to make sale of the goods levied upon in bulk, and were desirous that

he should make sale of them in that manner, was conditioned to hold him harmless from all actions, etc., to which he might be subjected by reason of selling the goods in bulk. On the same day, the following instrument was executed by Charles C. Lay, the proposed purchaser at the sale and the Hibernian Banking Association:

"Chicago, February 12, 1890.

"In consideration of the Hibernian Banking Association assigning to Charles C. Lay the following named judgments against F. C. Lawlor, to wit: Hibernian Banking Association, \$84,982.08; Murphy, \$1,765.67; Price, \$5,160.50, amounting, together with \$251.18 interest to date, to \$42,109.86, I, Charles C. Lay, hereby agree to pay to said association the sum of \$37,109.86, less the amount to be received by said association from the sheriff of Cook county on account of the sale this day by said sheriff of the property in the Wabash avenue store of said Lawlor.

"(Signed) Charles C. Lay.

"Hamilton B. Dox,

"Cashier Hibernian Banking Asson."

There is no evidence tending to show that any of the several postponements of the sale of the goods levied upon were made for want of bidders, but the evidence tends to show that they were all made in furtherance of efforts on the part of the execution debtor, co-operated in by the plaintiffs in the senior executions, first, to obtain the unanimous consent of all the creditors of the execution debtor to a private sale of the goods, and

and permitting him to dispose of it as before will postpone the writ. *Pary's App.* (1861) 41 Pa. 273, 80 Am. Dec. 618; *Keyser's App.* (1860) 18 Pa. 409.

Permitting the debtor to consume the property for the purposes of his family will postpone the execution to one levy subsequently. *Farrington v. Sinclair* (1818) 15 Johns. 428.

If the property is permitted to remain in the possession of the debtor for the use of himself and his family and not as agent for the sheriff, the special property acquired by the levy is relinquished and the lien is gone. *Kirkpatrick v. Oason* (1868) 80 N. J. L. 381.

Where an execution was levied on a stock of goods on the 14th of January, and by permission of the creditor the property was left in the store of the debtor where he continued to carry on his trade until the 31st of the next May, when the sheriff took possession, it cannot be said that an execution is really executed where the debtor is permitted by the plaintiff to retain possession and exercise the same acts of ownership over it which he before had done. *Barnes v. Billington* (1808) 1 Wash. C. C. 32.

And the lien will also be lost if the property is left in possession of the debtor for an unreasonable time.

Justice to other creditors requires that goods which may be at the time sufficient to satisfy all shall not be left in such a situation that they may be consumed or eloiigned. The law and sheriff are not left to take their course. It is not they but the plaintiff who is acting by the sheriff, whom he sees fit to install as his private agent. The goods being no longer in the custody of the law, but rather in that of the plaintiff, there is no foundation for the lien and preference which the law can attach is a consequence of its own regular action only. *Knower v. Barnard* (1843) 5 Hill, 377.

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Permitting the property to remain for months in possession of the debtor and allowing him to sell from it as usual is fraudulent as against other creditors. *Davidson v. Waldron* (1863) 81 Ill. 120, 88 Am. Dec. 206.

Where property easily removable is left in the possession and use of the debtor and the sale delayed an unreasonable time, the execution will be postponed. *Acton v. Kowles* (1862) 14 Ohio St. 18.

Permitting the goods to remain in the debtor's possession an unreasonable time after levy or under instructions to the sheriff to proceed no further with the writ will postpone it. *Etheridge v. Edwards* (1852) 1 Swan, 426.

Leaving the property in the possession of the debtor for a year after the levy and permitting him to use it as his own will make the execution fraudulent and void and postpone it in favor of the second execution. *Storm v. Woods* (1814) 11 Johns. 112.

In *Eberle v. Mayer* (1829) 1 Rawle, 366, the court recognizes the doctrine that postponing the sale and leaving the property in the debtor's hands will render the writ dormant. But in that case the evidence was such as to show fraud on the part of the creditor.

Delaying sale.

If in addition to leaving the property in the debtor's hands the creditor delays the sale he loses his lien.

If the property is left in the possession of the debtor and the sale is delayed at the instance of the creditor, the execution becomes dormant. *Benjamin v. Smith* (1834) 12 Wend. 404; *Ball v. Shell*, 21 Wend. 222; *Kimball v. Munger* (1842) 2 Hill, 304; *Price v. Shippis* (1858) 16 Barb. 585.

Where the property is left with the defendant upon execution of a delivery bond which is forfeited and no attempt made to renew the execu-

after that scheme was abandoned, to enable him to make arrangements for a purchaser who would bid off the two stocks of goods in bulk, and to have it so fixed that the sale should be made in that manner and not otherwise. The evidence also tends to show that the plaintiffs in this suit did not consent, but expressly objected to having the sales made in bulk.

On February 18, 1890, the Wabash avenue stock of goods was sold by the sheriff, without being previously offered in parcels for \$86,026, and on February 15th, the Blue Island avenue stock was sold in the same manner for \$6,100, Charles C. Lay in both cases becoming the purchaser. The amount thus realized being a little less than sufficient to satisfy the senior executions, the execution in favor of the plaintiffs in this suit was returned wholly unsatisfied.

The defendant pleaded not guilty, and at the trial, which was had before the court, a jury having been waived, all propositions submitted on behalf of the plaintiffs, of which there were a considerable number, were held as the law in the decision of the case, and the court thereupon found the defendant guilty, and assessed the plaintiffs' damages at \$2,318.22, and for that sum and costs the plaintiffs had judgment. On appeal to the appellate court, the judgment was reversed, and a final judgment was entered by that court that the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and also that the defendant recover of the plaintiffs his

costs. In rendering this judgment, the appellate court found the facts and recited the same in its final order as follows:

1. That defendant on February 5, 1890, was the sheriff of Cook county, Illinois, and on that day plaintiffs delivered to him the writ of *fiery facias* mentioned in the plaintiffs' declaration dated February 5, A. D. 1890, for the sum of \$1,957.77 and costs of suit and against said Fanton R. Lawlor, and gave to the said defendant the instructions alleged in said declaration.

2. That prior to said February 5, A. D. 1890, and on the 8th day of January, A. D. 1890, one Nano Murphy had recovered in the superior court of said Cook county a judgment for \$1,765.67 and costs of suit; one E. W. Price had recovered in the same court a judgment for \$5,160.50 and costs of suit, and the Hibernian Banking Association had recovered in the circuit court of said Cook county seven judgments for \$202.50, \$3,030.11, \$7,942.89, \$3,990.61, \$9,888.83, \$4,031.84 and \$5,031.25, and costs of suit, respectively all of said judgments being against the said Fanton R. Lawlor, upon each of which said judgments a writ of *fiery facias* in due form had been duly issued out of and under the seal of, the proper court, and delivered to the said defendant on the 8th day of January, A. D. 1890, and all of the said nine executions in favor of the said Nano Murphy, E. W. Price, and the Hibernian Banking Association for the respective sums above mentioned were on said 8th day of January, A. D. 1890, duly levied by the defendant

tion for five years, the lien will be lost. *Slocumb v. Blackburn* (1867) 18 Ark. 399.

Delay in sale may of itself be sufficient to defeat the lien if for an unreasonable time although not coupled with the other fact of leaving the property in the debtor's possession.

Suffering the levy to remain without proceeding on it, term after term, will raise a presumption that it was intended as a cover which will postpone the lien. *Cortlee v. Stanbridge* (1835) 5 Rawle, 286.

Leaving property in the possession of the debtor without sale for a period of eight years will render the writ dormant. *Lewis v. Smith* (1815) 2 Serg. & R. 142.

A delay for three years to enforce a sale will postpone the lien. *Deposit Bank of Cynthiana v. Berry* (1867) 2 Bush, 236.

Doty v. Turner (1811), 8 Johns. 20, recognized the rule that delay in effecting a sale will postpone the lien.

But there are some courts which hold that mere delay or acquiescence in delay unless for an unreasonable time will not postpone the execution.

Mere granting a delay in effecting the sale will not postpone the execution, if the execution is not kept up, merely by color and for fraudulent purposes. *Sterling v. Van Cleve* (1831) 12 N. J. L. 327.

Mere acquiescence of an execution creditor in delay of a sheriff in selling under an execution where the creditor does not direct such delay, does not render execution dormant as to subsequent ones. *Thompson v. Van Vechten* (1857) 5 Abb. Pr. 453.

Mere sufferance will not defeat the lien. *McOoy v. Reed* (1836) 5 Watts, 302.

In *Howell v. Alkyn* (1890) 2 Rawle, 283, it is held that the only ground for postponing an execution is fraud. The judge delivering the opinion denies the ruling of *Berry v. Smith*, that if the plaintiff directs the sheriff to delay the sale one day, he

avoids his levy as much as for a year. The judge states that the practice in England is not applicable to this country and that there are many cases in which a reasonable delay may be beneficial to all concerned, in which mere delay cannot be considered fraudulent.

In *Locke v. Coleman* (1825) 2 T. B. Mon. 12, 15 Am. Dec. 118, the court was asked to instruct that if the execution was held up an unreasonable time after the levy before a sale was effected the sale could not be enforced as against leases taken subsequently to the levy, but the court refused to do so and was upheld by the appellate court, which said when an officer has once levied he may sell at any time and the lien continues until he does sell, but it does not appear from the case by what authority the sale was postponed.

Conflicting instructions as to the order of sale which result in a delay in the advertisement of only one day will not result in a postponement of execution. *Childs v. Dilworth* (1869) 44 Pa. 123.

But if the enforcement of an execution levy has been delayed for an unreasonable time, a third person has a right to presume that it has been abandoned. *Cook v. Clemens* (1838) 37 Ky. 568.

The lien may be lost if the plaintiff is guilty of gross laches in not having the property sold in a reasonable time. *Conway v. Jett* (1822) 3 Yerg. 438, 24 Am. Dec. 590.

Permitting a levy to be dormant for three years and eight months before taking proceedings to enforce a sale under it will displace it. *Patterson v. Fowler* (1861) 23 Ark. 470.

Temporary postponement.

A mere stay of execution without fraud will not destroy the levy. *State v. Records* (1843) 5 Harr. (Del.) 147.

In *Hyman v. Hubbs* (1874) 71 N. C. 424, it was held

upon the goods and chattels mentioned in the plaintiffs' declaration, contained in two separate stores, a mile distant from each other, which said goods and chattels were at usual invoice prices, worth the sum of \$62,000 to \$65,000.

3. That the said defendant duly advertised to sell said goods and chattels pursuant to law, under said writs of *ieri facias*, in favor of said Nano Murphy, said E. W. Price and the Hibernian Banking Association, on the 22d day of January, A. D. 1890, but postponed said sale, first, to the 29th day of January, A. D. 1890, again to the 8th day of February, A. D. 1890, again to the 11th day of February, A. D. 1890, and again to the 13th, and as to a part of said goods and chattels to the 15th day of February, A. D. 1890, on which two last-mentioned dates said defendant, after duly advertising, sold said goods and chattels at public sale, to the highest bidder, selling the stock of goods in each store in bulk as one lot, and realized as the proceeds of the same the sum of \$42,000.

4. That said judgments and writs of *ieri facias* in favor of said Nano Murphy, E. W. Price, and said Hibernian Banking Association, were bona fide, and said writs of *ieri facias* were not taken out or used by the said Nano Murphy, E. W. Price, or said Hibernian Banking Association, or either of them, or by the said defendant, for the purpose of hindering, delaying, or defrauding any of the creditors of said Fanton R. Lawlor, and, although said postponements of said sale, as made by the defendant, as aforesaid, were

so made with the consent of the said Fanton R. Lawlor, and at the request of the said Nano Murphy, said E. W. Price, and said Hibernian Banking Association with the hope that Lawlor might make some arrangement with his creditors, and for his benefit, said postponements were reasonable and proper, under all the circumstances, and did not, in fact, in any manner, injure, delay, defraud, or hinder, or tend to injure, delay, defraud, or hinder the plaintiffs, or any other creditor or creditors of the said Fanton R. Lawlor, in the collection of their demands against him.

5. That at the time of the making of said sale of said goods and chattels, as aforesaid, the said judgments in favor of said Nano Murphy, said E. W. Price, and said Hibernian Banking Association, were in full force and effect, and there were due thereon, the amounts respectively for which said judgments had been rendered together with interest, as provided by law.

6. That the defendant in selling the same in two lots or parcels as aforesaid, acted in good faith, though under the direction of and indemnified by the Hibernian Banking Association, and obtained for said goods and chattels as large a price as could or would have been obtained had he divided said goods and chattels into smaller lots or parcels, and the said plaintiffs suffered no damage whatever by reason of said sale being made in the manner aforesaid.

7. That the proceeds of said sale of said goods and chattels, after deducting the legal

that merely postponing the sale does not waive the lien as against a junior execution, where the owner of the latter had the right to proceed to sell notwithstanding such directions, and it is not shown that the property brought any lower price when the sale actually took place than it would have brought had the sale proceeded when advertised.

In *Denton v. Woods* (1897) 19 La. Ann. 354, it was held that merely to stay a sale would not permit a sale under a junior writ which would gain a valid title.

A postponement of sale for six days will not defeat a writ as against a second one coming to the hands of the sheriff two months after the expiration of the six days. *Huber v. Schnell* (1896) 1 Browne (Pa.) 18.

In *United States v. Conyngham* (1801) Wall. C. C. 178, it is ruled that the sale must be proceeded with as fast as is reasonable under the circumstances, and that where the execution of the writ is procrastinated by the connivance or privity of the party and in the interim another execution comes, he loses his preference.

The adjournment of the sale to a time before the return day of the writ will not postpone the lien. But an adjournment to a time beyond the return day, so that no sale could take place under the writ, will be equivalent to an indefinite postponement and will postpone the writ. *Lantz v. Worthington* (1846) 4 Pa. 153, 45 Am. Dec. 662.

Indefinite postponement.

Indefinite postponing of the sale will defeat the lien. *McClure v. Ege* (1898), 7 Watts. 74.

Preventing sale for three years during which time a third person bona fide purchases the property, will defeat the lien. *Owens v. Patteson* (1846) 6 B. Mon. 493, 44 Am. Dec. 780.

Directing the sheriff not to sell and permitting
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the execution to be returned and remain dormant for two and one-half years will displace the lien as against one who purchases the property from the debtor's administrators. *State Bank v. Etter* (1854) 15 Ark. 268.

An execution placed in the hands of a sheriff with instructions not to sell until further orders is not in his hands for any purpose known to the law. *Alabama Gold L. Ins. Co. v. McCreary* (1890) 65 Ala. 127.

Postponing the sale for eight months and leaving the property in the meantime in the possession of the debtor without bond will destroy the preference gained. *Abertson v. Goldsby* (1856) 28 Ala. 711, 65 Am. Dec. 880.

A man has a judgment for a just debt against A, and takes out a *ieri facias* and gets the sheriff to seize the goods but would not let him proceed further; B, who has a judgment for a just debt against A, takes out a *ieri facias* against him and the court ruled that he could seize the same goods, for the former was a fraudulent execution and the sheriff might very well return *nulla bona* upon it. *Rice v. Serjeant* (1708) 7 Mod. 87.

Leaving the property in the debtor's possession and directing the sheriff not to proceed to sell until further orders makes the execution dormant. *Hickok v. Coates* (1829) 2 Wend. 419, 30 Am. Dec. 632.

An instruction after the execution has been levied, to stop further proceedings, will render it fraudulent as against subsequent execution. *Branch Bank at Montgomery v. Broughton* (1148) 15 Ala. 127.

Instructing the officer to proceed no further after making the levy will be regarded as fraudulent. *Hickman v. Caldwell* (1834), 4 Rawle, 376, 27 Am. Dec. 274. In that case the court says that some of the statements in *Howell v. Allyn*, 2 Rawle,

costs and charges of the defendant accruing from said levy and sale, were insufficient to satisfy the writs of *fiery facias*, aforesaid, in favor of said Nano Murphy, said E. W. Price, and said Hibernian Banking Association, and accordingly the defendant applied said proceeds *pro rata* upon said writs and returned the same in part unsatisfied; and there being none of said proceeds remaining to be applied upon the writ of *fiery facias* aforesaid, in favor of the plaintiffs, and the said defendant not having been able by due diligence to find any property of the said Fanton R. Lawlor, out of which he, the said defendant, could make the amount of said writ of *fiery facias* in favor of the plaintiffs, or any portion thereof, duly returned said writ "No part satisfied."

Wherefore this court doth now find the said defendant and appellant not guilty of

the wrongs and injuries in the declaration of the plaintiffs and appellees set forth.

Messrs. Weigley, Bulkley & Gray, for plaintiffs in error:

The stay of execution sale under the agreement between the parties gave priority to appellee's writ.

Freem. Executions, § 206; Murfree, Sheriffs, § 586; *Dennis v. Whetham*, 80 L. T. N. S. 514; *Warmoll v. Young*, 5 Barn. & C. 660; *Imray v. Magnay*, 11 Mees. & W. 267; *Rice v. Serjeant*, 7 Mod. 37; *Ments v. Hamman*, 5 Whart. 150, 34 Am. Dec. 546; *Eberle v. Mayer*, 1 Rawle, 886; *Hickman v. Caldwell*, 4 Rawle, 876, 27 Am. Dec. 274; *Berry v. Smith*, 3 Wash. C. C. 60; *Ross v. Weber*, 26 Ill. 222; *Koren v. Roemheld*, 6 Ill. App. 275; *Gilmore v. Davis*, 64 Ill. 487; *Baldwin v. Freydenau*, 10 Ill. App. 119.

III, were not the opinion of the court, but of the judge who delivered the opinion.

A direction to proceed no further with the writ is a relinquishment of it. *Kaufelt's App.* (1840) 9 Watts, 384.

An order to stay all proceedings until further orders will postpone the writ. *Ments v. Hamman* (1839) 5 Whart. 150, 34 Am. Dec. 546; *Lowry v. Coulter* (1845) 9 Pa. 849.

Instructions the sheriff not to sell until further orders and permitting the debtor to have a key giving him access to the goods will postpone the lien. *Freeburger's App.* (1861) 40 Pa. 244.

A direction to levy and hold without sale prevents the execution from creating a lien. *Koren v. Roemheld* (1880) 6 Ill. App. 275.

An instruction not to advertise a sale is a postponement of the writ. *Work's App.* (1879) 22 Pa. 281.

A direction not to sell until compelled to do so by other creditors will not defeat the lien of the execution. *Janvier v. Sutton* (1839) 3 Harr. (Del.) 97; *Houston v. Sutton* Id. 39; *Hickman v. Hickman* Id. 484; *Palmer v. Clarke* (1830) 18 N. C. 364.

If the sheriff is instructed not to execute the writ unless another writ comes into his hands, it will not bind the goods. *Foster v. Smith* (1856) 13 U. C. Q. B. 243.

If the instructions to the sheriff are to levy the execution and not to make the sale unless compelled to do so, by the coming in of other executions, the condition is fraudulent, although it is not intended to do so, and the execution will be postponed to others which come into the sheriff's hands before the instructions are revoked. *Cook v. Wood* (1837) 16 N. J. L. 254.

Contract to suspend.

An agreement for a consideration to stay execution six months will postpone it. *Porter v. Cocke* (1829) Peck. (Tenn.) 80.

The lien may be lost by an agreement or act of the judgment creditor which would discharge the liability of a surety under an ordinary contract. *Michie v. Planters Bank* (1839) 4 How. (Miss.) 130, 34 Am. Dec. 112.

An agreement recognizing an intention not to have the property sold under the writ will postpone its lien. *Weir v. Hale* (1843) 3 Watts & S. 285; *Flick v. Troxell* (1844) 7 Watts & S. 65.

If the creditor takes a bond for the payment of a debt in installments at future periods of time and in the meantime leaves the debtor in possession to sell as usual, he will postpone his levy. *Truitt v. Ludwig* (1855) 23 Pa. 145.
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A suspension of the execution for three months for a valuable consideration renders it dormant. *Burnham v. Martin* (1875) 54 Ala. 159.

A binding agreement on consideration of the payment of the portion of the demand within a certain time to stay the execution will remove its lien as against subsequent execution. *Ross v. Weber* (1861) 23 Ill. 221.

Property which requires delay.

Delaying of sale of growing wheat from the time of levy in December until it is ready for harvest in August, will not in itself amount to a fraud in law. The nature of the property accounts for the delay and destroys the presumption of fraud that might otherwise exist. *Whipple v. Foot* (1807) 2 Johns. 413, 3 Am. Dec. 442.

Where the property seized was hides in a vat, which could not be sold for several months without great loss, the court held that postponing the sale did not render the execution dormant, saying: "We think that an execution cannot be considered dormant because it thus seeks to make the most of the property taken, though some little delay be the consequence." *Power v. Van Buren* (1827) 7 Cow. 560.

Land.

Since in most jurisdictions the judgment itself is a lien on land, the same rules do not necessarily apply as apply in cases of personalty. *McLaughlin v. McLaughlin* (1877) 85 Pa. 817.

The lien of the judgment may be enforced as against land although there was a delay for about twenty-six months after execution issued before sale was enforced and the property had been sold to a third person in the meantime. *Harman v. May* (1882) 40 Ark. 144.

But it has been held that a delay of sale for four years will defeat a lien on land in favor of purchasers. *Allen v. Levy* (1882) 59 Miss. 613.

Effect as to debtors.

The execution may be good against the debtor, notwithstanding delay. *Arrington v. Sledge* (1890) 13 N. C. 859.

The suspension of the sale will not affect the validity of the writ as against defendant or his heirs. *McKeel v. Larkin* (1882) 31 Ark. 493.

Mere delay will not defeat the execution as to the representatives of the debtor after his death. *Barber v. Peay* (1876) 31 Ark. 393.

Effect on alias execution.

The indulgence of the original writ will not postpone the alias, if that is issued in time. *Roberts v. Oldham* (1890) 63 N. C. 297.
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A complaint for a false return on execution need not allege deceit or fraud. It is enough if it is untrue.

Smith, Sheriffs, 576; *Peebles v. Newsom*, 74 N. C. 478; *Johnson Bros. v. Reilly*, 59 How. Pr. 354.

Messrs. Duncan & Gilbert, for defendant:

The senior execution creditors did not lose their priority by reason of the adjournments of the sale.

A mere adjournment of a sale is not sufficient to suspend the lien of the execution creditor.

Lantz v. Worthington, 4 Pa. 153, 45 Am. Dec. 683; *Weir v. Hale*, 3 Watts & S. 285; *Re Thorne's Case*, 2 Pa. 381; *Dancy v. Hubbs*, 71 N. C. 424.

Bailey, J., delivered the opinion of the court:

The 87th section of the Statute in relation to practice in courts of record provides that, when any final determination shall be made by the appellate court as the result, wholly or in part, of a finding of the facts concerning the matter in controversy different from the finding of the court from which the cause was brought by appeal or writ of error, it shall be the duty of the appellate court to recite in its final order, judgment, or decree the facts so found, and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in such cause. In this case, the appellate court has found the facts upon which its judgment is based, and has recited those facts in its final judgment, and it is insisted that recital is conclusive in this court as to all the facts in the case.

It is urged, however, with much earnestness that the section of the statute here referred to is not applicable to this case, for the reason that there was not, either in the appellate court or in the trial court, any substantial controversy as to the material facts, and that the judgment of the appellate court therefore was not and could not have been the result, either wholly or in part, of any finding of facts different from the finding of the trial court, but only of a difference of opinion between the two courts as to the legal consequences of facts about which there was really no controversy.

It must be admitted that the power of the appellate court to find and recite the facts in such way as to make its recital the exclusive evidence of what the facts in controversy are, is purely statutory, and can be exercised only in those cases to which the statute applies. And there seems to be much reason for the contention that, where the facts are not really in controversy, there can be no occasion for the appellate court to find and recite them in its final judgment. In such case, its determination cannot, in the nature of things, result from a difference between its finding and that of the trial court as to the facts, and consequently no case is presented which is within either the letter or intention of the statute.

It is urged in this case that the practical objection to accepting the recital of facts

found in the final judgment of the appellate court, instead of taking them as they appear in the record of the trial court, arises, not so much from any inaccuracy in the recitals of the appellate court, so far as they go, but from the omission, as the plaintiffs insist, of various material and undisputed facts which appeared before the trial court. If, then, the findings of the appellate court are to be taken as the final, plenary and conclusive recital of all the facts in the case, it is insisted that the plaintiffs will now be deprived of the benefit of the omitted facts, though proved at the trial and not controverted.

But while we are disposed to think that there is much force in the contention, we are inclined to base our decision solely upon the facts as recited in the judgment of the appellate court. It appears from that recital that the nine executions in favor of the Hibernian Banking Association, Nano Murphy, and E. W. Price were placed in the hands of the defendant, as sheriff, January 8, 1890; that on the same day, the defendant levied those executions upon the two stocks of goods in question; that he advertised the same for sale on January 22, 1890, but postponed the sale to January 29, and again to February 8, and again to February 11, and finally to February 18, at which last-mentioned date the Wabash avenue stock of goods was sold, the Blue Island avenue stock being sold, after similar postponements, on February 15. It was further recited, in substance, that these several postponements of the sales were made as aforesaid by the defendant, with the consent of the execution debtor, and at the request of the plaintiffs in the executions, with the hope that the execution debtor might make some arrangements with his creditors, and for his benefit.

On the 5th day of February, which was pending the postponement from January 29 to February 8, the execution of the plaintiffs in this suit came into the hands of the defendant, as sheriff and the question is, whether at that date, the senior executions were, or thereafter became, as against the junior execution, dormant, so as to give to the junior execution priority of lien.

The theory upon which it is claimed that the senior executions became dormant is, that the several postponements of the sale, made as they were at the request of the execution creditors, for the benefit of the execution debtor, and for the purpose of aiding him in making some arrangement with his creditors, constituted an employment of the writs for an object inconsistent with their nature, and were such a perversion of them from their legitimate purpose, as rendered them fraudulent and void, as against other creditors.

It is true the appellate court found, as a matter of fact, that the senior executions were not taken out or used by the plaintiffs therein or by the sheriff, for the purpose of hindering, delaying, or defrauding any of the creditors of the execution debtor, and that the postponements of the sale were reasonable and proper, under the circumstances, and did not in fact in any manner injure or tend to injure, delay, defraud, or hinder the plaintiffs in the junior execution, or any

other creditor of the execution debtor, in the collection of their demands against him. If the present case is one in which the appellate court was required by the statute to find the facts and recite the same in its final judgment it must of course be conceded that this finding is conclusive that in the several postponements of the sale there was no fraud in fact, that is to say there was no actual intention on the part of the plaintiffs in the senior executions or of the sheriff, to hinder, delay, or defraud other creditors, and that the postponements of the sale did not in fact have that effect. But it is clear that the finding of the appellate court upon the question whether the use made of the executions was fraudulent can be given no effect beyond this. Whether there was fraud in law, that is to say, whether fraud resulted as a legal consequence or conclusion from the postponements of the sale, made in the manner and for the purposes above stated, is a legal question, in respect to which the findings of the appellate court can have no binding effect in this court.

Does the law then, from the facts as found, imply such fraud as must be held to be sufficient to postpone the senior executions to the lien of the junior creditors? The general doctrine applicable to this subject is stated by Freeman, in his Treatise on Executions, as follows: "An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the Statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce collection of his judgment. He is likely, therefore, to take out execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law will not tolerate." 1 Freeman, Executions, § 206. And again: "The lien of an execution is designed to assist the plaintiff while he is seeking to enforce the writ. If at any time he is shown not to be seeking such enforcement, then, during such time, he is without any execution lien, and is liable to lose the benefit of his writ through the sale or incumbrance of the defendant's property, or by the operation of a junior writ. He cannot avoid this result by showing that his intentions were meritorious, or that he knew of no other creditors. Whenever, by the plaintiff's orders, or by agreement between him and the defendant, the execution of the writ is suspended, by directions not to levy, or, after levy, by directions not to sell, whether such directions

are permanent in their nature, or designed to operate only until further orders are given, then, according to the decided preponderance of the authorities, the lien is also suspended, and the execution becomes dormant." *Ibid.*

In *Gilmore v. Davis*, 84 Ill. 487, this court stated the rule as follows: "We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer, it gives to the creditor a priority, because the law imposes the duty upon the officer to execute it without delay. Any act of the creditor, therefore, diverting the execution from this purpose, renders it inoperative against other creditors, and clothes them with priority." In that case, an execution was placed in the hands of the officer with instructions not to levy until further orders, and it was held to be subordinate to another execution afterwards issued to the officer with instructions to proceed at once. In *Ross v. Weber*, 26 Ill. 221, a judgment creditor entered into an agreement with his debtor to stay his execution, and it was held that the execution thereby became dormant, and that the creditor lost the lien acquired by his levy.

But an execution does not become dormant or fraudulent by the mere indulgence or negligence of the sheriff. "The concurrence of the plaintiff is necessary to produce that result, and if the delay in proceeding under an execution arises from the orders of the party by whom it has been issued, or from collusion with him, such delay will render the execution fraudulent and void as against all other creditors of the defendant." *Murfree, Sheriffs*, § 536. See also, *Eberle v. Mayer*, 1 Rawle, 366; *Com. v. Strenback*, 8 Rawle, 841, 24 Am. Dec. 851; *Hickman v. Caldwell*, 4 Rawle, 876, 27 Am. Dec. 274; *Kellogg v. Griffin*, 17 Johns. 274; *Berry v. Smith*, 3 Wash. C. O. 60; *Koren v. Roemheld*, 6 Ill. App. 275; *Baldwin v. Freydenhall*, 10 Ill. App. 106.

The application of these rules to the present case must result, we think, in the conclusion that, at the time the junior execution was placed in the hands of the sheriff the senior executions were dormant so as to give priority to the junior writ. The postponements of the sale from time to time do not seem to have been made by the sheriff for want of bidders, nor in the exercise by him of the discretion which the law vested in him in matters of that character, but they were all made as the result of the interference by the creditors in the due execution of their writs, and at their express request, and for objects inconsistent with the nature and purposes of the writs. On that subject, as we have already seen, the appellate court found the fact to be, that all these postponements of the sale were made by the sheriff, at the request of the plaintiffs in the executions, and for the benefit of the execution debtor, and with the hope that the debtor might make some arrangement with his creditors that such use of the writs constituted a perversion of them from their legitimate purposes seems to us too plain to admit of serious doubt. Action under them was postponed from time to time for the mere purpose of giving the

debtor an opportunity to negotiate with his other creditors, in such a way as to secure from them some compromise or other advantage. This manifestly was not a purpose for which the writs could be legitimately used.

It matters not that the creditors were actuated by motives of kindness or leniency to their debtor, or that they had no actual intention to hinder or defraud other creditors, nor is it a controlling circumstance that the various postponements of the sale did not, as a matter of fact, hinder, delay, or defraud other creditors. Fraud arises from such abuse of the writs as a legal conclusion and the consequence which the law imposes is, to give to a junior execution coming into the hands of the sheriff during the pendency of such postponements a preference over the writs used for such fraudulent purpose.

The senior creditors having thus lost their priority the sheriff, in distributing the proceeds of the sale of the goods, should have satisfied the junior execution first, and sufficient money having been realized to more than satisfy that execution, his return that he could find no property of the execution debtor with which to satisfy it was a false return which entitled the plaintiffs therein to recover from him the amount of their judgment and costs.

We are of the opinion, therefore, that the judgment of the superior court was justified by the facts, and the judgment of the Appellate Court will accordingly be reversed, and the judgment of the Superior Court will be affirmed.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

HOMESTEAD STREET R. CO., v. PITTSBURG & HOMESTEAD ELECTRIC STREET R. CO., App't.

(106 Pa. 162.)

1. Not more than one street railway franchise upon the same highway can be given under a statute authorizing the incorporation of street railway companies only for the construction and operation of a street railway on a street or highway "upon which no track is laid, or authorized to be laid, or to be extended under any existing charter."

2. An actual corporate existence clothed with a legal right to build a railroad being a fundamental condition of permission to occupy a highway for that purpose, permission nominally granted to a company not yet legally in existence cannot become effective on its incorporation, at least as against a company previously chartered which with reasonable promptness obtains a later grant of permission to use the same road.

(January 14, 1895.)

APPEAL by defendant from a decree of the Court of Common Pleas, No. 8, for Allegheny County in favor of complainant in a proceeding brought to enjoin defendant from constructing railway tracks along certain streets leading out of the city of Pittsburgh. *Reversed.*

The facts are stated in the opinion.

Messrs. William B. Rodgers, J. M. Swearingen, and J. R. McQuade, for appellant:

The alleged agreement of November 20, 1893, between the supervisors and appellee, is void.

Gent v. Manufacturers & M. Mut. Ins. Co. 107 Ill. 652; Act of May 14, 1889, Pub. Laws, 211; *New Brighton & N. C. R. Co's App.* 106

NOTE.—What authorities there may be on the questions above decided seem to be very fully presented by the case.

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See also 35 L. R. A. 859.

Pa. 18; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.* 12 L. R. A. 220, 141 Pa. 407; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Penn Match Co. v. Haggood*, 141 Mass. 145; *McArthur v. Times Print. Co.* 48 Minn. 819.

The authority to grant charters is limited first to highways and secondly to such of them upon which no track is already authorized.

Chicago City R. Co. v. People, 73 Ill. 541; *Junction Pass. Railway v. Williamsport Pass. Railway*, 154 Pa. 116.

Messrs. John F. Sanderson, Walter Lyon, Charles H. McKee, and D. H. Stone, for appellee:

Concurrent rights may exist under the Act of 1889.

Pennsylvania Schuylkill Valley Railroad v. Philadelphia & R. Railroad, 157 Pa. 42; *Norristown Pass. R. Co. v. Railway Co.* 8 Mont. Co. Rep. 119; *Re Easton Transit Co.* 82 W. N. C. 278.

Defendant has no standing to question the corporate power and authority of plaintiff.

Western Pennsylvania R. Co's App. 104 Pa. 369; *Junction Pass. Railway v. Williamsport Pass. Railway*, 154 Pa. 129; *Philadelphia & Gray's Ferry Pass. R. Co's App.* 102 Pa. 123.

The consent was a valid consent.

Reeves v. Philadelphia Traction Co. 152 Pa. 153; *Pittsburgh's App.* 115 Pa. 4; *Larimer & L. Street R. Co. v. Larimer Street R. Co.* 137 Pa. 533; *Rathbone v. Tioga Nav. Co.* 2 Watts & S. 74, 8 Kent, Com. 450; *Bell's Gap R. Co. v. Christy*, 79 Pa. 58, 21 Am. Rep. 89; *McClure v. People's Freight R. Co.* 90 Pa. 271; *Allegheny v. Millville, E. & S. Street R. Co.* 159 Pa. 411.

Green, J., delivered the opinion of the court:

The subject of contention in this case is the right of the plaintiff to occupy, with its railway, a part of the public road in Mifflin township between Pittsburgh and Homestead. Both the parties are electric street railway companies. In the bill the plaintiff asked for an injunction to restrain the de-

fendant from the construction of any electric road upon the part of the highway in question, and also to restrain any interference by the defendant with the construction of the plaintiff's road. The learned court below decreed that the plaintiff had a right to construct its railway on the highway, but that its rights were not exclusive, and the defendant was also entitled to construct its railway upon the same highway. Each of the litigants held a permissive grant from the township authorities. The order of the charters and grants of permission is as follows: The defendant obtained its charter November 16, 1893, and the municipal consent on December 19, 1893. The plaintiff obtained its charter November 29, 1893, and a municipal consent was granted on November 20, 1893; the grantees therein named being "The Homestead Street-Railway Company." The defendant challenges the validity of this grant, as there was no such company in existence when the grant was made. It will be perceived, therefore, that one main subject of contention is whether there may be two, or rather more than one, grants of franchise to construct street passenger railways on the same public highway. Both of these companies were chartered under the General Law of May 14, 1889 (Pub. Laws, 211). The authority for the charters is conferred by the first section of the act, and its language is as follows: "Be it enacted that any number of persons, not less than five, may form a company for the purpose of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, or to be extended under any existing charter with the privilege of occupying so much of any street, used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers by any power other than by locomotive."

We have reached the conclusion that there can be but one street-railway franchise upon the same highway, under this statute. The express words of the act limit the right of incorporation to one railway only. The purpose of the act is expressed in its title to be "to provide for the incorporation and government of street-railway companies in this commonwealth." A reading of the whole act shows that the incorporation of street-railway companies, and their government, was the entire purpose and object of the act. The earlier sections provide for the manner of accomplishing the organization, and define the powers and privileges of the corporations. The fourth section confers authority to construct extensions and branches, provided "that no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter provided." The fourteenth section confers a right to use portions of the tracks of other companies already laid, when it is necessary to construct a circuit upon its own road at the end thereof, but the extent of such use is limited to 500 feet, and compensation must be paid for the privilege. By the fifteenth

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section it is provided that no street passenger railway shall be constructed by any company incorporated under the act, within the limits of any city, borough, or township, without the consent of the local authorities thereof. The seventeenth section provides that any company may ascertain and define such route as they may deem expedient upon any turnpike, not, however, exceeding width for two tracks to be laid upon such turnpike, and thereupon to lay down a track or tracks for its use in the transaction of its business, but making compensation therefor in the manner provided by the act. By the nineteenth section it is provided that street passenger railway companies shall have the right to the street, and any willful obstruction of the passage of the cars shall be punishable by fine, upon conviction. We think it apparent that all of these sections are inconsistent with the exercise of more than one railway franchise on the same street. The language of the first section expressly limits even the right of incorporation to such companies only as are formed "for the purpose of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, or to be extended under any existing charter;" that is, the statutory power of incorporation can only be executed in favor of a company which will construct and operate a railway on a street or highway upon which "no track is laid or authorized to be laid" under any existing charter. There can be but one meaning to these words, and that is, if a track is already laid, or even authorized to be laid, on the proposed street or highway, then there can be no incorporation of such company. It cannot come into existence, and, as a matter of course, if a charter should be obtained, in such circumstances, it would be simply nugatory,—it could confer no power in hostility with the law of its creation. It seems to us there can be no more convincing proof than this; that it is the settled, fixed, established policy of the commonwealth, as determined by this legislation, that there shall not be more than one lawfully authorized street passenger railway track laid upon the same street or highway at one time. There are manifest reasons why such a policy should prevail, though it is not necessary to look for them. These railways are authorized to be laid upon the public highways of the commonwealth. Those highways are for the use of the whole public,—all the citizens of the commonwealth, in all its territorial extent. This use is of the broadest and most comprehensive character, embracing, as it does, all the purposes of free and unobstructed passage for the persons, the vehicles, the animals, and other property of the citizens at all times. Now, it is not thought inconsistent with this right to confer a right to a special mode of transit by means of street cars and railway tracks on the highways, because they tend to facilitate, rather than obstruct, public travel. But it is very easy to see how the right of the general public to free and unobstructed travel may become most seriously impaired if there should be an unlimited right to occupy the streets and

highways of the commonwealth with railway tracks. Even one track becomes, at times, especially in our large towns and cities, an obstruction to travel. The great bulk of public travel is off, and not on, our street cars. In the crowded thoroughfares, particularly where the streets are constantly occupied by horses and carriages, heavy wagons, carts, drays, omnibuses, and other vehicles, a duplication of street-car tracks would be an intolerable burden and a most serious obstruction. Even on country roads, where travel is much less, the traveled part of the roads is so much narrower than in the cities and towns that the obstruction would be felt quite as severely as in the streets of the cities. It is a very proper inference, therefore, that when the legislature prohibited, in the fundamental law of street railways, the laying of more than one track upon one street or highway, it was for the purpose of preventing the obstruction of travel on the highways of the commonwealth. The fourth section of the Act contains the same prohibition in relation to extensions and branches as is imposed by the first as to the original structure. In a negative sense, the fourteenth section, by giving the right to make a circuit by occupying a distance of 500 feet of the track of any other company, recognizes the same principle of the nonoccupancy of the highway by more tracks than one. The fifteenth section, by imposing upon the street-railway companies the duty of obtaining the consent of the municipal authorities to the occupancy of their streets, placed it within the power of the local governments to absolutely prevent the obstruction of their streets by refusing their consent to such occupancy; so that, if a second occupation should be proposed, the authorities could stop it immediately by simply refusing their consent. There would be little use for such a right of refusal, if it was the purpose of the act to empower as many railway companies as could obtain charters to lay their tracks upon streets already occupied. The seventeenth section, which authorizes the occupancy of turnpikes by street-railway companies upon making compensation, expressly prohibits the laying of more than a double track; thereby implying that two tracks at most, and those belonging to the same company, should be tolerated on the same highway. We conclude the reading of the act by declaring that its manifest and consistent purpose is to prevent the occupancy of the public highways by more than the track or tracks of one street-railway company.

Some contention is made that by the expression, "under any existing charter," is meant only charters existing at the date of the passage of the act. But this proposition is so manifestly untenable that it deserves only a passing notice. The plain reading of the language of the section proves conclusively that the exclusive words, "upon which no track is laid or authorized to be laid," relate to the time of proposed incorporation, for they prohibit the incorporation of such a company. How can a company be incorporated years after the passage of the act, if there was no outstanding charter, or

track actually laid, at the date of the act, and yet there were such a prior charter or track laid, after the date of the act, but before the application for incorporation? The act would be senseless if it meant to permit the incorporation of a company notwithstanding the presence of a recent track, or the existence of a recent charter granted after the date of the act, and yet prohibited incorporation if the track or the charter existed when the act was passed. We hold, therefore, that the time of which the act speaks is the time of proposed incorporation, and that such incorporation is prohibited if then, at that time, there is a track laid or an outstanding authority for a track.

Assuming, then, that incorporation is prohibited, if at the time it is sought there is a track down or any outstanding authority to lay a track, the practical question here is, Which of these litigant companies is subject to that prohibition? It is certain that on November 16, 1898, when the defendant company sought and obtained its charter, there was no track laid, and it is equally certain that there was no outstanding authority residing in the plaintiff to lay a track, for the simple, but conclusive, reason that the plaintiff company had at that time no corporate existence. It had not even the municipal consent, although unincorporated, because that consent was not given until November 20, and it could not possibly antedate the day of its birth, and have a prenatal efficacy to prevent the defendant's otherwise lawful incorporation. But the municipal consent alone could not suffice to create a right to lay a track, without being joined with a corporate existence possessing a proper franchise. Whether such a consent might be joined to a subsequent incorporation is perhaps immaterial to consider, because, whether it could or not, it could not operate to debar or to defeat a prior incorporation, granted when there was neither corporate existence nor municipal consent residing with the plaintiff.

We consider the subject too plain for a prolonged argument. Of course, the prior incorporation of the defendant being perfectly valid, a reasonable time must be conceded in which to obtain municipal consent; and this was so proceeded with that on the 19th December, barely a month after the charter was obtained, full municipal consent was given, and an important contract executed, regulating the construction of the road between the municipality and the defendant company. The chronological situation, therefore, suffices for all the legal needs of the defendant in the acquisition and assertion of its prior right. But there is no lack of logical or legal precision in holding that, in any point of view with which the plaintiff is concerned, there was a real authorization of the defendant company to lay a track prior to the grant of the plaintiff's charter, or even to the application for it. The plaintiff's articles of association were not signed or attested until November 21, 1898, and the proceeding for incorporation was not completed until the 29th, while the defendant's proceeding was completed on the

16th. Now, the charter of the defendant company fully authorized the laying of a track over the disputed highway. The source of such authority is not the municipality, but the commonwealth, through its enabling legislation, in this case the Act of 1899. The municipal consent is an incident, essential, it is true, but necessarily of subsequent occurrence. So far as incorporation is concerned, the authorization to lay the track is complete when the charter is obtained. Therefore, both when the plaintiff's municipal consent was obtained (granting that it could be obtained prior to actual incorporation, which is more than doubtful), and also when its charter of incorporation was sought and obtained, there was a previously authorized charter right to lay the track in question, which was followed up with the necessary municipal consent immediately thereafter. This being so, the plaintiff's right to incorporation was posterior in time to the defendant's, and was subject to the prohibition of the statute; hence it cannot be set up against the defendant's prior right, which was unaffected by the prohibition of the statute. We hold, therefore, (1) that the defendant was legally authorized to lay a track on the disputed highway at the time of the plaintiff's application for a charter; (2) that the defendant obtained the municipal consent to lay the track within a reasonable time after the grant of its charter, and therefore consummated its legal right by the speedy acquisition of the municipal consent; (3) that the plaintiff was subject to the prohibition of the statute at the time of its application for a charter, and could not acquire a right to occupy the disputed highway with a track in hostility with the previously acquired right of the defendant; (4) the municipal consent granted on November 20, 1893, to a grantee designated as "The Homestead Street-Railway Company," could not defeat in any degree the previously acquired right of the defendant company, nor could it be joined to a subsequent incorporation so as to have such effect. We say this without saying, or intending to say, that in no circumstances could a previously granted municipal consent be acquired by a subsequently incorporated company. It may be that, on the principle of ratification or adoption, all parties consenting, and no intervening rights being affected, such a combination might be accomplished; but we do say that it cannot be done to defeat an opposing right which was already initiated and perfected, so far as the law permitted, at a time anterior to both the municipal consent and the subsequent incorporation of the opposing claimant. The municipal consent, of itself, can confer no right. The municipality has no power to confer the franchise. But it is the franchise, and that alone, which gives the legal right to build the railway. When the franchise is granted, authority is conferred to lay the track, and it can then truly be said that the laying of a track is authorized. Municipal consent is only essential to the execution of the authority, not at all to its creation. Definitely, and in this case, we do say, therefore, that the municipal

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pal consent set up by the plaintiff has no validity as against the defendant. No incorporation of the plaintiff's name, vested with authority to lay any track over this disputed highway, was in existence at the time of the grant; and, as no other than that kind of a body could receive such a grant, the attempt of the supervisors of Mifflin township to give consent to the plaintiff to lay a track on the highway in question, by their resolution of November 20, 1893, was a void act, and ineffective for any purpose. The language of the fifteenth section is: "No street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough, or township, without the consent of the local authorities thereof." It is manifest at a glance that only a "company incorporated under this act" could construct a passenger railway within the limits of the township, and hence a grant of permission to lay the track could only be made to such a company. But the company had no existence when the grant was made, and was therefore not competent to accept it. On the contrary, when the grant of permission was made to the defendant, it had a full corporate existence, and was clothed with legislative authority to lay the track in question.

The Act of 1899 is of such recent origin that cases involving the question at issue have not heretofore arisen, and there is, therefore, an entire absence of authorities directly upon the subject we are now considering. There is, however, some analogy in cases of steam railroad construction. Thus, in the case of *New Brighton & N. C. R. Co. v. Pittsburgh, Y. & C. R. Co.*, 105 Pa. 18, the two contending companies were duly incorporated with authority to construct a railroad along Big Beaver river between defined points. Each company claimed to have adopted a survey and location of a route made by engineers before either company was incorporated, and the contest was, Which had the prior right to the location at points of interference? The present chief justice, delivering the opinion, said: "It thus appears that the first act of each company, looking to the location of its line, was the adoption by mere resolution of a survey and location made before either of them came into existence, by parties who, respectively, had no authority to survey, locate or construct a railroad on the route in question. The first location actually made on the ground, after the incorporation of either company, was that made by appellant, as above stated. It is too clear for argument that neither of the surveys thus made, prior to the incorporation of either company, by parties having no authority to locate or construct a railroad on the route in question, could, in and of themselves, confer any right to the location in dispute." After stating that the question in dispute turned upon the construction of the General Act of 1868, authorizing the creation of railroad companies by voluntary articles of association, and pointing out the authority of companies organized under that law, the opinion proceeds: "The provisions of the act are clear and explicit. Every railroad

company is created for a purpose that is essentially public, and to that end it is clothed with a right of eminent domain. . . . It is expressly authorized to survey, mark, and determine the route of its road between the points designated in its charter, and to enter upon and occupy all lands on which its road may be so located. . . . In thus exercising the right of appropriating to public use the lands of private individuals, it is necessary, in the first place, to survey, locate, and designate by appropriate marks, the property to be taken. It was undoubtedly intended that these essential acts upon the ground should be performed, not by the projectors of a railroad company before its incorporation, nor by any one not authorized by the legislature to do so, but only by the president and directors of a duly incorporated company, their engineers and employes. Indeed, the act expressly authorizes them to do so, but is silent as to the right of all others. No such thing as a wholesale adoption, by mere resolution, of an unauthorized preliminary survey and location, appears to have been contemplated. The foregoing principles were reaffirmed, and again enforced, in an exhaustive opinion by our Brother Williams in the case of *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. 407, 12 L. R. A. 320, in which we held that nothing but an actual location and appropriation, after incorporation, would suffice to confer title to the route of a railroad. Applying this doctrine to the present contention, it will be perceived that the subject of controversy is the right to locate and construct a railway track upon the bed of a public road in Mifflin township. The plaintiff, not denying the prior charter right of the defendant to occupy the same road with its track, alleges that a grant of permission by the authorities of the township was made to it before a similar grant of permission was made to the defendant; and claims that the prior permission granted to itself, after its charter right had come into existence by the organization, which it completed on November 29, 1898, became effectively attached thereto, so as to confer title to the location by priority of right. In point of fact, the plaintiff had no corporate existence until November 29, 1898, and did not do any act, by acceptance of the permission, or by any resolution of adoption, at any time before December 19, 1898, when the municipal authorities made a direct grant of permission to the defendant company in its corporate capacity. The situation, then, is that the defendant held both a prior chartered right to occupy the street, and a full municipal permission to do so, granted after it became incorporated, while the plaintiff held a chartered right subsequent to that of the defendant, and no grant of permission from the municipal authorities to itself as a corporation. Now, the disputed question being the right to build the railway on a particular street, which company had the prior right? The plaintiff seeks to make out a complete prior right in itself, by the aid of a grant of permission made when it had no existence as a corporation. Independently of the reply to 27 L. R. A.

this contention, which grows out of the prior charter of the defendant, which at least authorized the building of the railway, it is apparent, from the foregoing decisions, that the grant of permission of November 20th was ineffective to confer any right to the location, because it was not made to anybody competent to build the road. Although the grant was made nominally to a grantee called "The Homestead Street-Railway Company," there was no such company in existence, and therefore no party competent to build the road. But, if there was no competency to build the road, there was none to accept the grant of the municipal permission to build it. The municipal authorities had no power whatever to confer a franchise to build upon any corporation, and, of course, not upon any individuals. Now, although in the above-cited cases the right to build the road carried with it the power of eminent domain to the contending companies, thereby authorizing the taking of private property, we can see no difference in principle between those cases and this. The fundamental condition is the same in both, to wit, an actual corporate existence, clothed with a legal right to build a railroad. In the cited cases there was a complete actual survey and location by both of an actual route on the ground, but because it was made before incorporation, although by the agents and employes of the persons who subsequently became incorporated, it was held entirely ineffective, although in one of the cases there was a formal adoption by the company after incorporation; and it was so held because the thing to be done, to wit, the location and building of a railroad, could not be done except by an incorporated company. But the Act of 1889 is just as imperative upon this subject as the Act of 1868. Both require an actual incorporation, because the franchise is only conferred upon chartered companies, and the administrative acts authorized to be done must all be done by the actual corporate body. The case of *Larimer & L. Street R. Co. v. Larimer Street R. Co.*, 187 Pa. 588, does not raise the question involved here, and was not decided upon any point applicable to this. The defendant there had both a chartered right to build the road, and also the municipal consent given to itself in its corporate capacity. The plaintiff had a prior chartered right, but it had no municipal consent at all, the same having been applied for, but flatly refused. The case was decided upon the point that the plaintiff, being without any municipal consent, had no standing to be heard. The question whether a consent given prior to incorporation could become effective was not in the case, and did not arise. Nor did the other question arise, whether a prior chartered right, followed speedily and within a reasonable time by full municipal consent, would be legally prior to a subsequent charter preceded by a municipal consent granted before incorporation. These are both new questions, which require decision upon their own merits. Upon the whole case, we are of opinion that the defendant company has priority of right to occupy the highway in question, and that its right of occupancy

is exclusive as against the plaintiff. Of course, we do not agree that there may be concurrent rights of construction upon the same highway in both companies.

The decrees of the court below is reversed, and the plaintiff's bill is dismissed with costs.

COMMONWEALTH of Pennsylvania

v.

Rudolph HARMEL, *Appt.*

(166 Pa. 89.)

1. A contract by which an article is left with a person for a certain time for the payment of certain amounts per week, the aggregate of which for the time equals the price of the article, and which provides that the article may be purchased at any time by paying the price upon which all rents paid shall be credited, is a sale and not a lease.

2. The peddling of the separate articles after the package in which they were shipped from other states has been broken may lawfully be regulated under the police power of a state.

(January 7, 1895.)

APPEAL by defendant from a judgment of the Court of Quarter Sessions for Allegheny County convicting him of violating the statute against peddling without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Kinnear and Shiras & Dickey, for appellant:

If this act is not a police regulation it is void as a regulation of trade.

Sayre v. Phillips, 16 L. R. A. 49, 148 Pa. 482.

A police regulation must be reasonable and for the common benefit; it must be exercised by means of laws that are equal and uniform; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit.

Millerstown v. Bell, 123 Pa. 151; *Northern Liberties Comrs. v. Northern Liberties Gas Co.* 12 Pa. 818; *Sayre v. Phillips*, *supra*.

The imposition of a license tax on the peddling of goods is a regulation of commerce.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719; *Wellon v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

Defendant in this case was not a peddler or hawking clocks in violation of the act of assembly in question when arrested.

Com. v. Gardner, 7 L. R. A. 666, 183 Pa. 284; *Com. v. Farhum*, 114 Mass. 267; *Wheeler & Wilson Mfg. Co. v. Heil*, 115 Pa. 487.

Mr. A. B. Stevenson, for appellee:

This license requires no citizenship, discriminates against no race or color, rich or poor,

NOTE—As to regulation of peddlers who deal in goods from other states, see note to *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97. The later case of *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, establishes the unconstitutionality of a license tax imposed on peddlers engaged in interstate commerce but is held not to control the present case because the goods were not in original packages. See also *Com. v. Schollenberger* (Pa.) 22 L. R. A. 155, 27 L. R. A.

nor against goods of any state or county. It applies to all persons peddling all kinds of clocks, and is properly placed under police regulations.

Com. v. Gardner, 7 L. R. A. 666, 183 Pa. 284.

The act was held valid in *Wolf v. Clark*, 2 Watts, 288, and has never been doubted since.

There are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719; *Ficklen v. Shelby County Tazing Dist.* 145 U. S. 1, 36 L. ed. 601.

Ownership of the goods can make no difference.

Wolf v. Clark, *supra*; *Gibson v. Kauffeld*, 63 Pa. 168.

Williams, J., delivered the opinion of the court:

The judgment now appealed from rests on three distinct findings of fact made by the learned judge of the court below. These are: First, that the defendant was engaged in April, 1894, in the business of selling clocks in Allegheny county; second, that he made his sales, not as a merchant having a place of business, but as a peddler, going from house to house, and exposing his clocks for sale in the homes he had invaded; and, third, that he was in so doing violating the Act of February 6, 1830 (Pub. Laws, 39), as he had no license authorizing him to sell clocks. These findings have not the conclusive effect of a verdict, but they are entitled to great weight and will not be disturbed unless plain error is shown.

As to the second and third findings no serious question is raised. It is conceded that the defendant had no license under the Act of 1830, and it is not denied that he carried his clocks from house to house, and disposed of them wherever he could bring a possible customer to buy.

The first finding is attacked on the allegation that the defendant did not sell clocks, but let them for hire, and that the persons who took them were bailees, and not purchasers. In support of this position the written agreement made with customers was relied on. It provided that the American Wringer Company rents one clock for the term of thirteen months, at the rent of 25 cents per week, or \$13 for the term; and the lessee may at any time during the term purchase the clock for the price of \$13, and be allowed all rents as a credit on such purchase. Now, let it be conceded that this agreement may be enforced according to its terms between the parties, because it is their agreement; the question still remains, What is the legal effect as to the rights of creditors or the commonwealth? The rent and the price of the article are the same. The payment of the price passes the title to the purchaser. It was plain to the court below that the device of a lease was a cover for an actual sale, in violation of the Act of 1830, so thin as to be transparent. The justice of the peace before whom they were first brought testifies that the defendant admitted that he

was selling clocks. The constable who arrested him testifies that he saw him going from house to house, peddling clocks. Maggie Tyrie, a witness, says he offered to sell a clock to her. She finally took it, and the paper relied on as a lease was produced, executed, and left with her as a receipt for the money paid. Two other witnesses testified that clocks were offered to them, to be paid for by monthly or weekly payments. G. H. Rishel, the general agent of the American Wringer Company at Pittsburgh, testified that the company was a corporation, created under the laws of Rhode Island; that the clocks were made in Connecticut, and sent to him in original packages. By him they were delivered to the road agents of the company, who sold them at retail, upon a commission. In answer to the question, "On what terms are they sold?" his answer was, "They are sold on monthly installments." This testimony clearly warranted the first finding of fact, viz., that the clocks were sold, and that the lease, or instrument so called, was a device contrived to evade the Act of 1880, and defeat its salutary provisions.

The findings of fact standing undisturbed, there is but one question left, and that a question of law. Is the Act of 1880 constitutional? It is not alleged that it violates any provision of the constitution of this state, but it is said that it violates the Constitution of the United States, because it interferes with interstate commerce. But how does it interfere with interstate commerce? It is a part of a system of police legislation beginning as early as 1784, directed against the business of peddling, because of the fraud and crime connected with it. The Act of 1784 (2 Smith's Laws, p. 99), in its preamble, recites the mischief requiring a remedy thus: "Whereas many idle and vagrant persons may come into this state, and under pretence of being hawkers and peddlers, may greatly impose upon many persons in the quality and price of goods, and also may commit felonies and other misdemeanors; for preventing such inconveniences and evil practices, and to the intent that no person may be admitted to follow the business of hawkers and peddlers within this state, but those who are of known honesty and civil behavior;" and then follow the provisions of the statute requiring proof of good moral character, and the payment of a license fee by the applicant. As new branches of this peripatetic commerce have sprung up, the legislature has extended the prohibition of the Act of 1784 to them. As early as 1880 the peddling of worthless clocks became an evil of sufficient magnitude to attract the attention of the legislature; and in that year the act now before us was passed, requiring all persons, resident or nonresident, desiring to embark in the business, to make proof before the court of quarter sessions of their good moral character, and to obtain a license authorizing them to peddle clocks. The purpose of the act was to secure some measure of protection for the citizens of the commonwealth against the frauds practiced upon them by strangers, who had no place of busi-

ness in the state, and who, when wanted to answer for their cheats and crimes, were safely beyond the reach of process. This court has uniformly asserted the validity of such legislation as a reasonable and proper exercise of the police power, and we do not propose to travel over the argument again in this case.

It is urged that the act is a trade regulation, like the ordinance of Sayre borough, considered in *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49. But this statute is not directed against certain persons engaged in peddling clocks. It is directed against all persons. It does not distinguish between the citizens of different subdivisions of this state, or between citizens of Pennsylvania and those of any other state. It is directed against the business of peddling clocks, by whomsoever undertaken. It does not, however, prohibit the business, but regulates it. The regulation is reasonable. It is impartial in its operation. It is general in its application. It meets the tests required by *Millerstown v. Bell*, 128 Pa. 151; by *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49; and by *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847. In the recent case of *Titusville v. Brennan*, 148 Pa. 642, 14 L. R. A. 100, the judgment of this court was reversed by the Supreme Court of the United States (*Brennan v. Titusville*, 158 U. S. 289, 38 L. ed. 719), on the ground that the ordinance upon which the prosecution rested was not a police, but a trade, regulation; but it was said in that case that, "by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated," subject to the qualification that a "subject-matter which has been confided exclusively to congress by the constitution is not within the police power of the state, unless placed there by congressional action." We submit with great respect that the control of no branch of retail trade has been confided exclusively to congress by the constitution, and that the interstate commerce clause was never intended to do more than keep the great channels of commerce open, and to guard against such obstructions as state custom houses, state inspections, state taxes, and the like, on goods passing from manufacturer or wholesaler in one state to retail dealer or consumer in another.

It must be conceded that these clocks may be sent into this state in manufacturers' packages, and they may be sold in the same packages, under the authority of the interstate commerce clause; but once in this state, and the package opened by the consignee, the disposition of the separate articles at retail is infrastate traffic, and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property. To deny this power to the states, and to assert that the wandering and unscrupulous adventurers who buy their brass jewelry or worthless clocks on one side of a state line may, as agents of interstate commerce, invade any

other state to cheat and defraud its citizens, is to degrade the whole subject, and to create needless friction between the general government and the people of the several states. It is suggested that these clocks, standing on the shelves of purchasers, belong to the Rhode Island corporation still. This overlooks the finding of the court below that they were sold. It overlooks the testimony of the general agent of the corporation, who says distinctly, "They were sold on monthly installments."

Finally, the general principle that penal statutes are to be strictly construed is appealed to, as a reason for reversing the judgment of the court below. We cannot see its applicability. The statute forbids the peddling of clocks. The defendant was fairly and properly convicted, on the evidence, of violating the statute. He did exactly that thing which the statute commanded him not to do. No matter how strictly the statute may be construed, he has been found guilty of violating it, and this finding is abundantly supported by the testimony. He should therefore suffer the penalty he has incurred.

If any vestiges of the police power of the states remain to them for the protection of the property or of the comfort of the people, we must think the statute now before us is a proper exercise of that power, and that the states do not invade the jurisdiction of congress when they seek to regulate a business conducted, in the language of the preamble to the peddler's act, by "idle and vagrant persons," and in a manner that does "greatly impose on many persons in the quality and price of goods," and which results in the commission by these irrepressible vagrants of "felonies and other misdemeanors." We cannot bring ourselves to doubt the validity of the Statute of February 6, 1880, or the justice of the conviction and judgment appealed from.

The judgment is affirmed.

W. W. STURGIS

v.

William J. KOUNTZ, JR., App^t.

(105 Pa. 366.)

1. The owner of a ferryboat should provide a bar to the driveway strong enough to withstand the crowding of a horse when frightened by the usual whistle of a vessel in the locality.
2. The proximate cause of the drowning of a horse which breaks a defective guard rail on a ferry-boat when frightened by the whistle of a tug-boat, is a defect in the rail and not in the whistle.

NOTE.—For other cases in this series on the subject of ferries, see (as to snow on deck) *Fearn v. West Jersey Ferry Co.* (Pa.) 18 L. R. A. 806; (as to negligence of passenger) *Watson v. Camden & A. R. Co.* (N. J.) 19 L. R. A. 487; (as to wire cable obstructing waters) *The Imperial* (D. C. D. Or.) 8 L. R. A. 234; (as to duty to operate) *Koretke v. Irwin* (Ala.) 21 L. R. A. 787.

27 L. R. A.

(January 7, 1895)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Allegheny County, in favor of plaintiff in an action brought to recover the value of a horse and sulky lost on the Ohio river through the alleged negligence of the defendant.

Affirmed.

The facts are stated in the opinion.

Messrs. Patterson & Smith, for appellant:

The proximate cause of the injury was the whistling or escaping steam of the tug-boat.

Herr v. Lebanon, 16 L. R. A. 106, 149 Pa. 222; *Jackson Twp. v. Wagner*, 127 Pa. 184; *Worritow v. Upper Chichester Twp.* 149 Pa. 40; *Schaeffer v. Jackson Twp.* 18 L. R. A. 100, 150 Pa. 145; *Kieffer v. Hummelstown*, 17 L. R. A. 217, 151 Pa. 810; *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 859.

The liability of a ferryman is not that of a common carrier, at least where the passenger retains control of his own property. It is most nearly like the liability of the owner of a bridge or turnpike. The ferry is really but a continuation of the public highway.

7 Am. & Eng. Encyclop. Law, title *Ferries*, pp. 941, 947.

The traveler himself is bound to take every precaution that he can for the safety of himself and property.

White v. Winnisimmet Co. 7 Cush. 155; *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. 615.

Messrs. M. H. Stevenson and W. T. Tredway, for appellee:

The general finding of the jury in favor of the plaintiff fixes and establishes two facts: First, that the plaintiff was guilty of no contributory negligence, and secondly, that the defendant was guilty of negligence. The case was properly submitted to the jury.

Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; *Haverly v. State Line & S. R. Co.* 185 Pa. 59.

In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

West Mahanoy Twp. v. Watson, 112 Pa. 574, 56 Am. Rep. 386.

The negligence of the defendant in failing to provide a sound and sufficient guard rail or other protection at the entrance to and exit from the boat to prevent teams and wagons from going overboard into the river was the direct, proximate, and efficient cause of the injury.

Ibid.

Dean, J., delivered the opinion of the court:

The defendant was the owner of a ferry-boat, William Thaw, plying between the lower part of Allegheny City and south side of the Ohio river. On 9th of February, 1892, the plaintiff, Dr. W. W. Sturgis, a practicing physician, drove on the boat in a light two-wheeled sulky, to be ferried from north

to south side. The boat left the wharf, and was some distance from it, in the channel, when it was passed by a small tug-boat, the John Dippel, which, when near to the William Thaw, blew its steam whistle. This frightened the horses, of which there were a number on the ferry-boat. The entrance on the boat from the landing had been closed by a wooden rail or bar, to prevent frightened or unruly horses from backing vehicles off the boat, or from plunging over into the water. When frightened by the scream of the whistle, the horses commenced backing and plunging. The plaintiff was sitting in his sulky, the horse's head in the direction of the forward part of the boat, and the rear of the sulky not far from the crossbar which protected the entrance. In front of him was a two-horse team, which backed against plaintiff's horse. His horse then backed, turned almost around towards the outside of the boat, struck the crossbar with his shoulder, broke it, and plunged into the river with sulky and driver. The horse was drowned, the sulky lost, but the owner was rescued without sustaining any serious personal injury. He brought suit for loss of his horse and sulky against defendant, the owner of the ferry-boat, averring negligence in putting up and using a defective and insufficient crossbar to protect the owners of teams in traveling on the boat. The bar had been broken and spliced, to be used, temporarily, until a new one was procured. Several days before the accident, the inspector of hulls had called attention to the defective rail, and directed it should be replaced. The jury rendered a special verdict for plaintiff, in the sum of \$865 damages, subject to the opinion of the court on the question whether the blowing of the whistle on the tug Dippel was the proximate cause of the accident, in the sense that the owner of the Thaw was not responsible, even if the guard bar or rail was defective. If so, then judgment to be entered for defendant, notwithstanding verdict for plaintiff. The court afterwards, in an opinion filed, entered judgment for the plaintiff on the verdict. From this defendant appeals.

While, as argued by appellant, the liability of a ferryman, under the facts in this case, was not exactly as great as that of a common carrier of goods, nevertheless, having undertaken to carry the plaintiff, with his horse and vehicle, for hire, his duty was to carry safely as against defects and insufficiency of his boat or neglect on part of himself and servants. At the same time, the plaintiff, the owner of the horse and sulky, assuming the care of them while on the boat, was bound to exercise ordinary watchfulness and skill to prevent loss or injury. *Wyckoff v. Queens County Ferry Co.* 52 N. Y. 82, 11 Am. Rep. 650. And, as is said in *Clark v. Union Ferry Co. of Brooklyn*, 85 N. Y. 485, 91 Am. Dec. 66: "They [the owners of the boat] are also required to be provided with all proper and suitable guards and barriers on the boat, for the security of the property thus carried, and to prevent damage from such casualties as it would be naturally exposed to, although ordinary care is required on the part of the traveler." In this last case, as

here, a horse was lost while the owner was in the vehicle. It took fright, and backed against the chain which was used to close the entrance to the ferry deck. The chain broke, because of a defective hook in it. The ferry company was held answerable for negligence. To the same effect are *Lewis v. Smith*, 107 Mass. 384; *Walker v. Jackson*, 10 Mees. & W. 161.

Therefore, in view of the verdict, the single assignment of error for our consideration is the one urged that, even if the broken rail was defective, the proximate and controlling cause of the accident was the blowing of the tug whistle, for which defendant is not answerable, and that the court erred in not so instructing the jury. The question of negligence of defendant in not providing such a guard rail as ordinary care required, and the question of the alleged contributory negligence of plaintiff in not getting from his sulky, and taking his horse by the head, and quieting him, were both fully and impartially submitted to the jury, and found against defendant. It seems to us, under the facts, the blowing of the whistle, although the originating cause of the injury, cannot relieve the defendant from liability. The cases cited and presented so concisely by the learned counsel for appellant are unanswerable when applied to the facts in them and even to facts as he assumes them to be in this issue, if some of the significant intermediate facts be not noticed. "The true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer, and likely to flow from his act." *West Mahanoy Twp. v. Watson*, 113 Pa. 574, 56 Am. Rep. 886. To the same effect is *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 359. And so all the cases cited on both sides, either expressly or by implication, rule.

Was the plunging of this frightened horse against the guard rail such a consequence as ought to have been foreseen by the owner of the ferry-boat? The primary cause of the plunging was the blowing of the whistle; but the primary is by no means always the natural and probable cause of the particular injury. It is not when there is a sufficient and independent cause between it and the injury. In such case resort must be had by the sufferer to the originator of the intermediate cause. As is said by Agnew, J., in *Pennsylvania R. Co. v. Hope*, 80 Pa. 377, 21 Am. Rep. 100, the question is: "Was there a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause." The primary, natural, and probable consequence of the blowing of the whistle was the fright of the horses, and their rearing and plunging. Any injury they might have done to each other, or those in charge of them on the boat, would not have been attributable to the owner of the ferry-boat, because that was the consequence of the primary cause,—the

blowing of the whistle. But what is naturally to be expected from a frightened horse on the narrow circumscribed deck of a ferry-boat? Manifestly, that he will plunge off it into the water. This the ferry-boat owner, to a large extent, provided against by guard railing of sufficient strength all around the boat except at the one place,—the entrance; and here it was usually strong enough to prevent such an accident, but on this day was not. The horse plunged against the spliced and defective rail, which broke, and it went over. Here was an independent intermediate cause or omission of duty, without which, notwithstanding the primary cause, the injury would not have been suffered. And the jury, on sufficient evidence, have found defendant was negligent in maintaining a defective guard rail at that point. Says Appelman, *Ch. J.*, in *Moulton v. Sanford*, 51 Me. 184: "Ordinarily, that condition is usually termed the 'cause' whose share in the matter is the most conspicuous, and is the most immediately preceding and proximate in the event." It does not help us much in the administration of justice to refine on the distinctions between "cause" and "condition" in bringing about results. Taking the case before us on its facts, it is not essentially different from *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 783. The plaintiff was driving his horse in a park maintained by the city for the use of the public. He was on a roadway fifty feet wide, which curved round the declivity very near a steam railroad, the high bank on the right of the roadway descending very abruptly to the Schuylkill river. At this side there was no barrier or railing. The horse took fright at a locomotive whistle on the railroad, plunged down the bank into the river, and was drowned. This court held it was for the jury to say whether, under the circumstances, it was negligence in the city not to have erected a proper barrier at such a point. If such omission were negligence, then that condition interposed between the originating cause—the blowing of the whistle—and the event, so as to constitute the negligent omission the efficient and proximate cause of the loss. To the same effect are *Alger v. Lowell*, 8 Allen, 402; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Joliet v. Verley*, 85 Ill. 58, 85 Am. Dec. 842.

The owner of the ferry-boat in this case, on whom was the duty of care according to the circumstances, ought to have foreseen such a result, because it was natural and probable, and have guarded against it by a sufficiently strong rail. The fact is he did foresee it, but negligently did not guard against it. His business was to ferry persons and vehicles across a navigable river, at a point where other water craft were constantly passing and repassing. When approaching each other, passing or crossing each other's path, signaling or warning by steam whistles is the settled custom. Whether any less startling signal might, with comfort and safety, have been adopted, has not yet been determined. It is now, and has been since the use of steam power, the recognized method of communication between steam vessels. He knew this, and could not have been ignorant of the fact that fright by a screeching whistle was a constant menace to the safety of the animals and those having them in charge on that boat. Horses will take fright at just such noises, especially in such a situation, penned up on a boat. That, when frightened, they would press against each other and the guard rails, he was bound to know, for he was bound to have such knowledge of his business as would enable him to conduct it with reasonable safety to the public, whose patronage he invited. If the blowing of a steam whistle by a passing vessel had been out of the ordinary course of things, or if it were out of the ordinary and usual habit of horses to take fright at such a sound, he would not have been expected to foresee and provide against such an accident. Ordinary care would not have required precaution against extraordinary contingencies. But, here, the breaking of the bar, by the pushing of a frightened horse against it, was the natural and probable consequence of putting such a defective bar there; and this was the negligence which, under the circumstances, was the proximate cause of plaintiff's injury. The learned judge of the court below, in his opinion on the reserved point, has very clearly distinguished this from the cases cited, and claimed to establish the blowing of the whistle as the proximate cause.

The assignments of error are overruled; the judgment affirmed.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* INDEPENDENT DISTRICT TELEGRAPH CO. *et al.*,

v.

SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY.

(.....Mont.....)

A receiver of a corporation may be ap-

NOTE.—As to power to appoint receivers of corporations where no other relief is asked, see *note* to Supreme Sitting Order of Iron Hall v. Baker (Ind.) 20 L. R. A. 210. See especially, *Miner v. Belle Isle Ice Co.* (Mich.) 17 L. R. A. 412, and *Wheeler v. Pullman Iron & Steel Co.* (Ill.) 17 L. R. A. 512.
27 L. R. A.

pointed on the application of minority stockholders pending the investigation of charges of outrageous fraud on the part of the majority stockholders and managers in a suit for an injunction against the negotiation or enforced or fraudulent obligations created by them and for other relief, although that does not extend to the winding up of the corporation.

(February 12, 1896.)

CERTIORARI to the District Court for Silver Bow County to review a judgment appointing a receiver for the Independent District Telegraph Company and the Citizens'

District Messenger & Burglar-Alarm Telegraph Company. *Dismissed.*

Statement by DeWitt, J.:

This is a writ of certiorari directed to the district court to review its action in appointing a receiver of the properties of two of the relators, viz., the Independent District Telegraph Company and the Citizens' District Messenger & Burglar-Alarm Telegraph Company, it being claimed by the relators that the district court acted in that matter without jurisdiction. The receiver was appointed in an action entitled as follows: "H. L. Haupt and E. A. Nichols, trustee, Plaintiffs, v. Independent District Telegraph Company, Citizens' District Messenger & Burglar-Alarm Telegraph Company, Fred B. Puddington, H. Sommers, John O'Rourke, Thomas D. Butterfield, G. A. Lauzier, Alex. Johnson, and John Doe (whose true name is unknown), Defendants." The appointment was made upon the complaint in that case and upon affidavits filed. The following facts appear from the complaint:

Each of the companies defendant in the case in the district court (and who are relators here) is a corporation organized under the laws of this state. The plaintiff Haupt is owner of 76 shares of the stock of the Independent Company. The plaintiff Nichols, as trustee, is also owner of 76 shares of said company. The Independent Company is the owner of a franchise from the city of Butte permitting it to carry on the district messenger business, and granting to the company the use of the streets and alleys of the city for the purpose of said business. The Citizens' Company owns a similar franchise. On May 1, 1892, the said two companies entered into an agreement by which they should put their respective stocks, franchises, and property into a common business, to be carried on by officers and agents to be appointed by the two corporations jointly. This agreement was to run for twenty years. All moneys earned should go into a general fund, and be in the hands of a general treasurer. After paying expenses, a reserve fund of \$500 was to accumulate in the hands of the treasurer. After paying expenses and the accumulation of this reserve, the profits were to be paid by the general treasurer to the respective corporation treasurers in the proportion of five ninths to the Independent Company, and four ninths to the Citizens' Company, to be distributed by the said respective companies as dividends on their stock. Thereupon the general manager and general treasurer were elected to carry on this joint business. The reserve fund of \$500 was accumulated. The business was carried on until June 1, 1893. At that date the stockholders Sommers, Lauzier, Butterfield, and O'Rourke united together and obtained a majority of the stock of each company. After obtaining this stock, those stockholders united and conspired together to manage and conduct the combined corporations for their individual benefit, and to exclude from the management profits and benefits the plaintiffs Haupt and Nichols. Since that time said plaintiffs Haupt and Nichols have been

entirely excluded from the profits, management, and benefits of said corporations and the combination of the corporations. From the time said association of the two corporations was formed until said Sommers, Lauzier, Butterfield, and O'Rourke obtained control of the said combined business, there was paid to the treasurers of the said corporations \$500 a month, to be distributed by them as dividends on the stock of the corporations. That, when said Sommers and others obtained control of the said associated corporations, there was in the hands of the general treasurer said reserve fund of \$500, and also cash in the sum of \$1,000, and also interest on the reserve fund of \$25. That this total sum of \$1,525 was turned over to Lauzier, the general treasurer elected by his friends Sommers, Butterfield, and O'Rourke. That the current expenses which then remained unpaid did not exceed \$300, and that there was therefore \$1,225 available as a dividend to be paid to the stockholders. That, ever since said Sommers and others obtained control as aforesaid, they have refused to give the plaintiffs any account of the profits of the association, and have refused to pay any dividends on the stock. Plaintiffs allege, on information and belief, that, since the Sommers control obtained,—that is, since June 1, 1893,—the net profits of the associated corporations have been \$500 per month, and that said Sommers, O'Rourke, Butterfield, and Lauzier, instead of paying those profits as dividends, have converted the same to their own use. On February 9, 1894, the officers elected under the Sommers management executed to Fred B. Puddington three promissory notes, payable each in nine months, for the sums, respectively, of \$5,000, \$2,000, and \$2,000, bearing interest at the rate of 1½ per cent per month. That said Sommers management, also as security for said notes, executed to said Puddington a chattel mortgage upon the franchises and all the property of said corporations. That said notes purported to be given for the purchase price of a certain franchise granted by the city of Butte to said Puddington,—a franchise to erect and maintain a district messenger and burglar-alarm telegraph system in the city of Butte. That said franchise was granted by the city subject to certain conditions precedent. The complaint then sets out those conditions, and then alleges that none of those conditions were fulfilled. The complaint alleges that said Puddington's franchise is forfeited and void, and was forfeited and void at the time of the pretended sale of the same to the two said companies and the execution of said notes and mortgage. The complaint further states that said Sommers and others, at the time of said pretended sale, well knew that the Puddington franchise was forfeited and void and was of no value whatever. It is further alleged that said Sommers, Lauzier, Butterfield, and O'Rourke conspired together to defraud the plaintiffs, and to obtain possession of the plaintiffs' stock, and all interest in the Independent Company, and of the said combination of the two companies; and that in fact they executed said mortgage and notes without any consideration, and for the pur

pose of bringing about the sale of said property and franchises of the said companies, and of foreclosing all interest of the plaintiffs therein. The complaint further alleges that unless the negotiation of the said notes is restrained, and the notes and mortgage declared fraudulent and void, all the property of the Independent Company will be sold under the mortgage, and plaintiffs will be deprived of their interests in the said corporation. The complaint prays for several items of relief, among them that said Fred B. Puddington, and all persons claiming under him, may be enjoined from negotiating said notes or mortgage, or from collecting or foreclosing the same, or from interfering in any manner with the properties or franchises of the said companies, and that said mortgage and notes be adjudged null and void.

In addition to the allegations made in the complaint, a number of affidavits were filed and used on the hearing. One Le Clare deposes that he heard John O'Rourke and G. A. Lauzier, two of the defendants in the district court, conversing about the business of the said district messenger companies, and that O'Rourke said "that if they [meaning himself, Butterfield, Lauzier, and Sommers] would stand together, they would do that Dutch outfit up [referring to the Shultzes and the other stockholders]." H. A. Neidenhofer deposes that from December, 1890, to February, 1892, he was manager of the Independent Company, and that all that time monthly dividends were paid to its stockholders amounting to \$750 per month, excepting during the time when there was an opposition company, and that those dividends were net profits. This affiant also states that after the combination was made between the two companies they paid dividends of \$500 a month. Seth B. Smith, another affiant, stated that, prior to the time when Sommers and his party obtained control of the combined corporations, he (affiant) was treasurer of the combination. He testifies in his affidavit rather fully about the formation of the combination between the two companies. He testified that the reserve fund above mentioned, of \$500, accumulated in the hands of the treasurer; that finally Sommers and his party bought the affiant's stock and he retired from the management; that he turned over to the new management all the funds in three different checks of \$911.80, \$107.94, and \$14.25; that at that time there were expenses outstanding and unpaid of only \$400; that when he retired he was just preparing and ready to declare a dividend of \$500, but he was instructed by the Sommers party not to pay said dividend; that while affiant was treasurer of the company he paid dividends to the stockholders of about \$500 a month. Carl Shultz and his wife, Mary Shultz, each made an affidavit in which they testify as to Lauzier's and Butterfield's negotiations for the purchase of affiants' stock, and threats that if they did not sell that they (Lauzier and Butterfield) would freeze out said affiants. Haupt, one of the plaintiffs, also makes an affidavit that for more than a year after the combination of the two companies he received monthly dividends on his 27 L. R. A.

stock of 50 cents per share. This affiant also alleges, on information and belief, that the combined corporations keep two sets of books, one of which sets of books shows the actual receipts and disbursements and the net profits of the association, and the other set of books does not show the correct accounts of the said corporations, but is kept for the purpose of deceiving and misleading stockholders who have been excluded from the management and participation in the management of said business; that, since the Sommers party obtained control of the business, affiant has received no dividends on his stock, although there have been large profits. This affiant then sets forth the execution of the Puddington notes and mortgage. He also sets forth the facts showing that the Puddington franchise which he (Puddington) purported to sell to the companies for \$9,000 was absolutely void and worthless. One of the employees of the combined corporations testifies to hearing Butterfield say that the business was good and paying as well as any business in town.

An answer was filed by the defendants, and also some affidavits. It is not necessary to recite the contents of these papers, for on the writ of certiorari in this court the question of the discretion of the lower court in appointing a receiver is not under review. After hearing argument in the district court as recited in its order, the court found that the plaintiffs were entitled to the appointment of a receiver *pendente lite*. It was therefore ordered that A. H. Barrett be appointed receiver *pendente lite* of the franchises, plants, business, books, and accounts, and of all other property belonging to the said two corporations, for the purpose of managing and conducting said business; and he was by the order authorized and directed to take possession of the said premises, franchises, plants, and all property, books, and accounts, of any nature whatsoever, belonging to the said corporations, and to manage and control the same during the pendency of this action, and for that purpose to take care of and manage and control the said property and business, and to pay all debts and obligations, and collect all moneys due to the said corporations. It was ordered that the receiver give a bond, with sureties, in the sum of \$10,000. Upon the appointment of the receiver, the said G. A. Lauzier made an application to this court upon behalf of himself, and purporting to be also on behalf of the two district telegraph companies, asking for a writ of certiorari to review the action of the district court in appointing a receiver. The application, of course, is made upon the ground that the district court had no jurisdiction to make the appointment. That is the point discussed and decided in the opinion below.

Messrs. Robinson & Wapleton and John W. Cotter for relators.

Messrs. George Haldorn and Oliver M. Hall, for respondent:

The district court had jurisdiction to make the order appointing a receiver.

State v. Second Judicial Dist. Ct. Judges, 10 Mont. 401; *Re Lewis*, 52 Kan. 660; *Miner v.*

Belle Isle Ice Co. 17 L. R. A. 413, 98 Mich. 97; *St. Louis & S. Coal & Min. Co. v. Edwards*, 103 Ill. 472; *Haywood v. Lincoln Lumber Co.* 64 Wis. 689; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; 20 Am. & Eng. Encyclop. Law, pp. 49, 272, and notes; *Supreme Sitting Order of Iron Hall v. Baker*, 20 L. R. A. 310, 194 Ind. 293; *Edison v. Edison United Phonograph Co.* (N. J.) May 15, 1894; *Ford v. Kansas City & I. Short Line R. Co.* 52 Mo. App. 489; 1 Morawetz, Priv. Corp. §§ 285, 286; *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 625; *Ranger v. Champion Cotton-Press Co.* 52 Fed. Rep. 610; *Hall v. Astoria Veneer Mills & Lumber Co.* 4 U. S. Gen. Dig. p. 1628, § 81, 5 Ry. & Corp. L. J. 412.

In a suit by a creditor having no specific lien or judgment against a corporation, the appointment of a receiver by a chancellor is not void or subject to collateral attack.

Whitney v. Hanover Nat. Bank, 23 L. R. A. 531, 71 Miss. 1009; *Fischer v. Tuolumne County Super. Ct.* 98 Cal. 67; *Edwood v. First Nat. Bank of Greenleaf*, 41 Kan. 475; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632.

Though the court could not declare forfeiture of the franchises of insolvent corporations, nevertheless, in an action brought for the purpose of forfeiting a franchise, the appointment of a receiver and for general relief, the court should retain jurisdiction for the purpose of appointing a receiver.

Gaylord v. Ft. Wayne, M. & O. R. Co. 6 Biss. 286; *Davis v. United States Electric Power & Light Co. of Baltimore City*, 77 Md. 35; *Becker v. Gulf City Street Railway & Real-Estate Co.* 80 Tex. 475; *Stevens v. Davidson*, 18 Gratt. 819, 98 Am. Dec. 692; *Batchford v. Ross*, 87 How. Pr. 115; 2 Beach, Mod. Eq. Jur. § 967, note 7; 2 Waterman, Corp. § 856.

De Witt, J., delivered the opinion of the court:

The question in this case is simply whether under the facts, as recited in the statement above, the district court had jurisdiction to appoint a receiver. *State v. Second Judicial Dist. Ct. Judge*, 10 Mont. 401. See also *French Bank Case*, 53 Cal., at page 550. There is here no question of the court's discretion under consideration. The relators in this application rely very largely upon the decision in the *French Bank Case*, but we think that the case at bar is distinguishable from that case in many respects, and, in order to make the distinction apparent, we quote as follows from the California case: "Irrespective of the effect of the fifth subdivision of section 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management, and substitutes its own, and assumes, in the language of the order under review, 'to do

all and everything necessary (in the judgment the receiver, under the advice of the court) to protect the rights of the creditors and depositors of said corporation.' This precise question was brought directly under consideration here in the case of *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508, where, in a suit brought by a stockholder, a receiver had been appointed by the district court to take possession of the property of the Gold Hill & Bear River Water Company, a corporation existing under the laws of this state. The opinion in that case, rendered by Mr. Justice Cope, and concurred in by the whole court, after referring to the adjudicated cases in England and in this country, uses this language: 'This decree, if permitted to stand, must necessarily result in the dissolution of the corporation; and in that event the court will have accomplished, in an indirect mode, that which, in this proceeding, it had no authority to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.' Of course, it is not to be doubted that the trustees of a corporation, the persons who constitute its direction, and from time to time exercise the corporate authority in the management of its affairs, are subject to the control of courts of equity; or, as observed by Chancellor Kent, 'that the persons who from time to time exercise the corporate powers may, in their character of trustees, be accountable to this court [the court of chancery] for a fraudulent breach of trust; and,' he adds, 'to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined.' *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 388, 1 L. ed. 420. And in exercise of these admitted equity powers of the court, referable to the well-known grounds upon which its jurisdiction ordinarily proceeds, embracing the cognizance of fraud, accident, trust, and the like, the rights of natural persons, injured or put at hazard through corporate proceedings unauthorized by law, will find ample protection and redress. But, even in such a proceeding as that, the trustees must, of course, be made parties defendant; and it will be observed, upon looking at the complaint of Gallagher in this view, that it is not substantially sufficient in its scope to put the equity powers of the court in motion for any purpose. The corporation itself being the sole party defendant, the trustees—those persons upon whom the management of its affairs is devolved—are not parties, nor is any relief sought against them personally. That there is no inherent power in the district courts, as being courts of equity, to appoint a receiver in such a case as that presented by the complaint of Gallagher, is therefore apparent, both upon principle and authority."

In the California case an important element in the decision, as it appears, was that the appointment of the receiver acted as a dissolution of the corporation. In the case at bar no such result is intended by the order ap-

pointing the receiver, or is accomplished by that order. It is true that the complaint in the case in the district court asks for a dissolution of the corporation, but whether such relief may be granted in that action is not now before us for review. The complaint also asks another relief, as set forth in the statement, namely, that the negotiation of the notes described be restrained, that the foreclosure of the mortgage be prohibited, and that the notes and mortgage be declared null and void. While the determination of these matters is pending in the action, the receiver is to act. His appointment is *pendente lite* only, and he is authorized to do only those acts which are peculiarly *pendente lite*. Again, in the *French Bank Case*, one ground of the decision was that the action was against the corporation only (see page 546 of the decision), and not against the malfeasant trustees; that is, the "persons upon whom the management of its affairs is devolved" (at page 551). But in the case at bar the managing officers of the corporation are joined as defendants, and their unlawful acts are sought to be set aside, and their future wrongful conduct enjoined. The receiver is not to wind-up the corporation under his appointment. He is simply to manage the affairs of the same while charges of the most outrageous frauds by the managers and controllers of the corporation are being investigated in the trial of the action. We are fully aware of the reluctance of courts of equity to interfere by receivership in the management of corporations, or to take that management from trustees elected by the shareholders. It is said in *Morawetz on Private Corporations* (sec. 281) as follows: "A court of equity will grant all relief to a shareholder which the nature of his case may require. But it has always been a settled principle that no interference with the management of a corporation can be justified, unless such interference is absolutely necessary to the attainment of justice. The reason of this rule is obvious. The officers of a corporation are generally elected by a vote of the shareholders. Every shareholder has a voice in their appointment, and may insist that they shall represent the corporation when duly appointed. If an officer is guilty of a breach of duty, he may in many cases be removed by act of the corporation; but no minority of the shareholders have any authority to restrain his action, or remove him and appoint another officer in his place. Nor can a court of chancery interfere at the suit of a portion of the shareholders, and remove an offending officer, or even enjoin him generally from acting for the corporation, unless this be essential to the protection of the corporate rights; as, for example, where the directors have conspired to defraud the corporation, or have otherwise shown themselves to be totally unfit to be intrusted any longer with the management of the company's affairs. The court must ordinarily confine its remedy to the redress of the specific wrongs which have been charged."

But the case before us is not an ordinary one, and perhaps it may be doubted that many such histories of fraud will be found in the

conduct of human affairs. It is difficult to imagine a case more thoroughly saturated with fraud than this which was presented to the district court on the application for the appointment of a receiver. Four shareholders of two small corporations, which were paying handsome dividends, obtained control of the majority of the stock, and elected their own officers. These four conspirators, instead of paying \$500 a month dividends which the corporations were earning, proceeded to put that money into their own pockets. They kept false books to deceive the shareholders. They pretended to buy for the corporations an absolutely worthless franchise, when they already owned two good and valid franchises, which were more than ample for the same purpose. They gave the corporations' notes for this worthless franchise, and mortgaged all of the property of the corporations for the purpose of having the mortgage foreclosed, and the property of the corporations wiped out. It is needless to enlarge upon these facts. They are all set forth in the statement preceding this opinion. This is a story of wrecking and robbing that would make a pirate of the Spanish main exclaim, in the language of *Lord Clive*, "I am surprised at my own moderation." Is not interference here absolutely necessary, as *Morawetz* says, to the attainment of justice? Again *Morawetz* remarks, as quoted above, the court of chancery will not interfere at the suit of the shareholders unless this be essential to the protection of the corporate rights. We can scarcely conceive of a case where it would be more essential than it is here, for the protection of the corporate rights, for, if the interference is not had, the corporate property will be swept away from the corporations into the grasp of the conspirators; and, while the investigation into the acts of the *Sommers-O'Rourke* party is being made by the court, should the court allow this same band of marauders to remain in possession of the corporations and their property, and continue to convert the assets to their own use, and exercise their own pleasure as to the trusts imposed upon them? To allow such a proceeding, it seems to us, would shock the conscience of the most indifferent court. Our statute provides that "a receiver may be appointed by the court in which an action is pending, or by the judge thereof:

Sixth. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." Code Civ. Proc. § 229. We are of opinion that the decisions of the courts sustain the doctrine of the powers and the usages of courts of equity in such a case as that which was made in the showing before the district court. We note the following language from a very recent decision (January, 1894) of the Kansas supreme court. While the Kansas statute is broader than ours, and the case of *Re Lewis*, 52 Kan. 660, is decided largely upon the statute of that state, still the following remarks of the Kansas court are valuable, as is also the collection of authorities appended to the decision. We extract from the opinion as follows: "By the averments of the petition, it would appear that all the officers of the corporation have

conspired together to divert its business to another company, and to absorb its earnings and assets, and appropriate the same to their own uses. Under those circumstances, it would be useless to apply to the officers to bring an action against themselves, and in such cases the law permits the appointment of a receiver at the instance of a stockholder. In most cases of this character no other adequate remedy exists. The appointment of a receiver is not necessarily a proceeding to dissolve a corporation, nor will it necessarily result in its extinction. The property and assets of the corporation, which are being dissipated and fraudulently absorbed, will be preserved and rightfully applied under the supervision of the court, and may be restored to the officers of the corporation when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporations to its duly constituted officers. See *First Nat. Bank of Mauch Chunk v. United States Encaustic Tile Co.* 105 Ind. 227; *Wayne Pike Co. v. Hammons*, 129 Ind. 888; *Supreme Sitting Order of Iron Hall v. Baker*, 184 Ind. 293, 20 L. R. A. 210; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Consolidated Tank-Line Co. v. Kansas City Varnish Co.* 48 Fed. Rep. 204; *Morawetz, Priv. Corp.* § 281; *Pom. Eq. Jur.* § 1834; *High, Receivers*, § 818; *Spelling, Priv. Corp.* § 1001; 20 Am. & Eng. Encyclop. Law, p. 272." We also find it stated in *High on Receivers* as follows: "It has already been shown that in most of the states of this country the general jurisdiction of courts of equity over corporations has been enlarged to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders." Section 818.

The court of Michigan (October, 1892), in *Miner v. Belle Isle Ice Co.*, 98 Mich. 97, 17 L. R. A. 412, after reviewing the history of a fraud which perhaps is worthy to be ranked with that of the case at bar, says: "The present case furnishes an instance of gross abuse of trust. Must the *cestui que trust* be committed to the domination of a trustee who has for seven years continued to violate the trust? The law requires of the majority the utmost good faith in the control and management of the corporation as to the minority. It is of the essence of this trust that it shall be so managed as to produce for each stockholder the best possible return for his investment. The trustee has so far absorbed all returns. What is the outlook for the future? This court, in view of the past, can give no assurances. It can make no order that can prevent some other method of bleeding this corporation, if it is allowed to continue. If Lorman be removed, who shall take his place? He has the absolute power to determine. Once deposed, he may elect a dummy to fill his place. There are practically but three persons concerned, Miner, Lorman, and Lorisaa Carpenter, and she has for seven years, in fraud of complainant's rights, been paid a dividend to secure her acquiescence. Who has any right to complain if ample and complete justice is awarded to Miner? Who shall be permitted to stand between him and an adequate remedy? This corporation has

utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital, to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up." In the Michigan case the decision went to the winding up of the corporation, but in the case before us the receiver is only to hold until the charges of fraud are investigated. The Michigan decision is an able discussion of the powers of the court of equity in this respect, and a valuable review of decisions. It may be said here, as was said in the Michigan case, that the corporations have utterly failed of their purpose, not because of matters beyond their control, but because of the fraudulent mismanagement and misappropriation of their funds. An equal if not greater mismanagement and misappropriation has been done by the officers of the corporations who are here made defendants, and whose acts are sought to be restrained and set aside and declared null and void. We also find the same general subject mentioned in the following language of *Waterman on the Law of Corporations* (vol. 2, § 856): "The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. It is exercised when an estate or fund is in existence, and there is no competent person entitled to hold it; or the person so entitled is in the nature of a trustee, and is misusing or misapplying the trust, or the property is about to be removed beyond the reach of the court; and, generally, when it is necessary to secure rights and prevent a failure of justice. The property is thus placed in the hands of an officer of the law in order that it may be under the protecting care and control of the court, and be delivered unimpaired to the persons to whom it is legally ascertained to belong." See also *Ranger v. Champion Cotton-Press Co.* 52 Fed. Rep. 611; *Morawetz, Priv. Corp.* § 642.

Upon questions of equity and jurisdiction aid is always found in the records of the courts of chancery of New Jersey, and from a decision rendered in May, 1894, by that learned court, we quote as follows: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled; but I think it is equally well settled that this power is subject to certain

limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire. This is the doctrine, as I understand it, which was laid down by *Vice Chancellor Malins* in *Featherstone v. Cooke*, L. R. 16 Eq. 298, and *Trade Auxiliary Co. v. Vickers*, Id. 808, and which was approved by *Chancellor Runyon* in *Einstein v. Rosenfeld*, 88 N. J. Eq. 809, and by *Chancellor McGill* in *Archer v. American Waterworks Co.* 50 N. J. Eq. 88; *Edison v. Edison United Phonograph Co.* (N. J.) 29 Atl. Rep. 197. It is true, of course, that the power must be exercised with great caution, but we are of the opinion that the most scrupulous caution would not cause a court to hesitate in the matter which was before the district court. Furthermore, the district court did not go any further in the appointment than was necessary to preserve the property of the corporations, and protect the rights and interests of its stockholders, as was stated in the New Jersey case. It does not seem necessary to go further in this discussion. The facts of this

case will not afford a precedent in the future for any imprudent or unauthorized appointment of a receiver for corporations, or the unwise withdrawal of the business of a corporation from the management of its duly elected and lawfully acting trustees. The case is a precedent only as to its own facts. Here the objects of the existence, and, indeed, the practical existence itself, of the corporations, are being totally destroyed by the unlawful (not to use a stronger term) acts of its managers; and one object, at least, of the action in the district court, is to set aside and prevent such unlawful acts of such managers, and the action itself is against such unlawfully acting persons. If they are allowed to go on in their course which they are pursuing, the corporations are to be totally wrecked, their funds are to be embezzled, and their property is to be taken from them by a fraudulent conspiracy of the managers, whose position is one of trust towards the plaintiffs in the action in the district court. Under such a vigorous showing of facts, we believe that the decisions of the courts of equity uphold the powers and usages of those courts to interfere by a receivership. See the cases cited in this opinion and the cases referred to in those citations.

We are therefore of the opinion that the writ of certiorari must be dismissed, and it is so ordered.

Pemberton, Ch. J., and Hunt, J., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Bridget L. WHITE

v.

PROVIDENCE SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

(.....Mass.....)

1. **Technical warranties as well as representations** made in an application for insurance, although referred to in the policy as part of the contract, are included in the provision of Stat. 1887, chapter 214, section 21, that misrepresentations in the negotiation of a contract shall not be deemed material unless made with actual intent to deceive, or unless the matter misrepresented increases the risk.
2. **A person was attended by a physician** within the meaning of the question in an application for life insurance, if he went to the office of the physician, telling him he had coughed and spit blood, submitted to a physical examination, obtained a prescription, and paid a fee therefor, and afterwards consulted the physician again and paid a fee.

NOTE.—For construction of life or accident policies, see also notes to *Badenfield v. Massachusetts Mut. Acc. Asso.* (Mass.) 13 L. R. A. 268; *Cobb v. Covenant Mut. Ben. Asso.* (Mass.) 10 L. R. A. 606.

For late cases as to warranties, see *Michigan Shingle Co. v. State Investment Ins. Co.* (Mich.) 23 L. R. A. 819; *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 23 L. R. A. 835; *Manufacturers' Acc. Indemnity Co. v. Dorgan* (C. C. App. 8th C.) 23 L. R. A. 620.
27 L. R. A.

(February 28, 1896.)

EXCEPTIONS by plaintiff to the ruling of the Superior Court for Essex County made during the trial of an action to recover the amount alleged to be due on a policy of life insurance, which resulted in a verdict in defendant's favor. *New trial granted.*

The policy was issued upon the life of John T. White, who died February 26, 1892, and the question at issue was as to whether or not the policy was avoided by answers which the insured had given to certain questions propounded in the application.

The case sufficiently appears in the opinion.

Messrs. J. F. Quinn and H. P. Moulton for plaintiff.

Messrs. William H. Moody and Joseph H. Pearl, for defendant:

The stipulations and agreements in the application are made a part of the policy by apt and sufficient words of reference and incorporation. In the application they are declared to be "with the stipulated premiums the sole basis of the contract," and in the policy, of them it is said, "all of which are a part of this contract." The application thus becomes a part of the policy itself.

Campbell v. New England Mut. L. Ins. Co. 96 Mass. 381; *Olapp v. Massachusetts Ben. Asso.* 146 Mass. 518; *Foot v. Etina L. Ins. Co. of Hartford, Conn.* 61 N. Y. 571; *Cushman v.*

United States L. Ins. Co. 63 N. Y. 404; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661; May, Ins. 8d ed. § 158.

The nature of the answers in issue are such that there is no hardship to the assured or the beneficiary in treating them as warranties. They related to the present health of the assured, the existence of pulmonary symptoms, the disease of the lungs, the death of a blood relative from hereditary disease, and to the medical attendance of the assured. The information sought by the interrogatories was vitally material to the risk and peculiarly within the knowledge of the assured.

Miles v. Connecticut Mut. L. Ins. Co. 8 Gray, 580; *Tebbetts v. Hamilton Mut. Ins. Co.* 1 Allen, 805, 79 Am. Dec. 740; *Calvert v. Hamilton Mut. Ins. Co.* 1 Allen, 808, 79 Am. Dec. 744; *Abbott v. Shawmut Mut. F. Ins. Co.* 8 Allen, 218; *McLoon v. Commercial Mut. Ins. Co.* 100 Mass. 473, 1 Am. Rep. 129; *Foot v. Aetna L. Ins. Co. supra*; *Barbeau v. Phœnix Mut. L. Ins. Co.* 67 N. Y. 595; *Dwight v. Germania L. Ins. Co.* 108 N. Y. 841, 57 Am. Rep. 729; *Line v. Massachusetts Mut. L. Ins. Co.* 8 Mo. App. 368; *Roberts v. State Ins. Co.* 26 Mo. App. 92; *Cushman v. United States L. Ins. Co.* 63 N. Y. 404; *Boyd v. Vanderbilt Ins. Co.* 90 Tenn. 318; *Sterens v. Queen Ins. Co.* 81 Wis. 885; *Supreme Council American L. of H. v. Green*, 71 Md. 268; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661; *Wilkinson v. Connecticut Mut. L. Ins. Co.* 80 Iowa, 119, 6 Am. Rep. 657.

Section 21, chapter 214, Acts of 1887, dealt with representations and not warranties.

Ex parte Hall, 1 Pick. 261; *Merchants Bank v. Cook*, 4 Pick. 405.

The representations were clearly such as, if untrue, would increase the risk of loss.

McCoy v. Metropolitan L. Ins. Co. 133 Mass. 89; *Cobb v. Covenant Mut. Ben. Asso.* 10 L. R. A. 666, 158 Mass. 176; *Ring v. Phœnix Assur. Co.* 145 Mass. 426.

Where material statements have been incorporated in the policy and made the basis of the insurance, and the validity of the policy made to depend upon the truth of the statements, it is not important to determine whether the statements are representations or warranties, since in either case the policy is avoided by their untruth.

Voss v. Eagle Life & Health Ins. Co. 6 Cush. 42; *McCoy v. Metropolitan L. Ins. Co.* and *McCoy v. Covenant Mut. Ben. Asso. supra*; *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 47, 23 L. ed. 838; *Aetna L. Ins. Co. of Hartford v. France*, 91 U. S. 510, 23 L. ed. 401; *Price v. Phœnix Mut. L. Ins. Co.* 17 Minn. 497, 10 Am. Rep. 166; *Day v. Mut. Ben. Ins. Co.* 1 McArth. 41; May, Ins. 8d ed. § 185.

Barker, J., delivered the opinion of the court:

The most important question raised by the report is as to the effect of Stat. 1887, chap. 214, § 21, now, by the Massachusetts Insurance Act of 1894, re-enacted as Stat. 1894, chap. 522, § 21. The question is, in substance, whether the provisions of that section include in the word "misrepresentation" statements which in insurance law are classed

as "warranties," because expressly said to be warranties by the language of the parties, or whether the section deals only with statements which are representations, and not with technical warranties. The ruling of the trial court went upon the theory that the section did not affect statements which were said in the policy and the application to be warranties, but only misrepresentations as to matters which were the subject of representations as distinguished from warranties. The section, as it stood in Stat. 1887, chap. 214, § 21, was in these words: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss;" and the language of Stat. 1894, chap. 522, § 21, is the same. This language is broader than that of Pub. Stat., chap. 119, § 181, which applied only to misrepresentations made in obtaining or securing policies of fire insurance and of life insurance, and which was in these words: "No oral or written misrepresentation made in obtaining or securing a policy of fire or life insurance shall be deemed material, or defeat or avoid the policy, or prevent its attaching unless such misrepresentation is made with actual intent to deceive or unless the matter misrepresented increases the risk of loss." The broader language of the section, as it is found in the general insurance Act of 1887, was clearly designed to extend the rule, which up to that time dealt only with misrepresentations affecting policies of fire insurance and of life insurance, and to apply it to misrepresentations made in the negotiation of any contract or policy of insurance of whatever kind. Pub. Stat., chap. 119, § 181, is merely a re-enactment identical in language with Stat. 1878, chap. 187, § 1, which as to life insurance was a wholly new provision. There was, however, a previously enacted statute containing the form of fire insurance policies, providing that the conditions of the insurance should be stated in the body of the policy, and that neither the application of the insured nor the by-laws of the company should be considered as a warranty or a part of the contract, except so far as incorporated in full into the policy, and appearing on its face before the signatures of the officers of the company. This was Stat. 1864, chap. 196, which took the place of and repealed Stat. 1861, chap. 162, which seems to have been the earliest statute dealing with the form of fire insurance policies, and which provided that in all insurance against loss by fire the conditions of the insurance should be stated in the body of the policy, and that neither the application nor the by-laws, as such, should be considered as a warranty or part of the contract. The provisions of Pub. Stat., chap. 119, § 181, were substantially re-enacted in the General Insurance Act of 1887 and in that of 1894. See Stat. 1887, chap. 214, § 59; Stat. 1894, chap. 522, § 59. Besides the statutes already noted, there are also the several enactments,

beginning in the year 1873, establishing a standard form for policies of fire insurance. These are Stat. 1873, chap. 331, with the amendatory act (Stat. 1880, chap. 175; Stat. 1881, chap. 166), repealing the two acts last cited, and prescribing a new standard form of policy; and Pub. Stat. chap. 119, § 139; Stat. 1887, chap. 214, § 60; and Stat. 1894, chap. 522, § 60,—the last three being substantially re-enactments, continuing in force the provisions of Stat. 1881, chap. 166. In the standard form of policy given in Stat. 1873, chap. 331, is this clause: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the assured;" and the same clause is in the standard form given in Stat. 1881, chap. 166, and in Pub. Stat., chap. 119, § 139; in Stat. 1887, chap. 214, § 60; and in Stat. 1894, chap. 522, § 60. The provisions of Stat. 1887, chap. 214, § 21, are thus seen to be part of a system of legislation, beginning in the year 1861, and then applied only to fire insurance in which the legislature has dealt with the subject of statements on the part of the assured affecting contracts of insurance, and which, before the question now raised for decision arose, had been made to apply to all statements made in the negotiation of contracts and policies of insurance of whatever kind. Stat. 1878, chap. 157, does not appear to have been enacted in consequence of any recommendation by the insurance department, nor has any construction been given to that statute or to Pub. Stat., chap. 119, § 131; Stat. 1887, chap. 214, § 21; or Stat. 1894, chap. 522, § 21—by that department, or by this court, except so far as Stat. 1887, chap. 214, § 21, has been dealt with in the case of *Ring v. Phoenix Assur. Co.* 145 Mass. 426, and in that of *Durkee v. India Mut. Ins. Co.* 159 Mass. 514. The case last cited has no bearing upon the present question, nor is that question governed by the decision of *Ring v. Phoenix Assur. Co.* The statutes above referred to show a general intention on the part of the legislature to make, in lieu of the rules which spring from the doctrines held in the law of insurance as to technical warranties and representations, a statute rule by which to determine the effect upon the contract of all statements on the part of the assured, and also the effect of by-laws and similar matters which it might otherwise be contended would avoid or modify the contract.

The distinction in insurance law between "warranties" and "representations" is said by Baron Parke in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 496, to have been laid down by Lord Mansfield. In *Pawson v. Watson*, Cowp. 785, decided in the year 1778, Lord Mansfield said: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition, which makes a part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. . . . Nothing tantamount will do or answer the purpose. It must be strictly performed, as being part of

the agreement. . . . So that there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent." And in *De Hahn v. Hartley*, 1 T. R. 343, decided in 1786, he said: "There is a material distinction between a 'warranty' and a 'representation.' A representation may be equitably and substantially answered; but a warranty must be strictly complied with. . . . A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." And, in the same case, Ashhurst, J., says: "The very meaning of a 'warranty' is to preclude all questions whether it has been substantially complied with; it must be literally so." These doctrines of the law of insurance have long been recognized in our decisions, and their effect was fully pointed out by this court before the enactment of Stat. 1878, chap. 157. See *Houghton v. Manufacturers Mut. F. Ins. Co.* 8 Met. 114, 120, 41 Am. Dec. 489; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, 389, 401.

It is easy to see how an insurer by multiplying immaterial statements to be made by the insured, and giving to them, by the wording of the policy, the technical character of warranties, can, in the absence of any statute provision upon the subject, place the assured in a position in which it will be difficult, if not impossible, for him, although he has acted in good faith, to recover upon his contract, because of some inaccurate statement on his part. If he is held to have warranted the truth of a statement, its exact and literal truth is a necessary condition of his right to recover, however immaterial the statement may be, and however honest may have been his conduct. In the opinion of a majority of the court, it was the intention of the legislature by Stat. 1878, chap. 157, to change this rule to some extent, and to enact in place of it one which should hold the contract valid unless the misstatement, if made in the negotiation of the contract, was made with an actual intent to deceive, or unless the misstatement was of a matter which actually increased the risk of loss; and this with reference to statements which may be said by the parties to be warranties as well as those which were only representations. Such was already the law as to statements not technical warranties. As to mere representations, the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court, it speaks in terms neither of warranties nor of representations, technically so called, but deals with all misrepresentations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed

in each case upon the same footing by the statute which applies to them if the statements are called "warranties" by the parties no less than if they are mere "representations." And the same construction must, in the opinion of a majority of the court, be given to Pub. Stat., chap. 110, § 181, and to Stat. 1887, chap. 214, § 21, which was in force when the policy sued on was written.

It is not necessary at present to consider whether the statute would have any effect if an immaterial statement declared by the application to be a warranty, instead of, as in the present case, being referred to in the policy, and thus brought into it by such reference only, were independently written out at length in the policy itself, and thus there declared to be a warranty upon the exact truth of which the policy was conditioned and founded. The statements upon the falsity of which the defendant relies in this case are not incorporated into the policy except by reference to the application. The declaration of the applicant warranting the answers to be true was in his application made in the negotiation of his policy, and was within the operation of the statute. In the opinion of a majority of the court, it was not taken out of the operation of the statute by the reference to the application in the policy, that it was "in consideration of the

stipulations and agreements in the application hereof, and upon the next page of this policy, all of which are a part of this contract." In the trial of the present case a different view of the effect of the statute was held by the presiding judge, who ruled that, because the statements of the assured were warranties, the provisions of Stat. 1887, chap. 214, § 21, did not apply. The plaintiff's exception to this ruling was well taken, and because the ruling was wrong the verdict for the defendant must be set aside, and a new trial ordered. We all agree that the ruling was correct; that the assured was attended by a physician, within the meaning of the question, "When and by what physician were you last attended, and for what complaint?" If he went to the office of a physician, told him that he had coughed and spit blood, desired him to make a physical examination, to which he submitted, receiving a prescription, and paying for the services of the physician, and subsequently calling again at the physician's office, and consulting him professionally, and paying him a fee, the circumstances recited show that the assured was under the care and treatment of the physician for a complaint, and was as really attended by the physician as if the latter had seen the assured at his home.

Verdict set aside, and a new trial ordered.

MISSOURI SUPREME COURT, (Division 1).

GATE CITY BUILDING & LOAN ASSOCIATION, *Appt.*,

v.

NATIONAL BANK OF COMMERCE,
Resp't.

(.....Mo.....)

The power to indorse a check which the secretary of a loan association, who is its general

financial agent, has authority to collect, is implied in the power given him to collect its securities and pay the money for them to the treasurer.

(December 10, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover the amount of a check belonging to plaintiff the proceeds of which were alleged to

NOTE.—Power of agents to indorse negotiable paper.

I. Checks.

II. Other negotiable paper.

- a. Of agents in general.
- b. Of corporate officers and agents.
- c. Of bank officers and agents.

III. Indorsement for accommodation.

1. Checks.

In *Thomson v. Bank of North America* (1880) 88 N. Y. L. the court said it was not prepared to hold that an agent receiving a check in payment of a claim would be authorized to indorse the principal's name thereon. The doubt thus expressed is shown by the authorities to be well founded, as all agree that mere authority to receive a check is insufficient to justify an agent in indorsing the principal's name thereon. Such is the decision in *Graham v. United States Sav. Inst.* (1870) 46 Mo. 186.

In *Pickle v. Muse* (1890) 7 L. R. A. 98, 88 Tenn. 360, the same doctrine was declared in denying title to sue on a check.

So the clerk of an acting trustee under a will employed to collect rents and perform other services has no implied authority to indorse checks taken for rent. *Robinson v. Chemical Nat. Bank* (1881) 86 N. Y. 407.

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In *Seventh Nat. Bank of Philadelphia v. Cook* (1873) 73 Pa. 483, 13 Am. Rep. 751, a clerk taking a check in collection of a debt was found by verdict of a jury to have indorsed it without authority.

A drummer or commercial traveler having power to collect accounts and receive money has no implied authority to indorse checks taken by him. *Jackson v. National Bank of McMinnville* (1893) 18 L. R. A. 663, 92 Tenn. 154.

So a power of attorney to prosecute a claim against the government giving authority to receive a check in payment gives the agent no power to indorse and collect the check. *Millard v. National Bank of the Republic* (1877) 3 McArthur, 54.

The same was decided in substance in *Hogg v. Snaith* (1808) 1 Taunt. 347, and *Holtsinger v. National Corn Exch. Bank* (1890) 6 Abb. Pr. N. S. 232, which were cases in which drafts were received and indorsed. See *infra*, II. a.

In *Messenger v. Fourth Nat. Bank of New York City* (1875) 6 Daly, 190, an indorsement of the name of another person on a check was held to be ratified by acquiescence.

The usage of a clerk to indorse checks for deposit by using a stamp which included the name of the bank and then signing his employer's name, was held insufficient to make valid an indorsement of a check by him without using the stamp for deposit

have been misappropriated by plaintiff's secretary with the connivance of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. S. Owsley and Lathrop, Morrow, Fox & Moore for appellant.

Mr. Elijah Robinson for respondent.

Brace, J., delivered the opinion of the court:

This is an appeal from a judgment in favor of the defendant in the Jackson county circuit court. The plaintiff is a building and loan association organized under the laws of this state, of which, at the time of the transaction in question, E. E. Richardson was

president, Benjamin Holmes, treasurer, and George L. Harris, secretary. In June, 1887, the association made a loan to Richardson of \$4,000, evidenced by his bond, and secured by a deed of trust on some property in Kansas City. In June, 1888, Richardson concluded to pay off this loan, and made an arrangement with Judge Brumback for that purpose, who on the 19th of June, 1888, drew his own check of that date for \$3,676.74, the balance due thereon, "on Armour Brothers Banking Co.," payable to "Gate City Building and Loan Association," and delivered the same to the said Harris in payment thereof, who indorsed said check, "Gate City B. & L. Ass'n, by George L. Harris, Secretary,"

in another bank to his own credit. *Schmidt v. Garfield Nat. Bank* (1892) 84 Hun, 238.

A bank taking checks on other banks indorsed *per pro* by a traveling agent who has no authority to indorse or deposit them, and then allowing him to check out the proceeds, is held in *Bissell v. Fox* (1885) 53 L. T. N. S. 128, to be guilty of negligence and therefore not protected by section 52 of the English Bills of Exchange Act of 1882; but a check on itself thus indorsed which it received and credited to the agent and then allowed him to check out the proceeds was held to be paid though not paid in cash over the counter, and so within section 60 of the Act whereby payments in good faith and in the ordinary course of business by a banker of a bill with forged indorsements is protected.

II. Other negotiable paper.

a. Of agents in general.

A principal may be bound by the indorsement of a note by his agent if he has acquiesced in the practice of the agent to make such indorsements. *New York Iron Mine v. First Nat. Bank of Negaunee* (1878) 39 Mich. 644; *Morse v. Diebold* (1876) 2 Mo. App. 163.

A general authority to indorse bills is held inferable by the jury from the agent's practice to draw checks and bills with several instances of indorsements. *Prescott v. Flinn* (1882) 9 Bing. 12, 2 Moore & S. 18.

The authority of a steward in charge of a stock farm to indorse bills was held to be a question for the jury where he was proved to have done such acts before without expressly proving the knowledge of the employer. *Davidson v. Stanley* (1841) 3 Scott, N. H. 49, 2 Mann. & G. 721.

So the authority of an agent of the proprietors of a town in Maine to indorse notes received on sale of land was held to be properly shown by proof of acquiescence in such indorsements by him as well as by a vote authorizing him to sell the land and "to attend to such other business as may concern the general interest." *Trundy v. Farrar* (1850) 32 Me. 225.

The question here was as to the sufficiency of the indorsement to transfer title so as to sustain an action by the indorsee against the maker.

The power to indorse is held to arise of necessity from the duties of the position and the customary exercise of such power with acquiescence where the business of the firm as a dock company was carried on by a general agent designated variously as secretary, cashier, and financial agent, with very great powers, who was shown to have negotiated notes taken in the business. *Edwards v. Thomas* (1877) 66 Mo. 468.

Where an agent was carrying on the whole business at a certain place with authority to receive payments in checks or cash, the court said the jury would have been warranted in finding that his plenary authority included implied powers to in-

dorse negotiable paper. *Charles v. Blackwell* (1877) 36 L. T. N. S. 195, L. R. 2 C. P. Div. 151, 45 L. J. C. P. 368, 25 Week. Rep. 472, affirming (1876) 35 L. T. N. S. 162, L. R. 1 C. P. Div. 542, 45 L. J. C. P. 542, 24 Week. Rep. 787.

The power of an agent to guarantee a subagent against liability for indorsing a bill was denied in *Fenn v. Harrison* (1789) 3 T. R. 757, on proof that he was expressly directed not to indorse it; but on a subsequent trial where there was no proof of directions not to indorse, the principal was held liable. (1791) 4 T. R. 177.

An agent in charge of a branch lumber yard was held to have no authority to indorse a note for his principal and ratification thereof could be made only with knowledge of the act. *Diets v. City Nat. Bank of Hastings* (Neb.) Nov. 8, 1894.

An agent's indorsement of a note before delivery was held to be ratified by a written agreement of the principal with the maker. *Harrod v. McDaniels* (1879) 126 Mass. 413.

Ratification of unauthorized indorsement of notes by an agent is made by retaining the proceeds. *Baer v. Lichten* (1887) 24 Ill. App. 811.

A clerk styled "cashier" in the office of the state treasurer, whose general duties are to keep a ledger, a cash book and bank pass, make bank deposits and certain petty cash disbursements, but expressly forbidden to cash drafts, cannot pass the title of such drafts to banks by indorsing them. *People v. Bank of North America* (1879) 75 N. Y. 543.

But a deputy treasurer was held authorized to make such indorsements. *Ibid.*

A wife cannot bind her husband by indorsing negotiable notes without express or implied authority. *Leeds v. Vall* (1850) 15 Pa. 186.

But her indorsement of his name on notes may be ratified by him. *National Bank of Orleans v. Fassett* (1869) 42 Vt. 422.

That oral authority to transfer a note by indorsement may be sufficient is implied by all the cases which hold the principal liable by reason of custom or acquiescence. So parol authority is expressly decided to be sufficient to sustain an indorsement for accommodation. *Turnbull v. Trout* (1822) 1 Hall, 356.

Under a statute requiring an indorsement to be "under the hand" of the indorser it is not necessary that an agent's indorsement should show his authority on the note or bill. *Bettis v. Bristol* (1881) 56 Iowa, 41.

The power to indorse need not be under seal. *Bank of Washington v. Pierson* (1828) 2 Cranch, C. C. 685.

A written authority to sign for the principal any note for the renewal of notes in a certain bank of which the principal was drawer or indorser is a continuing authority to indorse for successive renewals of such notes including therefore a renewal of notes of which he was indorser only by the act of the agent. *Ibid.*

and on the next day presented the same to the defendant bank, in which was then being kept an account in the name of said association, as also an individual account in the name of said Harris, for deposit on his personal account. Thereupon, the check was credited to Harris on his individual account, and collected by the bank, through the clearing house of Armour Bros. Banking Company, on the 21st of June, 1888. Afterwards the proceeds thus placed to the credit of Harris on his personal account were checked out by him on his individual checks, for what purposes does not appear, except that on the same day of the deposit there was deposited to the credit of the association on its

account the sum of \$590.83, the exact amount of one of his checks on that day charged to him on his individual account. On the same day the check was given by Brumback, the following written statement was made upon the face of the bond of Richardson: "Received June 19, 1888, payment in full by E. E. Richardson, per J. Brumback, \$3,676.74. Geo. L. Harris, Secretary,"—and the deed of trust was satisfied of record by a deed of quitclaim executed by the vice president of the association, in pursuance of a special order of the board of directors. Harris, the secretary, was the active manager of the association, and, under its by-laws, the custodian of its bonds, notes, mortgages, and other

An agent may indorse and transfer a note under power to do all matters in relation to property or debts which the principal could do. *Gould v. Bowen* (1888) 26 Iowa, 77.

Unrestricted general power of attorney to indorse notes makes the agent's indorsement binding on the principal although the power was intended to authorize renewals only. *Mann v. King* (1819) 6 Munf. 428.

Power of attorney by several persons authorizing indorsement of their names upon "all bills" drawn in favor of one of them does not authorize several and successive indorsements but only a joint indorsement. *Bank of United States v. Beirne* (1844) 1 Gratt. 234, 42 Am. Dec. 551.

A power of attorney left at a bank authorizing indorsements at that bank by an agent gives him authority to indorse any note payable at and due to the bank, but not a note due to another bank, although made payable at the bank named. *Morrison v. Taylor* (1827) 6 T. B. Mon. 52.

So a similar power of attorney left at the office of an insurance company authorizing the agent to indorse notes at the office of the insurance company does not authorize the agent to indorse a note to that company which is made payable at the bank where a different liability attaches to notes payable at the bank. In this case notwithstanding the fact that the agent was authorized to indorse a note at the bank and at the same time to indorse notes at the insurance company's office, a note due to the insurance company and made payable at the bank was held beyond his power to indorse. *Ibid.*

There is no power to indorse bills under a power of attorney to manage estates in Ireland, give leases, collect rents, bring actions therefor, "and do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said united kingdom, and generally to act for me and on my behalf in all matters as fully and amply in all respects as I might or could do therein were I personally present," since these general words must be construed with reference to the particular powers given. *Redaile v. La Nause* (1835) 1 Younge & C. Exch. 394.

A power of attorney to draw bills *per pro* does not necessarily authorize an indorsement *per pro*. So while an acceptance proves the drawing it does not prove an indorsement of the same bill though both were made *per pro*. *Robinson v. Yarrow* (1817) 7 Taunt. 455, 1 J. B. Moore, 150.

So a power of attorney to receive all moneys due, use all means for recovery, and appoint attorneys for bringing actions and to revoke their appointment, and "to do all other business," does not extend to a power to indorse a bill which comes to the hands of the agent under the power, as the general words are limited to the specific business mentioned. *Hay v. Goldsmid* (1804) 2 Smith, 79.

Authority to sell and indorse a note belonging to

a copartner individually in order to use the proceeds for paying partnership debts does not extend to negotiation of the note for other purposes after the dissolution of the partnership. *Callender v. Golsan Bros.* (1875) 27 La. Ann. 811.

An agent's power to negotiate a draft for cash does not include power to indorse it for his own debt. *Dowden v. Cryder* (1893) 56 N. J. L. 329.

An agent for collection has no authority to indorse and sell negotiable instruments in his possession, and there is no presumption of authority by virtue of his possession. *Hardesty v. Newby* (1850) 23 Mo. 557, 75 Am. Dec. 127; *Goodfellow v. Landis* (1855) 35 Mo. 103; *Smith v. Johnson* (1880) 71 Mo. 322; *Quigley v. Mexico Southern Bank* (1883) 80 Mo. 230, 50 Am. Rep. 503; *Hays v. Lynn* (1838) 7 Watts, 524.

The doctrine that an agent to collect has no authority to indorse drafts is declared in *Murray v. East India Co.* (1821) 5 Barn. & Ald. 204, although in that case the indorsement was made after the death of the principal.

Attorneys to collect a claim against the government are not authorized to indorse the principal's name on drafts received payable to his order under a power of attorney to receipt and sign acquittances "and execute other needful instruments and papers, and to perform all and every acts and thing whatsoever requisite and necessary to be done in and about the premises." *Holtzinger v. National Corn Exch. Bank* (1890) 6 Abb. Pr. N. S. 222.

To the same effect it was held in *Hogg v. Snaith* (1808) 1 Taunt. 347, a power of attorney to recover from the government all salary and other money due the principal does not authorize a negotiation of bills received in payment.

Indorsement of a bill to enable a purchaser to pay for goods sold is outside the scope of authority of an agent in charge of a store. *Bank of Hamburg v. Johnson* (1846) 8 Rich. L. 42. See also *infra* as to accommodation indorsements.

Power of attorney to sell an interest in a partnership and to act as the agent thinks best in the partnership matters does not give authority to indorse a note received on the sale of such interest for an amount much larger than the purchase price. *Eislok v. Buckwalter* (1890) 20 Pittsb. L. J. N. S. 26.

Similar to some of the above cases, though involving no indorsement, is the case of *Nickson v. Brohan* (1718) 10 Mod. 109, in which a servant sent with a note on Saturday to collect it got back bills therefor from a third person without his master's knowledge, and it was held that the master was liable for the loss resulting from the maker's failure on the following Monday before the note was paid. The court agreed in this case that as the note was not indorsed and title was not transferred it was only security in the hands of the person who advanced the money upon it.

securities, the keeper of its accounts with its officers and members and those having dealings with the association, whose duty it was "to receive all moneys, and pay the same over to the treasurer," and "at all meetings of the board of directors furnish a statement of the financial condition of the association, and give a detailed statement thereof at each annual meeting, and make a semiannual report for publication in January and July of each year." The treasurer was the custodian of the money of the association, whose duty it was "to receive from the secretary all money paid into the association," to "pay all orders issued by the board of directors, signed by the president, and countersigned

by the secretary," and to keep his accounts "open at all times to the inspection of the president and board of directors," and, when demanded by them, to give "satisfactory proof that the money and other assets are actually in hand in accordance with his own books and those of the secretary." It was the duty of the board of directors to hold monthly meetings, for the transaction of the business of the association not otherwise provided for, on the first Monday evening of each month. In the account of Holmes, the treasurer, kept by the secretary in the ledger of the association, appears the following entry: "October 1, 1888. Cash, E. E. Richardson, loan returned, thirty-seven hundred

b. Of corporate officers and agents.

A bona fide purchaser of a note from a corporation indorsed by an officer thereof takes at peril of the officer's lack of authority to make the indorsement. *Davis v. Rockingham Investment Co. (1892) 89 Va. 290.* In this case one who was secretary and treasurer and general manager of an investment company was held not to have authority to indorse and transfer a note.

But the possession of a note purporting to be indorsed by a corporation is by virtue of Minnesota Gen. Stat. 1878, chap. 76, § 89, prima facie evidence that it was indorsed by authority, as that statute provides that possession of a note or bill is prima facie evidence that it was indorsed by the person by whom it purports to be indorsed. *First Nat. Bank of Rock Island, Ill., v. Loybed (1881) 28 Minn. 306; National Bank of Battle Creek v. Mallan (1887) 87 Minn. 404.*

Denial of an indorsement by a corporation "so as to transfer title" was held insufficient to raise the question of authority to make the indorsement. *Second Nat. Bank of Richmond v. Martin (1891) 82 Iowa, 442.*

A local agent of a manufacturing company who takes a note for the company has no authority to indorse it for the company to himself and take it for his own commissions under an arrangement with the general agent so as to make a subsequent transfer from him to a third person valid. *Englehart v. Peoria Plow Co. (1887) 21 Neb. 41.*

An agent of a foreign corporation expressly authorized to indorse and discount at a certain bank paper which he has taken for sales may give good title to a note which he represents to the bank to have been taken for such sales. *Marine Bank of Buffalo v. Butler Colliery Co. (1889) 23 N. Y. S. R. 318.* This case also held that the power of the president to authorize such agent to indorse paper after being exercised for years is unaffected by by-laws.

The power of an executive committee of a board of trustees to indorse negotiable paper may be delegated by a power of attorney. *Sheridan Electric Light Co. v. Chatham Nat. Bank (1889) 52 Hun, 575.*

In *Chillicothe Branch of State Bank of Ohio v. Fox (1856) 3 Blatchf. 433*, a transfer of negotiable paper was admitted to have been made by authorized indorsement, but it was said that it was in accordance with universal usage of the presidents and cashiers of incorporated companies to make in their behalf indorsements and transfers by simply indorsing their name and title of office. This case turned rather on the form of the indorsement than the power to make it.

A corporation is estopped to deny the authority of its president to discount notes after it has received and used the proceeds. *German Nat. Bank v. Louisville Butchers Hide & Tallow Co. (Ky.) March 5, 1895.*

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The indorsement of negotiable paper by the president of a corporation is valid when this is in accordance with the usual custom of the business. *Clark v. Titcomb (1864) 43 Barb. 122; Ewell v. Dodge (1861) 38 Barb. 383.*

But one who takes from the president of a corporation for his individual debt a note payable to the corporation and indorsed for it by him is chargeable with notice of any lack of authority on his part to make the indorsement, but is a bona fide holder if inquiry would have shown his authority, even if he did not make the inquiry or know the fact. *Wilson v. Metropolitan Elev. R. Co. (1890) 120 N. Y. 145.*

Where a by-law of a corporation authorized the indorsement of a note by the secretary only a director chargeable with notice thereof is not protected in taking it on the president's indorsement. *Leavitt v. Connecticut Peat Co. (1886) 6 Blatchf. 189.*

A railroad president who is its financial agent may indorse and assign notes and mortgages given to aid in the construction of the road. *Irwin v. Bailey (1879) 8 Biss. 523.*

The transfer and indorsement of a promissory note in the name of a railroad company by its president was held in Illinois to be prima facie with authority where there was no plea verified by affidavit putting the authority in issue. *Goodrich v. Reynolds (1863) 31 Ill. 490, 83 Am. Dec. 240.*

The president of a warehouse company was held by usage to have power to indorse and transfer notes. *National Bank of New York v. German American Mut. Warehousing & Seour. Co. (1886) 21 Jones & S. 397.*

The president of an insurance company has no implied authority to indorse and negotiate notes in the absence of any provision in the charter or by-laws giving such authority, where no practice to make such indorsement is shown. *Marine Bank of New York v. Clements (1858) 3 Bosw. 600.*

But the president of an insurance company has power to indorse and transfer notes where the by-laws authorize him to make contracts and transact the ordinary business of the company. *Brouwer v. Harbeck (1862) 1 Duer, 114.*

No vote of the directors is necessary to authorize indorsement of notes by the president of an insurance company. *Topping v. Rickford (1862) 4 Allen, 120.*

The practice of the president of an insurance company to indorse and transfer notes may be sufficient to show his authority in this respect. *Marine Bank of New York v. Clements (1863) 31 N. Y. 33, affirming 6 Bosw. 166; Scott v. Johnson (1859) 5 Bosw. 213; Merchants Bank of New York v. McColl (1860) 6 Bosw. 473; Ogden v. Andre (1859) 4 Bosw. 583; Howland v. Myer (1850) 3 N. Y. 290, affirming sub nom. Aspinwall v. Meyer, 2 Sandf. 180; Caryl v. McElrath (1849) 3 Sandf. 176.*

In a suit against the maker of a note given to an insurance company an indorsement by the president

dollars." The evidence further tends to prove that Harris made the deposits to the credit of the association's account in the bank; that he was the only one that came to the bank to attend to its business; that prior to this transaction Harris had been making deposits both on his own account and on the account of the association; that he was in the habit of depositing checks payable to the association, indorsed as this one was, and no checks came to the bank indorsed in any other way; that he made other deposits to his own credit in the same way; that he "used very often to deposit the entire receipts to his own credit, and then give the company a check to cover it, and deposit it

to the credit of the association;" that no objection was ever made by any of the officers of the association to his mode of doing the business at the bank, and this check was not deposited otherwise than in the regular course of his business with the bank. It further appears from the evidence that in April or May, 1889, Harris absconded, and it was thereafter discovered by the association that there was a shortage in his accounts, and that the check in question had been deposited by him to the credit of his individual account. In July thereafter a demand was made on the bank for a return of the money collected thereon, and on the 28th of September, 1889, this suit was instituted for its recovery, in

dent of the company is *prima facie* sufficient to show his authority to make the transfer. *Cabot v. Given* (1858) 45 Me. 144; *Brown v. Donnell* (1861) 49 Me. 421, 77 Am. Dec. 266.

So where a note was payable to the order of a person described as president of an insurance company the indorsement by him was held sufficient to transfer the title. *Nichols v. Frothingham* (1858) 45 Me. 230, 71 Am. Dec. 539.

Even when an indorsement was made after the resignation of the president of an insurance company it was held sufficient *prima facie* to transfer title as against the maker. *Patten v. Moses* (1861) 49 Me. 255.

In *Central Bank of Brooklyn v. Lang* (1857) 1 Bosw. 232, a note was indorsed by the vice-president of a company, but no question was raised as to his authority.

An indorsement of notes by the treasurer of a corporation under express authority or when he is its general financial agent, is sufficient. *Lester v. Webb* (1861) 1 Allen, 34.

But the authority of the treasurer of a corporation to indorse negotiable paper must be shown either by resolution or by ratification of similar dealings. *Knight v. Lang* (1855) 4 R. D. Smith, 381, 2 Abb. Pr. 227.

Long practice of the treasurer of a corporation to indorse notes is presumptive evidence of his continuing authority to do so, and oral evidence is admissible to prove his statements that the indorsement was in the course of business and by authority. *Second Nat. Bank of Allentown v. Pottier & Stynus Mfg. Co.* (1888) 24 Jones & S. 216.

The authority of the president treasurer and general manager of a foreign phosphate company having its principal place of business in the state, to indorse its notes, is a question of fact for the jury where there is evidence that he was in the habit of making such indorsements. *Fifth Nat. Bank of Providence v. Navassa Phosphate Co.* (1890) 119 N. Y. 253.

The treasurer of a corporation to whom drafts are made payable by name, adding the word "treasurer," may authorize an attorney to indorse them for him whether he could do so or not in case of drafts payable to the company by name. *Shaw v. Stone* (1848) 1 Cush. 228.

Authority or a recognized course of business must be shown to make good the indorsement of a note by the secretary of a corporation. *Gould v. Union Cent. L. Ins. Co.* (1882) Cin. Super. Ct. 8 Week. L. Bull. 281.

The secretary of a mining company has no authority to transfer notes in payment of debts of the company. *Blood v. Marcuse* (1899) 38 Cal. 590, 99 Am. Dec. 435.

The indorsement of a note by the secretary of a corporation with the knowledge and consent of its directors is evidence of his authority and the pro-

duction of the note thus indorsed is *prima facie* evidence of the indorsee's title. *Williams v. Cheney* (1855) 3 Gray, 215.

Ratification on the trial was held sufficient to sustain an indorsement by the secretary of a corporation in *State Trust Co. v. Owen Paper Co.* (Mass.) Oct. 18, 1894.

The admissibility of evidence of an indorsement by the secretary of an insurance company on a note payable to the treasurer of the company was sustained in *Gould v. Union Cent. L. Ins. Co.* (1882) (Cin. Super. Ct.) 8 Week. L. Bull. 281. The court seems doubtful as to the authority to make the indorsement, but holds that the evidence was competent as far as it went.

The indorsement of a note by the secretary of an insurance company alleged to be that of the company by him duly authorized, was held to be admitted to be authorized by failure to deny the fact. *Nicholas v. Oliver* (1858) 36 N. H. 218.

The same was held as to the indorsement of a note by the secretary of a railroad company as to which the court said: "If it was not their act it should have been denied by affidavit." *Frye v. Tucker* (1890) 24 Ill. 180.

c. Of bank officers and agents.

Since the business of banks consists so largely in dealing with negotiable paper the question as to them of power to indorse is somewhat different from that in case of other corporations.

In *Hoyt v. Thompson* (1851) 6 N. Y. 333, the court said, although it was not actually decided in the case, that if the transfer be made in the usual course of business and in good faith, the denial of the power of the president or cashier to transfer negotiable funds of the bank without express authority from the directors is erroneous.

It is said in *Allison v. Hubbell* (1861) 17 Ind. 559, that in the business of banking either the president or cashier is authorized to bind the institution by indorsing bills of exchange, etc., in the absence of any specified manner of transacting its business, though this question was not actually in the case, which was as to the signing of bills.

The cashier and president of a bank have no authority to pledge its assets for antecedent debts, although they may dispose of its negotiable securities in the ordinary course of business. *Tennessee v. Davis* (1874) 50 How. Pr. 447.

The indorsement of a note by the president of a bank is held in *Hallowell & Augusta Bank v. Hamlin* (1817) 14 Mass. 180, to be a matter not within his power *ex officio*, but that his authority must be proved by legal evidence.

So in *Smith v. Lawson* (1881) 18 W. Va. 212, 41 Am. Rep. 688, it is held that the president has no power *ex officio* to transfer negotiable notes in consideration of the surrender of notes of another bank, although there was no cashier at his bank and it was

the form of an action for money had and received to the use of the association. At the close of all the evidence, the court instructed the jury to find for the defendant. Plaintiff thereupon took a nonsuit, and, the court refusing to set the same aside, the plaintiff appeals.

The law of the case seems to be within a narrow compass. There is not a particle of evidence tending to prove that the bank did not act in perfect good faith in this transaction, in respect of which it occupied no fiduciary relation to plaintiff. It does not appear from the evidence to what purposes the proceeds of the check were ultimately applied by Harris,—it may have been to his

own, or to those of the association,—nor is this a matter of any importance upon the present issue. The bank was not responsible for the proper application of those proceeds by him. Rev. Stat. 1889, § 8691. The check was a negotiable instrument. *Famous Shoes & Clothing Co. v. Crosswhite* (Mo.) 26 L. R. A. 568. The credit given to the account of Harris was the same as if the money had been paid him on the check, and had been immediately placed back by him and credited on his own account. *Benton v. German-American Nat. Bank*, 123 Mo. 832; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; 2 Morse, Banks & Banking, § 451. The bank thereby became a purchaser for

shown that he was in the habit of receiving deposits and payments. But it was held that such transfers by the president might be ratified by permitting him to carry on the practice.

The validity of the indorsement of a note by the president of a bank is sustained in *Alken v. Marine Bank of Milwaukee* (1863) 16 Wis. 690, as being within his implied authority.

In *Spear v. Ladd* (1814) 11 Mass. 94, it is said that the president of a bank may be authorized to indorse notes by virtue of his office and by vote of the directors.

The authority of the president of a bank to indorse and transfer a note payable to the cashier but belonging to the bank, was denied in *Kennedy v. First Nat. Bank* (U. S. C. C.) 5 Ctn. L. Bull. 219, but in that case it was held that the receipt of the proceeds acknowledged by the vice-president of the bank and approved by the cashier was a ratification of the indorsement.

In *Palmer v. Nassau Bank* (1875) 78 Ill. 380, an indorsement in the name of the president of the bank described as president on the transfer of the note to him was sustained, but it did not appear that he wrote the indorsement or had anything to do with it, nor was any question raised as to his authority to indorse notes. The court said it did not know of any legal inability in the bank through its agent and president to transfer by indorsement, the legal title of the note to him.

An indorsement by the president of a bank for the bank on his own note where the proceeds were credited to the bank, was held binding on the bank. *Central Trust Co. v. Cook County Nat. Bank* (1883) 15 Fed. Rep. 885.

The general agent of a bank possessing more than ordinary cashier's power was held in *Merchants Bank of Macon v. Central Bank of Georgia* (1846) 1 Ga. 418, 44 Am. Dec. 665, to have power to indorse in obtaining the discount of a bill.

As to the cashier of a bank it is held in *Carey v. Giles* (1851) 10 Ga. 9, that the payment of a debt by a bank, or securing the same by transfer of securities, is an act which belongs to his office and which he may rightfully do. And it was held in that case that evidence to the effect that there was no legal president and board of directors at the time was inadmissible for the purpose of showing that such transfers were invalid.

This doctrine of the power of a cashier to indorse negotiable securities of the bank is held by a large number of authorities. They agree that so long as the indorsements are in the regular course of business a cashier has prima facie authority to make them. *Fleckner v. Bank of United States* (1823) 21 U. S. 8 Wheat. 338, 5 L. ed. 631; *Lafayette Bank v. State Bank of Illinois* (1847) 4 McLean, 208; *Wild v. Bank of Passamaquoddy* (1825) 3 Mason, 506; *United States v. Greene* (1827) 4 Mason, 427; *Blair v. First Nat. Bank of Mansfield* (1877) 2 Flipp. 111, 3 Rep. 27 L. R. A.

40; *Lanning v. Lockett* (1828) 10 Fed. Rep. 451; *Everett v. United States* (1837) 6 Port. (Ala.) 193, 39 Am. Dec. 594; *Bank of the State v. Wheeler* (1868) 21 Ind. 90; *Merchants Ins. Co. of New Orleans v. Chauvin* (1844) 8 Rob. (La.) 49; *Haynes v. Beckman's Succession* (1851) 6 La. Ann. 224; *Farrar v. Gilman* (1841) 19 Mo. 440, 36 Am. Dec. 763; *Cooper v. Curtis* (1849) 30 Me. 483; *Kimball v. Cleveland* (1857) 4 Mich. 608; *Harper v. Calhoun* (1843) 7 How. (Miss.) 303; *Crocket v. Young* (1843) 1 Smedes & M. 241; *Corser v. Paul* (1860) 41 N. H. 24, 77 Am. Dec. 753; *City Bank of New Haven v. Perkins* (1864) 29 N. Y. 554, affirming 4 Bosw. 430; *Robb v. Ross County Bank* (1864) 41 Barb. 591; *Coats v. Donnell* (1863) 94 N. Y. 193; *Smith v. Lawson* (1831) 18 W. Va. 212-227, 41 Am. Rep. 688.

The case of *Merchants Ins. Co. of New Orleans v. Chauvin*, *supra*, distinguishes that of *United States Bank v. Fleckner* (1820) 8 Mart. (La.) 300, 13 Am. Dec. 237, in which it was held that a cashier was not authorized to indorse and transfer a note, and evidence of usage of that kind was rejected; but the later case distinguishes it on the ground of a resolution whereby in the *Fleckner* Case the president and cashier had been expressly given authority to act in the matter in question. If the case cannot be distinguished it is then clearly overruled and against nearly the whole current of authorities.

Although the statute says that "contracts" made by a banking association and "all bills" shall be signed by "the president, or vice-president and cashier," usage of cashiers to indorse negotiable paper in the business of banking is held unaffected by the statute. *Jones v. Hawkins* (1861) 17 Ind. 550.

Although the charter of a bank provides that "every contract or agreement" on behalf of the company shall be signed by the president and countersigned by the cashier, the cashier may make valid indorsements of negotiable paper. *Maxwell v. Planters Bank* (1850) 10 Humph. 507.

The indorsement of notes for collection is part of the regular business of a bank which a cashier has implied authority to do. *Corser v. Paul* (1860) 41 N. H. 24, 77 Am. Dec. 753.

The power of a cashier to indorse notes for collection is also sustained in *Hartford Bank v. Barry* (1821) 17 Mass. 97, in which the court denies that the cashier can transfer the property of the corporation in the note but can only transfer it so far as is necessary to collect it. The doctrine thus announced in this early Massachusetts case was not necessarily decided therein, as the only power involved was that to indorse for collection and this was sustained while in addition the acts were held to have been ratified by the corporation, and the doctrine there unnecessarily declared is substantially obsolete now.

In *Bank of the State of New York v. Farmers*

value in the ordinary course of business of the instrument, and entitled to collect the proceeds thereof to its own account, if it acquired plaintiff's title by indorsement. So that the only question is, Did Harris, in his official capacity as secretary, have power to transfer the check by indorsement? By the by-laws, the secretary was made the general fiscal agent of the association, the custodian of all its securities, whether bonds, bills, notes, drafts, checks, or whatever their form might be. To him, and to him alone, was intrusted the duty of keeping the accounts of the association, and of collecting all moneys due or coming to the association on account of such securities, or from any other source. All

moneys were to pass through his hands into those of the treasurer, whose only authority was to receive the moneys of the association from the secretary, and pay the same out in the manner prescribed by the by-laws. The by-laws were of course made for an association to be conducted in accordance with the business principles of the age, and it would be a strange construction of those by-laws, in an age in which nine tenths of the business of the country is transacted through the medium of bills of exchange, inland drafts, and bank checks, to hold that this secretary—who, it is conceded, had full power to collect the loan from Richardson, and in doing so to receive the check of Brumback there-

Branch of State Bank of Ohio (1882) 36 Barb. 632, an indorsement by a cashier was held to be simply for collection and not to bind the bank as indorser, and the court said: "It nowhere appears that the cashier was authorized to affix his name or that of the bank for the purpose of making the bank liable on a contract of indorsement." But the effect of this case to limit the generally recognized doctrine of the implied powers of cashiers is nullified by the fact which appears from a statement in Bank of the State of New York v. Muskingum Branch of the Bank of the State of Ohio, 29 N. Y. 626, 627, that the decision was reversed by the court of appeals on grounds which are not authoritatively stated as there was no opinion published. But the statement of counsel as to the reversal of the case adds that it was understood to be reversed on the ground that the question involved was for the jury.

In the case of Bank of the State of New York v. Muskingum Branch of the Bank of the State of Ohio (1864) 29 N. Y. 619, it was held that a cashier's indorsement for collection would bind the bank in favor of a bona fide holder of negotiable paper, although it had been fraudulently discounted by the bank to which it was sent for collection.

When indorsements by a cashier are outside the ordinary course of business the question becomes a different one. But in Blissell v. First Nat. Bank of Franklin (1871) 69 Pa. 415, where a cashier of a private bank for the accommodation of a customer took a draft, which he was unable to cash and which had been made payable to his bank, to the cashier of another bank on the street after banking hours, and indorsed it to obtain a discount of the draft from the other cashier, it was held to be a valid transaction and indorsement. In this case the act seems to have been done in reality as bank business to accommodate the bank's own customer simply because the bank itself could not discount the draft for lack of funds.

But the indorsement by a cashier of a note made payable to the bank for the purpose of discount but which the bank had not taken and did not own, was held outside the scope of his authority, in Elliot v. Abbot (1842) 12 N. H. 549, 37 Am. Dec. 227. The indorsement here seems to have been merely to give the holder a right of action and made after he had taken it and after the maker had absconded. The plaintiff declared as indorsee and the court held that his action in that form must fail.

The payment of a depositor by transferring to him negotiable paper owned by the bank is not within the usual course of business and therefore not within the implied authority of the cashier. Schneitman v. Noble (1888) 75 Iowa, 120.

Especially when the bank has become insolvent the transfer of negotiable securities to give a preference to a creditor is outside the authority of the cashier. Lamb v. Cecil (1886) 23 W. Va. 659.

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Still more clearly is this true where the preferred creditor is one of the directors of the bank. And in such case a statutory restriction on transfers of property of the bank exceeding a thousand dollars without resolution of the board of directors is held applicable. Gillet v. Phillips (1855) 12 N. Y. 114.

A cashier may transfer a certificate of deposit issued by his bank and made in his favor describing him as cashier. St. Louis Perpetual Ins. Co. v. Cohen (1845) 9 Mo. 421.

A cashier's indorsement of a note to himself was held in Preston v. Cutter (1888) 64 N. H. 461, to be valid until avoided by the bank even if not authorized, but in that case it was found to have been authorized.

A statement by a cashier on the sale of a bill that it is perfectly safe although he did not indorse the bill, is held to amount to a warranty binding the bank. Sturges v. Bank of Circleville (1869) 11 Ohio St. 153, 78 Am. Dec. 296.

But the transfer of non-negotiable instruments of a bank is held to be outside the scope of the cashier's implied authority. Holt v. Bacon (1853) 25 Mass. 567; Barriock v. Austin (1855) 21 Barb. 241.

A blank transfer made by a cashier on stock held as collateral when he surrendered it to the debtor has been held to bind the bank in favor of a person who was subsequently defrauded by the aid of the blank transfer. Matthews v. Massachusetts Nat. Bank (1874) Holmes, C. C. 396.

A mere clerk acting for a cashier in his absence has authority to transmit a note to another bank for collection, but cannot otherwise transfer or dispose of it or give any title thereto except what is necessary for collection. Potter v. Merchants Bank of Albany (1864) 23 N. Y. 641, 86 Am. Dec. 273.

The vice-president of a national bank has prima facie authority to guarantee a note transferred by it, and the bank while retaining the proceeds is estopped to deny his authority to make the guaranty. People's Bank of Belleville v. Manufacturers Nat. Bank of Chicago (1880) 101 U. S. 181, 25 L. ed. 907.

Directors of a bank may authorize one of their number to indorse its securities. Northampton Bank v. Pepon (1814) 11 Mass. 288.

The treasurer of a savings bank must have specific authority in order to be entitled to make indorsements outside of the ordinary course of business. Such an indorsement without recourse on paper in which the bank had only a nominal interest was held sufficient after it had been acquiesced in long enough to raise a presumption of his authority. Chase v. Hathorn (1873) 61 Me. 505.

Authority given to a savings bank treasurer to sell notes does not include authority to indorse them. Bradlee v. Warren Five Cents Sav. Bank (1879) 127 Mass. 107, 34 Am. Rep. 351.

III. Indorsement for accommodation.

Parol authority may be sufficient to authorize the

for, payable to the association, and who had full power to collect said check—had not the power to indorse the check for the association, in order that he might have in hand the actual money which he was required to receive and to pay over to the treasurer. Although the by-laws do not in express terms give the power to indorse checks, or to give acquittances for money received on account of the association, yet these powers are necessarily implied in the power given to the secretary to collect its securities and pay the money for the same to the treasurer. While

by the by-laws all moneys are to pass through the hands of the secretary into those of the treasurer, and he must have all the power necessary to enable him to collect the money for such securities, and have it on hand for that purpose, they do not contemplate that it shall remain in his hands for any considerable length of time, or that it shall be paid out by him at all; and, in order that no loss or inconvenience may result therefrom, the accounts showing the condition of its treasury were open at all times to the inspection of the board of directors, whose duty it was

maker of a note to indorse for his own benefit the payee's name upon it. *Turnbull v. Trout* (1823) 1 Hall, 286.

Acquiescence in the signing of one's name by another on the back of a note as accommodation indorser may be sufficient evidence of authority to make the indorsement. *Forsyth v. Day* (1858) 46 Me. 176.

The fact that an indorsement is made as agent is not sufficient to put one on inquiry as to the power to make the indorsement, which is in fact only for accommodation, especially when the agent states that the indorsement is to obtain money for the business of his principal. *Edwards v. Thomas* (1877) 66 Mo. 468.

But in England it is held that an indorsement "per pro" is notice that it is made by special authority and puts one on inquiry as to any limitations on the agent's authority. So an indorsement per pro, by the manager of a banking company when made for an accommodation is not binding if not in fact authorized. *Alexander v. Mackenzie* (1860) 6 C. B. 766, 18 L. J. C. P. 94, 13 Jur. 846.

The president of an insurance company has no implied authority to indorse a note for accommodation by virtue of his authority to indorse where the corporation is to receive the proceeds or benefit of the transaction. *Ætna Nat. Bank v. Charter Oak L. Ins. Co.* (1882) 50 Conn. 167.

The president of a manufacturing company is also held to have had no authority to indorse commercial paper for accommodation of makers or for a consideration paid by them. *National Park Bank v. German American Mut. Warehousing & Secur. Co.* (1889) 5 L. R. A. 673, 118 N. Y. 281.

A treasurer of a manufacturing company has no authority to indorse notes for accommodation by virtue of a custom to indorse notes in the usual course of business. *Re Wrentham Mfg. Co.* (1872) 2 Low. Dec. 119; *Ex parte Estabrook* (1877) Id. 547.

The managing agent of a corporation cannot bind it by an accommodation indorsement in favor of a person who took a note from the maker and required him to get an indorsement before accepting it in payment for a purchase. But the court said that if the note had been transferred by the corporation in the purchase of goods by it the indorsement would have been binding. *Odiorne v. Maxcy* (1816) 18 Mass. 178.

A bank discounting a note for the maker and passing the proceeds to his credit cannot hold the payee as an indorser on an unauthorized indorsement by his agent for accommodation, although the agent had general authority to indorse notes and bills. *Wallace v. Branch Bank at Moblie* (1840) 1 Ala. 666. The court says in this case that it is well settled that a person dealing with a special agent is bound to know the extent of his power. But the case did not involve any question of the rights of a bona fide holder without knowledge of the accommodation character of the indorsement.

To similar effect is the case of *Kingsley v. Bank of State* (1882) 3 Yerg. 107, in which it was held that power to "indorse notes payable and negotiable at

the Branch Bank" did not authorize an original indorsement as security for a third person. In this case the note said at the bottom, "Credit the drawer J. N. by his atto.," and the note was in fact made to the bank and the drawer thereof was credited with the proceeds.

An indorsement by an agent for his own benefit under general power to make indorsements is not binding in favor of a bank which discounts the paper for the agent. *Stainback v. Bank of Virginia* (1854) 11 Gratt. 269.

An indorsement for accommodation by the treasurer of a corporation is not a corporate act and does not make the corporation liable even to a bona fide holder in the absence of any by-law or usage or ratification showing his authority to make indorsements. *Wahlig v. Standard Pump Co.* (1890) 30 N. Y. S. R. 890.

In the absence of any proof that notes indorsed by the manager of a corporation were in its business, or that it received any benefit, or that the manager had any authority to bind it in that form, but where it seemed on the contrary that it did not concern the corporation's business, the court regarded the indorsement as without authority. No question of a bona fide holder was suggested. *Middlesex County Bank v. Hirsch Brothers Veneer Mfg. Co.* (1889) 24 N. Y. S. R. 297.

But it is expressly and clearly held that a bona fide holder can recover against the principal on indorsements made by an agent who has general power to indorse, although the indorsements are in fact made for accommodation only. *North River Bank v. Aymar* (1842) 3 Hill, 223.

So the usage of a secretary to indorse notes when acquiesced in by the corporation makes his indorsement for accommodation binding on the company in favor of a bona fide holder. *Bank of Auburn v. Putnam* (1897) 8 Keyes, 343, 1 Abb. App. Dec. 80.

So a corporation was held liable to a bona fide holder on an accommodation indorsement of a note by its president and financial officer for the corporation in *Mechanics Bkg. Assn. v. New York & S. White Lead Co.* (1886) 35 N. Y. 505. But in this case no question was made as to the authority of the officer.

The indorsement of a note by a cashier merely for accommodation binds the bank in favor of a bona fide purchaser. *Houghton v. First Nat. Bank of Elkhorn* (1870) 26 Wis. 663, 7 Am. Rep. 107.

But a cashier cannot bind the bank as an accommodation indorser of his own note. *West St. Louis Sav. Bank v. Parmelee* (1877) 96 U. S. 537, 24 L. ed. 490, affirming *West St. Louis Sav. Bank v. Shawnee County Bank*, 3 Dill. 408.

Somewhat akin to the subject is the decision that an agent employed to collect, who for the accommodation of the debtor indorses a bill in his own name and gets money which he sends to his principal, cannot charge the principal with the loss when compelled to pay on his indorsement. *Hines v. Butler* (1844) 33 N. C. 807.

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each month to meet, ascertain the amount in the treasury, and loan the same if practicable. Had these officers discharged their duties, the exact condition of the fund arising from the collection of the loan to Richardson would have been known to them within ten or fifteen days after it had been received by Harris, and they could have then taken such measures for its disposal, and the protection of the association, as to them might have seemed necessary and proper. If the associa-

tion has met with any loss by reason of a misapplication of that fund, it must be charged to a breach of the trust reposed in one of its officers, and the neglect of duty by the others. It cannot be charged to the bank on account of this transaction had with its secretary, who therein acted clearly within the scope of his authority.

The judgment is affirmed.

All concur.

MINNESOTA SUPREME COURT.

William McMULLAN, *Resp't.*,

v.

DICKINSON CO., *App't.*

(.....Minn.....)

*1. Where, under a contract for personal service, the wages are payable in installments, and, before the term of service expires, the master dismisses the servant without his fault, and the wages are paid up to the time of dismissal.—*Held*, the liability of the master to the servant is not an absolute liability for wages for constructive service during the balance of the term, but a contingent liability of indemnity for loss of wages. This liability accrues by installments on successive contingencies, each of which consists in the failure of the servant without his fault to earn, during an installment period, the amount of wages which he would have earned had the contract been performed, and the deficiency is the measure of damages. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches, and successive actions may be maintained for the recovery of the installments of damages as they accrue, if any.

2. This is the rule of damages usually allowed under the fiction of constructive service, but that fiction is rejected as false and inconsistent with that rule, while the rule itself is retained.

3. It does not follow, because of this, that the discharged servant cannot, if he so elect, consider the breach total, bring an action for all his damages, and recover all accruing up to the time of the trial; but it is held that prospective damages beyond the time of trial are too contingent and uncertain to be allowed.

(January 30, 1895.)

APPEAL by defendant from an order of the District Court for Hennepin County, sustaining a demurrer to the answer in an action brought to recover unearned salary caused by defendant's wrongfully discharging plaintiff from its service. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by CANTY, J.

NOTE.—The above case is in direct conflict with that of *Olmstead v. Bach* (Md.) 22 L. R. A. 74, in sustaining the right to successive actions for breach of contract by wrongful discharge of employé, and the other authorities on the question are extensively discussed in these cases.

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Mr. Henry J. Horn, with Messrs. Penney, Welch & Haynes, for appellant:

The form of judgment and satisfaction constituted a full defense to this action.

James v. Allen County, 44 Ohio St. 236, 58 Am. Rep. 821; *Moody v. Leverich*, 4 Daly, 401; *Colburn v. Woodworth*, 81 Barb. 381; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Attna L. Ins. Co. v. Neesen*, 84 Ind. 847, 43 Am. Rep. 91; *Sutherland v. Wyer*, 67 Me. 64; *Tarbox v. Hartenstein*, 4 Baxt. 78; *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea, 397; *Litchenstein v. Brooks*, 75 Tex. 196; *Keedy v. Long*, 5 L. R. A. 759, 71 Md. 385; *Keedy v. Crane*, 71 Md. 395; *Chamberlin v. McCalister*, 6 Dana. 352; *Booge v. Pacific Railroad*, 83 Mo. 214, 62 Am. Dec. 160; *Elderton v. Emmens*, 6 C. B. 178; *Wood, Mast. & S.* 2d ed. § 127, p. 261; 2 Sedgw. Damages, 8th ed. § 660, pp. 339, 407.

Plaintiff claims to recover in this action for purely constructive service.

The first action having been brought to recover upon the theory of constructive service wholly, this former action was in contemplation of law an action for damages for the breach of the contract caused by the wrongful discharge. The present action is likewise purely an action for damages for the breach of the contract.

A servant wrongfully discharged has his election of remedies.

1. He may treat the contract as continuing and bring the action against the master for breaking it.

2. If wages are not paid up to the time of the discharge, he may treat the contract as rescinded and sue on a *quantum meruit* for services actually performed.

Wood, Mast. & S. p. 250.

By the first remedy the servant can recover not only for wages actually earned but also for probable loss in being unable to secure equally profitable employment.

Ibid.; *Gandell v. Pontigny*, 4 Campb. 875; *Goodman v. Pocock*, 15 Q. B. 576.

This pernicious doctrine of constructive service received sanction in some of the earlier decisions of the *nisi prius* courts.

Thompson v. Wood, 1 Hilt. 96; *Huntington v. Ogdensburgh & L. C. R. Co.* 83 How. Pr. 416; *Heim v. Wolf*, 1 E. D. Smith, 78.

These cases, however, recognizing this doctrine, were subsequently overruled in *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

After the servant is dismissed he cannot recover for services.

Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; *Coldburn v. Woodworth*, 81 Barb. 881; *Howard v. Daly*, *supra*.

It is immaterial that the plaintiff may have intended only to sue in the first action for wages upon the theory of constructive service; it must be held to be an action for damages whether so intended or not.

1 *Sutherland Damages*, 175-184; *Toles v. Haen*, 57 How. Pr. 516; *Miller v. Covert*, 1 Wend. 487; *Forrington v. Payne*, 15 Johns. 432; *Smith v. Jones*, Id. 229.

The prosecution of subsequent action by the servant after one recovery has been had may be enjoined in equity even though the wages are payable weekly. The contract is entire and but one action is maintainable.

Turbo v. Hartenstein, 4 Baxt. 78; *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea, 397; *Litchenstein v. Brooks*, 75 Tex. 196; *Chamberlin v. McCutister*, 6 Dana, 252; *Keedy v. Long*, 5 L. R. A. 769, 71 Md. 385; *Keedy v. Crane*, 71 Md. 385.

Plaintiff in the former action had a right to recover for all the damage sustained by reason of the alleged wrongful discharge, both present and prospective.

Ennis v. Buckeye Pub. Co. 44 Minn. 105; *Bowe v. Minnesota Milk Co.* 44 Minn. 460; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Attna L. Ins. Co. v. Nexsen*, 84 Ind. 847, 43 Am. Rep. 91; *Sutherland v. Wyer*, 67 Me. 64; 2 Sedgw. Damages, 8th ed. § 866, p. 339; *Wood, Mast. & S.* 2d ed. p. 261; *Bennett v. Morton*, 46 Minn. 113.

Messrs. William H. Donahue and S. Myers, for respondent:

The doctrine of constructive service has been repeatedly recognized in this state.

McEvoy v. Bock, 37 Minn. 402; *Sterling v. Bock*, 37 Minn. 29; *Horn v. Western Land Assn.* 22 Minn. 233; *Dodge v. Rogers*, 9 Minn. 223; *Ramsey County Bldg. Soc. v. Lawton*, 49 Minn. 362. See also *Kahn v. Kahn*, 24 Neb. 709; *Beck v. Devereaux*, 9 Neb. 109; *Hallack v. Gagnon*, 4 Colo. App. 860; *Huntington v. Ogdensburgh & L. O. R. Co.* 83 How. Pr. 416; *Weiler v. Henarie*, 15 Or. 28; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Olmstead v. Bach* (Md.) 18 L. R. A. 53, overruled on rehearing in 22 L. R. A. 74, 78 Md. 132.

Under a contract for a certain fixed sum payable in installments, a party who is prevented from performing may treat the contract as still subsisting and sue for each installment as it falls due.

Gordon v. Brewster, 7 Wis. 855; *Booge v. Pacific Railroad*, 33 Mo. 212, 32 Am. Dec. 160; *Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 81 Miss. 361; *Coldburn v. Woodworth*, 31 Barb. 881; *Wilkinson v. Black*, 30 Ala. 329; *Holloway v. Talbot*, 70 Ala. 869; *Fowler v. Armour*, 24 Ala. 199; *Liddell v. Ohidester*, 84 Ala. 508; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *LaCousier v. Russell*, 82 Wis. 256; *School Dist. No. 1, Sturgeon Bay v. Drent* 27 L. R. A.

See, 51 Wis. 153; *Howe v. Harding*, 84 Tex. 74, 76 Tex. 19.

Canty, J., delivered the opinion of the court:

On the 25th of February, 1893, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name fifty shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of \$1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the fifty shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of \$125 for each of the months of March and April, 1894, and prays judgment for the sum of \$250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of \$512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in *Gandell v. Pontigny*, 4 Campb. 375, and this case was followed in England and this country for a long time (*Wood, Mast. & S.* 254), and is still upheld by several courts. *Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 81 Miss. 361; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. It has been repudiated by the courts of England (*Goodman v. Pocock*, 15 Q. B. 74; *Wood, Mast. & S.* 254), and by many of the courts in this country (Id.; and *notes to Decamp v. Hewitt*, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any rem-

edy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even, though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See *James v. Allen County*, 44 Ohio St. 236, 58 Am. Rep. 821; *Moody v. Leterich*, 4 Daly, 401; *Colburn v. Woodworth*, 81 Barb. 881; *Booge v. Pacific Railroad*, 88 Mo. 212, 83 Am. Dec. 160. No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Sutherland, *Damages*, 471; *Gordon v. Brewster*, 7 Wis. 855; *Fowler v. Armour*, 24 Ala. 194; *Wright v. Falkner*, 87 Ala. 274; *Colburn v. Woodworth*, 81 Barb. 885. Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a thirty year contract is no greater than for the breach of a six or seven year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes

that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Sutherland, *Damages*, 1st ed. 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our

opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of *Lord Ellenborough* this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. *Fowler v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 399, 88 Am. Rep. 8. But the wrongdoer can have no such election. He should not be allowed to take advantage of his own wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total.

The order appealed from should be affirmed.

Rehearing denied March 15, 1895.

STATE of Minnesota, *Resp't.*,

v.

Frank HOSKINS, *App't.*

(.....Minn.....)

*A libel on two or more persons (although not associated together in business), contained in a single writing, and published by a single act, constitutes but one offense.

(February 1, 1895.)

APPEAL by defendant from an order of the District Court for Otter Tail County overruling a demurrer to an indictment charging him with the publication of libel. *Affirmed.*

The facts are stated in the opinion.

Mr. F. W. Zollman, for appellant:

If the publication complained of is libelous within section 211 of the Penal Code, then a substantive offense has been committed against each of the three banks. There are then three distinct offenses, just so much so, as if three different crimes had been committed. The fact that the three offenses were committed in one act does not alter the case.

People v. Alibes, 49 Cal. 453.

Messrs. H. W. Childs, *Atty-Gen.*, and *George B. Edgerton*, *Asst. Atty-Gen.*, for the State.

*Headnote by MITCHELL, J.

NOTE.—The above decision is a rare one and almost without precedent as appears from the opinions of the judges.

For many cases on the general subject of joinder of offenses in indictments, see note to *Herman v. People* (Ill.) 9 L. R. A. 122.

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Mitchell, J., delivered the opinion of the court:

Although the trial court has in form certified all of the seven specific objections made to the indictment in defendant's demurrer, yet his counsel refers to only two of these in his brief, and of these two only one is worthy of any consideration, viz.: Does the indictment charge more than one offense? The defendant was indicted for a libel on three national banks (not in any way associated with each other in business), the libel against all three being contained in a single writing, published at one time, and by a single act. Defendant's contention is that this constitutes three separate offenses,—one against each bank libeled; and he likens it to a case where a person by a single act murders two or more persons. Without stopping to consider whether a person might not be indicted in the same court for any misdemeanor, such as assault, committed on two or more persons by a single act, we think that the case suggested by counsel is not analogous. His argument proceeds upon the false assumption that the gist of the crime of libel is the injury to the reputation of the person libeled. It is true that no publication is indictable unless it exposes the person of whom it is published to hatred, contempt, etc., or has a tendency to injure him in his business, but the indictability of the act does not come alone from harm to his reputation. The general policy of the law is to leave the care of men's reputations to themselves. No damage done to a reputation (at least, unless the further element of conspiracy enters into the act) is, at common law, in and of itself, a foundation for a criminal prosecution. The law makes the publication of a libel punishable as a crime, not because of injury to the reputation, but because the publication of such articles tends to affect injuriously the peace and good order of society. This has always been recognized as the reason why libel is a public wrong. For example, *Starkie* says: "It may consist in the tendency of the communication to weaken or dissolve religious or moral sentiments, or to alienate men's minds from the established constitution of the state, or to engender hatred and contempt of the king or his government or the houses of parliament or the administration of public justice, or in general to produce some particular inconvenience or mischief, or to excite individuals to the commission of a breach of the peace, or other illegal acts." *Bishop* defines libel as "any representation in writing," etc., "calculated to create disturbances of the peace, to corrupt public morals, or to lead to any act which when done is indictable." 2 *Bishop*, *Crim. L.* § 909. Of course, these common-law definitions are not in all respects applicable under our Criminal Code, but they are fully in point as illustrating the gist of libel considered as a crime. It is on the same principle, and for the same reason, that it is made a misdemeanor to publish anything which exposes the memory of any deceased person to hatred, contempt, etc. It cannot injure the dead man, but it tends to create a breach of the peace by inciting his surviving friends to avenge the insult of the family.

At least, such is the reason usually given in the books. The publication of a libel produces public mischief, and it is for that reason that it is an indictable offense. The more persons affected by the libel, the greater the public wrong; but one act of publication, however many persons are affected by it, constitutes but one crime, although each of the parties injured by it may bring a civil action for damages. The gist of the offense of libel is the publication of something which tends, in contemplation of law, to affect injuriously the peace and good order of society, because it injuriously affects the reputation, memory, or business of individuals. In the case of homicide suggested by counsel the gist of the offense is the taking of human life. It is that, and not the particular means by which it is accomplished, which the law forbids. If it be suggested that, where the libel affects more than one person, the defendant may desire to prove different lines of defense as to each, and therefore there should be a severance of the charge, our answer is that we see no difficulty in the defendant proving, under a plea of not guilty, any defense which he has. Of course, the defense must be as broad as the charge, but, if it is more difficult to establish the defense where several persons are libeled in one publication, that is the consequence of the defendant's own act. See 2 Bishop, Crim. L. § 888, and *note*. There are very few authorities directly in point on this question, for it seems to have been very rarely raised, it being apparently generally assumed that such an indictment was good; as, for example, in *Crowe v. People*, 92 Ill. 281. Bishop lays it down as the law. 2 Bishop, Crim. Proc. § 487. So, also, does the supreme court of Kentucky, in *Tracy v. Com.*, 87 Ky. 578, the only case we have found in which the rule was ever questioned.

Order affirmed.

Start, Ch. J., took no part.

Collins, J., concurring:

My first impressions were that upon principle as well as upon authority it would have to be held that the indictment charged more than one offense. But when we reflect that the gist of the offense of libel is the publication of something which tends, in contemplation of law, to injuriously affect the good order and peace of society, because of the injurious effect it has upon the reputation or business or memory of individuals, we are obliged to admit that upon principle it cannot be claimed that more than one offense was alleged. And in respect to the authorities it may be stated that we are not cited to one authority, and we have found none, which support the contention of defendant's counsel. The right of the prosecution to charge a libel published, as this is alleged to have been, reflecting on two or more persons, as a single offense, seems to have generally gone unchallenged. Whenever the question has been raised, the courts have sustained the practice adopted in this case. For these reasons, I concur in the views expressed in the main opinion.

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Canty, J., dissenting:

I cannot agree to the foregoing opinions. It seems to me that there is a crime against the person. Section 211 of the Penal Code provides: "A malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes *any living person* or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause *any person* to be shunned or avoided, or which has a tendency to injure *any person, corporation, or association of persons* in his or their business or occupation, is a libel." The gist of the action is the injury to the corporation in its business, and not an injury to the good order of society in general. This more clearly appears after the trial begins. It immediately assumes the form of three actions on trial together, and having, perhaps, nothing in common except that they are all against the same defendant, and all arose at the same time, the issues and evidence in each being totally distinct and dissimilar. As to one bank, he may justify by attempting to prove the truth of the charge, and his good motive; as to another bank, he may attempt to prove a sufficient excuse under that part of section 213 which provides that "the publication is excused when it is honestly made, in the belief of its truth, and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs;" as to the third bank, he may offer proof both of justification and excuse. Supposing the jury acquit him of libeling the first bank, but cannot agree as to the other two. Should the court refuse to receive such verdict, and discharge the jury for failure to agree, or should the court receive the verdict of acquittal as to one bank without an agreement as to all? Most certainly it should. Will this amount to an acquittal as to the other two banks? Certainly not. Supposing the defendant should request a return of three verdicts, one as to each bank, or what would be the same, a distinct finding of guilty or not guilty as to each bank, and the trial court should refuse such request, should a general verdict of guilty be allowed to stand? It might be that four of the jurors believed the defendant guilty as to the first bank, four others believed him guilty as to the second bank, and four others as to the third bank, while as to each bank eight jurors believed him not guilty, yet, by treating the libel of the three banks as one offense, the twelve jurors would vote to find the defendant guilty. Clearly, to prevent such an outrageous result, it would be the duty of the trial judge to instruct the jury to treat the libel as to each bank as a separate and distinct charge, and vote on it separately. It is true that the separate character of each charge does not so readily appear until the defense opens its case on the trial, but this is because the state has so little to prove in the first instance, and that proof happens to be the same as to each case; the burden of proof, except as to publication, being thrown on the defendant. To hold that this indictment charges but one offense, and not three offenses, is to sacrifice

substance to form. That there once were, and may yet be, criminal libels that were not offenses against the person, does not prove that this is not such an offense. If these three banks, taken together, constituted an "association of persons," within the meaning

of section 211, and they were libeled in their associated capacity, it would constitute but one offense. But this is not such a case. I am of the opinion that the indictment charges three separate offenses, and that the order overruling the demurrer should be reversed.

LOUISIANA SUPREME COURT.

A. G. FRERE

v.

Victor VON SCHOELER, *Appt.*

(47 La. Ann. 324.)

* The nineteenth paragraph of the eighth section of Act No. 150 of 1890, which imposes a license tax upon every person who shall engage in the business or avocation of operating one or more towboats to be graduated according to the gross annual receipts of said business, is illegal, unconstitutional, null, and void, because it is in conflict with, and contrary to, the provisions of the third clause of the eighth section of article 1 of the United States Constitution, familiarly known as the "Commerce Clause," it appearing that the defendant was operating his boats under a license or permit from the United States government, and that his towboats were engaged in traversing the waters of the Bayou Teche and the Atchafalaya and Mississippi rivers and their tributaries, and in operating between different states.

(December 10, 1894.)

A PPEAL by defendant from a judgment of the District Court for the Parish of St. Mary's in a proceeding brought to compel the payment of a license tax. *Reversed.*

The facts are stated in the opinion.

Messrs. D. Caffery & Son, for appellant: Congress alone has power to regulate commerce with foreign nations and among the several states.

U. S. Const. art. 1, § 8, ¶ 3.

The license required under Act 101 of 1886, although based upon gross annual receipts, is collectible on the second day of the year, while the receipts are mere potentialities or expectations; consequently it cannot be exacted from an interstate trader without coming within the constitutional prohibition.

State Tax on Railway Gross Receipts, 82 U. S. 15 Wall. 284, 21 L. ed. 164; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 658; *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243.

*Headnote by WATKINS, J.

Mr. J. S. Martel, for appellee:

A license predicated upon the revenues is legal and constitutional.

Moran v. New Orleans, 112 U. S. 74, 28 L. ed. 655.

A statute of a state imposing a tax upon the gross receipts is not repugnant to the Constitution of the United States.

State Tax on Railway Gross Receipts, 82 U. S. 15 Wall. 284, 21 L. ed. 164.

On rehearing.

The unconstitutionality of a part of a statute does not necessarily invalidate the whole. The same statute, and even the same section, may contain unconstitutional provisions and also salutary and useful provisions, not obnoxious to any constitutional exceptions.

Moore v. New Orleans, 82 La. Ann. 726; *State v. Keniclos*, 88 La. Ann. 253.

Watkins, J., delivered the opinion of the court:

This is a proceeding on the part of a tax collector by rule on the defendant to show cause why he should not be compelled to pay a state and parish license of \$30 each for prosecuting the business and occupation of running and operating the towboat Jim Watson, within the limits of the parish of St. Mary, in this state; or, in default of so doing, that he be adjudged and condemned to cease the further pursuit of said business or occupation. The defendant's answer is, in effect, that the statute of the state under which the aforesaid licenses are exacted (paragraph 19 of section 8 of Act No. 150 of 1890) is unconstitutional, null, and void, because same conflicts with and is contrary to the interstate commerce clause of the United States Constitution, and hence the licenses claimed cannot be imposed. The answer admits that defendant is engaged in the occupation designated in the rule and in the statute, but its representation is that he has already paid and had in his possession, a license from the United States government, and that such license entitles him to pursue his occupation, which is that of operating towboats in the various navigable watercourses of Louisiana, Mississippi, Arkansas, Ohio and

NOTE.—Power to impose local license tax on vessels licensed by United States.

The above case seems to be clearly within the authority of *Harmon v. Chicago*, 147 U. S. 306, 37 L. ed. 218, which holds unconstitutional an ordinance of Chicago which attempted to impose a license tax on tugs engaged in navigating the Chicago river. The court held that expenditures of the city in deepening and improving the river could not justify the imposition of such a license tax, saying: "The license fee is a tax for the use of navigable waters, not a charge by way of com-

pensation for any specific improvement." It was also said that the requirement of a license in that case was "equivalent to declaring that such vessels shall not enjoy the privilege conferred by the United States except upon the condition imposed by the city. This ordinance is therefore plainly and palpably in conflict with the exclusive power of congress to regulate commerce, interstate and foreign." This being the decision of the Supreme Court of the United States on a question which can be settled only by that court, it is not necessary to seek for other decisions. B. A. R.

Pennsylvania, and embracing those of the Bayou Teche, the Atchafalaya and Mississippi rivers, and the Gulf of Mexico, without the payment of any additional exaction, such as that which is sought to be imposed under the license law of Louisiana. The evidence shows that the area of defendant's operations with his towboats is similar to that indicated in the answer. The defendant comes within the purview of the statute. Is it unconstitutional? The act levies a license tax of \$30 upon "every business . . . of operating one or more towboats, or tugboats, . . . based on the gross annual receipts of said business." And paragraph 19 of the eighth section of the statute declares that "when the receipts are less than \$25,000 the license shall be thirty dollars." Act No. 150 of 1890, par. 19, § 8. This is an occupation license tax, and the same is to be collected of the person pursuing the avocation or business; and it is in no sense a property tax assessed against the property that is employed in the business of the owner, nor is it a tax levied on the cargo or boat. *Parish of East Feliciana v. Levy*, 40 La. Ann. 832. A question somewhat analogous to the one presented for our consideration is discussed and decided by the supreme court in *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164. In that case, the question was whether the act of the Pennsylvania legislature levying a tax upon a railroad company of three quarters of 1 per cent upon the gross receipts of the company was in conflict with the commerce clause of the United States Constitution (U. S. Const. art. 1, § 8, cl. 3). It being therein claimed and contended that the act was unconstitutional in so far as it taxes that "portion of the gross receipts of companies which are derived from transportation from the state [of Pennsylvania] to another state, or into the state of Pennsylvania from another state"; and, the supreme court of the state [of Pennsylvania] having decided adversely to the claim, the case was brought up for review." The court in passing on that question said: "We think that such taxation may be laid upon a valuation or may be an excise; and that, in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have no meaning beyond this, can be regarded as violating the Constitution." Proceeding, then, to the discussion of the case, the court reaches this conclusion, viz.: "This tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements, or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury." And, in conclusion, the court adds: "But we think it may safely be laid down that the gross receipts of the railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from

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transportation of freight between states, have become subject to legitimate taxation." But the instant case does not present the question of a tax upon the gross receipts of the defendant's business at all. He is proceeded against by the shorthand, compulsory process of the revenue law for the collection of a license or price of a permit to prosecute his avocation of operating towboats, and the alternative of the tax collector's rule is that, on the defendant's default in making payment of the license, he be adjudged and condemned to discontinue the prosecution of his avocation, notwithstanding he had previously obtained a license from the United States permitting him to pursue said calling. The case of *Moran v. New Orleans*, 112 U. S. 60, 28 L. ed. 653, presents the issue here raised, and, to our thinking, it is decisive of the controversy, and conclusively against the contention of the plaintiff. "But the license fee in the present case," says the court, "is not a tax upon the boats as property, according to any valuation. The very law authorizing its imposition declares that it shall not be construed to be a tax on property. It is said, however, to be a tax on an occupation, and for that reason not a regulation of commerce. If it were a tax upon the income derived from the business, it might be justified by the principle of the decision in the case of *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164, which shows the distinction between a tax on transportation and a tax upon its fruits, realized and reduced to possession, so as to become a part of the general capital and property of the taxpayer. But here is not a tax on the profits and income after they have been realized from the business. It is a charge explicitly made as the price of the privilege of navigating the Mississippi river between New Orleans and the Gulf, in the coastwise trade, as the condition on which the state of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authorities of congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade, and the state then seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that, if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What one declares may be done without the tax, the other declares shall not be done except upon the payment of the tax. In such an opposition, the only question is, Which is the superior authority? and, reduced to that, it furnishes its own answer." There is no distinction between that case and the one before the court. The principle involved in each case is the same, and must control our decision. And the supreme court, in the case cited, overruled the decision of this

court in *New Orleans v. Eclipse Tow Boat Co.* 33 La. Ann. 647, 39 Am. Rep. 279. *Vide* *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243.

The judgment appealed from must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the demands of the plaintiff in rule be rejected, at his costs in both courts.

Rehearing denied February 25 1895.

Peter GRAHAM, *Appt.*,

v.

ST. CHARLES STREET R. CO. *et al.*

(47 La. Ann. 214.)

*1. **The intentional causing of loss by one man to another, without justifiable cause, and with a malicious purpose to inflict it is of itself a wrong, and it is a general principle that every act of man which causes damage to another obliges him by whose fault it happened to repair it.**

2. **While it may be conceded that a person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal be based upon reason, or be the result of whim, caprice, prejudice, or malice, and that there is no law which could reach him for so doing, it is not equally true that he can always, from such motives, influence another person to do the same without incurring legal liability. The question of liability or not, in different cases, would be dependent upon their own special facts, and upon varying conditions and relations.**

(February 11, 1895.)

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in favor of defendants in an action brought to recover damages for injuries alleged to have been caused by defendants' malicious interference with his business. *Reversed.*

The facts are stated in the opinion.

Messrs. Walter H. Rogers and W. B. Lancaster, for appellant:

There is a law prohibiting one from doing any act injurious to his neighbor. Civil Code, art. 2292, sets forth that an obligation may arise "from an act of the party," and article 2315 provides that, "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

To influence others not to deal with a neighbor is an act.—a positive, not a negative, agency,—whether done by means of persuasion or intimidation, or otherwise. It obliges

*Headnotes by NICHOLLS, CH. J.

NOTE.—The liability to a merchant for keeping prospective customers away from his store by means of threats to discharge them from employment if they deal with him is a question presented for the first time, we think, in the above case. The decision plainly recognizes a liability in case of malice that would not exist in its absence. This case is plainly distinguishable from cases of 27 L. R. A.

its author to repair any damage arising from it; provided it happened "by his fault," as when done through malice.

Dely v. Winfree, 80 Tex. 400; *Walker v. Cronin*, 107 Mass. 562; *State v. Glidden*, 55 Conn. 46.

Mr. Harry H. Hall, for defendants:

Defendants had the legal right to discharge their servants, arbitrarily and without cause. The exercise of a legal right gives no cause of action against them. If the plaintiff be injured, it is *damnum absque injuria*.

Orr v. Home Mut. Ins. Co. 12 La. Ann. 255, 68 Am. Dec. 770.

Nicholls, Ch. J., delivered the opinion of the court:

Plaintiff seeks to recover a judgment against the St. Charles Street Railroad Company and Thomas Newman, *in solido*, for \$5,000. Defendants filed an exception of "no cause of action," which having been sustained, and the suit dismissed, plaintiff has appealed.

The action is grounded upon the following allegations: "That Newman is the foreman of the company, and as such has the power of employing and discharging its employés; that for a considerable time, less than one year, he has persistently abused said power, in making use of it for persecuting petitioner and injuring him in his business, as hereinafter set forth; that petitioner is proprietor of a substantial grocery store at the corner of Baronne and Eighth streets, of New Orleans, the stable and buildings of said company occupying another corner of the same street intersection; that Newman has frequently and continuously instructed the men under his control, in said capacity, that they must not deal at petitioner's store, and that he would discharge them if they did; that he especially directed such commands and threats to Henry Rigner, Joseph Santos, and Lee Halliday in the early part of the year 1893, say in the months of February and March, and thereabouts, and to various other persons within the past eight months; that he did discharge one Andrew Heffner from the employ of said company on or about the 19th of March, 1893, for no other cause than that said Heffner had manifested friendship for petitioner, by speaking in his favor; that the *animus* of all this was that of ill will against petitioner, and the deliberate desire to injure him; that, in all said conduct and actions, he was within the scope of his employment by said company; that in many other ways said Newman has manifested his ill feeling and malevolence towards petitioner; that petitioner has suffered loss in his business to the extent of one thousand dollars, in the patronage thus driven away and diverted, which he would otherwise have enjoyed; that petitioner has also suffered great annoyance and humiliation from the no-

inducing employés to leave service or any other kind of cases as to inducing breach of contract, for which, see note to *Boysen v. Thorn* (Cal.) 21 L. R. A. 233; and also from cases of conspiracy to interfere with business, since in the present case no conspiracy appears and no contract with the merchant is alleged to have been interfered with.

tority which their persecution has obtained in the neighborhood, through the openness with which it was carried on, and from the ridicule thereby engendered, the injury from which he estimates at not less than five hundred dollars; that he is entitled to punitive and exemplary damages in the further sum of thirty-five hundred dollars for said tortious, wanton, malicious, and unprovoked persecution."

Defendants' counsel in his brief refers us to the case of *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255, 68 Am. Dec. 770, as containing a clear exposition of the principle upon which this defense rests. He says: "Defendants had the legal right to discharge their servants arbitrarily and without cause. The exercise of a legal right gives no cause of action against them. If the plaintiff be injured, it is *damnum absque injuria*. No authority has been suggested in opposition to the principle that a man has an undoubted right to employ labor, and fix the terms and conditions of that employment, in his discretion. In the instant case, defendants had the absolute legal right, the exercise of which was proper in the conduct of their business, to prohibit their employes from going to grocery stores or bar rooms, or from dealing in any way or with any person in such manner as might be prejudicial to the interest of their business. They had the legal right to insist upon abstention in dealing as a condition precedent to their employment or retention in service. If the employes did not see fit to comply with these restrictions, they were at liberty to leave the employment. They were not coerced, in any sense of the word. They were free agents. They could have continued dealing with plaintiff, if they saw fit, but they could not so deal and remain in the employ of the defendant company. Defendants were exercising a legal right." The plaintiff in this case does not appear before us either as one who, having sought employment from defendants, and been refused by reason of what he alleges to be unreasonable, unwarrantable requirements at his hands, as conditions precedent to being taken into service, claims damages from defendants, nor as one who, having been employed by the defendants, under circumstances such as to have legally authorized the employer, at any moment, and without cause assigned, to discharge him, claims that he has legal ground of complaint, for the reason that the discharge was arbitrary, wanton, and malicious. Had this case presented features of that kind, the arguments which counsel makes would be unanswerable. A complainant, under such circumstances, would find himself met by the principle, which has taken the shape of a maxim, "*neminem ledit qui jure suo utitur*." The issue before us is whether, while the plaintiff, engaged in a lawful business, is legitimately earning his livelihood by and through the custom and patronage of others, the defendant, a corporation, and its foreman, having the power of employing and discharging large numbers of persons, can, without incurring legal liability therefor, without justifiable cause, and moved solely by a malicious and wanton intent and design to injure the plaintiff, use their power of employment and

discharge upon persons seeking employment from them, or already in their employ, so as to cause those who are already dealing with the plaintiff to desist from further doing so, and those who would desire to do so from carrying out their wishes, by threats of nonemployment or discharge. In so doing the defendants would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice, the choice and will of others, through fear of nonemployment or discharge. This will and power of choice both the plaintiff and the parties themselves are entitled to have left free, and not have coerced, in order simply to work the former damage and injury. In *Loughshore Printing & Pub. Co. v. Howell* (Or.) 83 Pac. Rep. 553, the court said, "Every man has a right to require that he be protected in his property rights," and quotes approvingly and correctly a citation to the effect that "the labor and skill of the workman or the professional man (be it of high or low degree), the plant of a manufacturer, the equipment of a farmer, the investments of commerce, are all, in equal sense, property." In *Dolz v. Winfree*, 80 Tex. 400, the court said: "Every man has a right to use the fruits and advantages of his own enterprise, skill and credit. He has no right to be protected against competition, but he has the right to be protected from malicious and wanton interference, disturbance, or annoyance. If the disturbance or loss come as a result of competition or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is interfered with. But if it comes from merely wanton or malicious acts of others, without the justification of competition, or service of any interest or lawful purpose, it then stands upon a different footing." In the case at bar, defendants have committed the error of enlarging a right into a wrong, and applying to it the maxim, "*neminem ledit qui jure suo utitur*." In dealing with the question before us, we could entirely disregard, as a mere incident or accident of the case, the particular instrumentality by and through which the alleged damage and injury to plaintiff were inflicted. If it was accomplished under circumstances such as to give rise to legal liability, it would matter little whether it was through the power and influence which an employer can bring to bear upon the conduct and actions of his actual or prospective employes, or through some other means.

For the purposes of this opinion, we have taken up and followed the line of discussion and argument adopted and presented by both sides, and passed upon the general legal proposition advanced by plaintiff and disputed by defendant, without subjecting plaintiff's petition, as to its exact language and arrangement, to the strictest rules of pleading. From that standpoint, it is open to some criticism, but we have viewed it as substantially raising the issues presented in the briefs. We do not undertake to lay down any general rule by which should be ascertained and tested the right of one man to control and direct, against his will, the action and conduct of another, to the injury and prejudice of third persons, under the

different relations and varying conditions of life. We do not mean, for an instant, to say, that defendants may not, on the trial of this case upon the merits, justify any conduct which they may have pursued in respect to the plaintiff. We simply say that the whole matter should be thrown open to inquiry and investigation. In the case of *Dela v. Winfree*, cited above, counsel laid down a proposition which the court said might be conceded as correct, to the effect that "a person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property;" but it declared that "the privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that a person may, from such motives, influence another person to do the same. If, without such motive, the cause of one person's interference with the property or privilege of another is to serve some legitimate right or in-

terest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated. In the case of *Walker v. Cronin*, 107 Mass. 562, it was recognized to be a general principle that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages. The intentional causing of such loss to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong."

We are of the opinion that the exception of no cause of action should have been overruled, and the parties should have been made to go to trial on the merits.

It is ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed, and that the exception of no cause of action filed by the defendants in the district court be, and the same is hereby, overruled, and this cause is ordered to be remanded to the lower court for further proceedings according to law.

NEW YORK COURT OF APPEALS.

Gilbert MURDOCK, Admr., etc., of Harvey Murdock, Deceased *et al.*, *Repts.*,

v.

Clarissa WATERMAN *et al.*, *Appts.*

(145 N. Y. 65.)

A payment on a mortgage made by heirs of a deceased mortgagor to protect their title to part of the mortgaged premises descended to them, will not arrest the running of the statute, as against the lien of the mortgage on another part of the mortgaged premises conveyed by the mortgagor for full value in his lifetime to a third person who is under no obligation to pay any portion of the mortgage debt.

(February 23, 1885.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Otsego County Circuit in favor of plaintiffs in an action brought to foreclose a mortgage. *Reversed as to appellant Waterman.*

The facts are stated in the opinion.

Mr. George Brooks, with **Mr. James W. Tucker**, for appellants Robinson and Lamb:

The payment of \$1 as made August 8, 1885, was not such a payment as the law required to remove the bar of the statute.

As there was never an old promise by these defendants, that is, as they were not parties to the contract of the mortgage, how can it be

NOTE.—The above decision is apparently without any direct precedent but follows the rule that part payment of a debt which can keep it alive must be made by authority of the debtor to be prejudiced thereby.

As to such payments by former partners, see note to Kerper v. Wood (Ohio) 15 L. R. A. 652, 27 L. R. A.

said that they have made a new promise, and if they have made a promise, there is no previous promise to furnish the consideration.

Morgan v. Rowlands, L. R. 7 Q. B. 493, 3 Moak, Eng. Rep. 611; *Harper v. Fairley*, 53 N. Y. 442; *Blair v. Lynch*, 105 N. Y. 686; *Miller v. Magee*, 17 N. Y. S. R. 547; *Roosevelt v. Mark*, 6 Johns. Ch. 266, 2 L. ed. 121; *McLaren v. McMartin*, 86 N. Y. 92; *Kelly v. Weber*, 27 Hun, 8; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *Pickett v. Leonard*, 24 N. Y. 175; *Von Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322.

The fact that the party had knowledge of the payment made by one who claimed to act for him was not enough to avoid the defense of the statute of limitations.

McMullen v. Rafferty, 89 N. Y. 456; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75.

The omission to avoid the statute must amount to an unqualified acknowledgment of the debt, disconnected with any circumstances indicating an intention not to become liable upon it.

Devo v. Jones, 19 Wend. 493; *Arnold v. Downing*, 11 Barb. 554; *Sands v. Gelston*, 15 Johns. 520; *Abbott, Trial Ev.* 825; *Morgan v. Rowlands*, *supra*; *Van Keuren v. Parmelee*, 2 N. Y. 531, 51 Am. Dec. 322; *Cocks v. Weeks*, 7 Hill, 46; *Ball v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 174; *Crow v. Gleason*, 141 N. Y. 489; *Adams v. Otin*, 140 N. Y. 150.

The mortgage being more than twenty years old, there was a presumption of fact that it was paid, and the burden of proof was on the plaintiffs to show that in fact the mortgage had not been paid and was a good and valid demand, and this without reference to the statute of limitations.

Giles v. Baremore, 5 Johns. Ch. 545, 2 L. ed. 1169; *Malloy v. Vanderbilt*, 4 Abb. N. C. 127; *Pangburn v. Miles*, 10 Abb. N. C. 43; *Dun-*

ham v. Minard, 4 Paige, 442, 8 L. ed. 507; *Moore v. White*, 6 Johns. Ch. 860, 2 L. ed. 150; *Belmont v. O'Brien*, 12 N. Y. 394; *Townshend v. Townshend*, 1 Abb. N. C. 81.

A payment made on behalf of a debtor is not sufficient to avoid the statute of limitations, unless the additional fact appears that it was authorized by him or was adopted by subsequent ratification.

Littlefield v. Littlefield, 91 N. Y. 205, 43 Am. Rep. 663; *Shoemaker v. Benedict*, 11 N. Y. 178, 62 Am. Dec. 95; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155; *Harper v. Fairley*, 58 N. Y. 442; *Winchell v. Hicks*, 18 N. Y. 558; *Re Kendrick*, 107 N. Y. 109.

Mr. E. M. Harris, for appellant Waterman:

The defendants Harriet Robinson and Mary Lamb are not personally liable for the mortgage debt.

Hauselt v. Patterson, 124 N. Y. 349.

The alleged payment, August, 1885, by the defendants Robinson and Lamb, cannot have for effect the taking of the case out of the operation of the statute of limitations.

They are not debtors charged with the payment of the mortgage debt, and an acknowledgment or new promise on their part was *nudum pactum*.

Harper v. Fairley, 58 N. Y. 442; *Kelly v. Weber*, 27 Hun, 8; *Smith v. Ryan*, 66 N. Y. 853, 23 Am. Rep. 60; *Littlefield v. Littlefield*, 91 N. Y. 205, 43 Am. Rep. 663; *Miller v. Magee*, 17 N. Y. 8, R. 547; *Blair v. Lynch*, 105 N. Y. 636; *Lord v. Morris*, 18 Cal. 492; *Cotter v. Quinlan*, 2 Dem. 29.

Mr. Lynn J. Arnold, for respondents:

The one dollar payment by the Lamb heirs kept the mortgage debt alive and a lien on that portion of the mortgaged premises owned by them.

Payment by Lucinda Lamb, with the knowledge and approval of Harriet Robinson and Mary Lamb, has the same legal effect as if payment were made by all three.

Dings v. Guthrie, 45 Hun, 436; *Pears v. Laing*, L. R. 12 Eq. 51.

The one dollar payment by the Lamb heirs kept the mortgage debt alive, so that it continued a lien on the portion of the mortgaged premises owned by Clarissa Waterman.

Payments on the mortgage debt by the mortgagors, after the sale to Waterman, would continue the lien on her portion.

New York Life Ins. & T. Co. v. Covert, 6 Abb. Pr. N. S. 164.

Having received this property, the heirs were bound to satisfy and discharge the debt in the first instance; their position was exactly the position of the ancestor.

Suppose that the Lamb heirs, after the death of the elder Lambs, had paid interest on the debt annually for over twenty years; such payments would have the same legal effect as though made by the ancestor.

Pears v. Laing, L. R. 12 Eq. 41; *Moller v. Duryee*, 21 N. Y. Week. Dig. 458.

No personal representatives of deceased mortgagors ever having been appointed, a payment by the heirs under such circumstances would certainly keep the debt alive.

New York Life Ins. & T. Co. v. Covert, supra; *Hughes v. Edwards*, 22 U. S. 9 Wheat. 97 L. R. A.

489, 6 L. ed. 142; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663; *Tighe v. Morrison*, 5 L. R. A. 617, 116 N. Y. 263; *Hauselt v. Patterson*, 124 N. Y. 349; *Roddam v. Morley*, 1 DeG. & J. 1; 2 Jones, Mortg. 4th ed. § 1202; *Pears v. Laing*, and *Moller v. Duryee*, supra.

Andrews, Ch. J., delivered the opinion of the court:

The only question arises upon the defense of the statute of limitations. The action is for the foreclosure of a mortgage executed by Alanson Lamb and Daniel Lamb to Harvey Murdock and Erastus Robinson, dated September 21, 1861, to secure the payment of \$826, with interest, in installments, the last of which became due September 21, 1865. The mortgage contains an express covenant of payment in the same terms as in the bond of the mortgagors, executed concurrently therewith, and purports to bind them, "their heirs, executors, and administrators." The mortgaged premises consisted of a village lot, on which were two dwelling houses owned by the mortgagors as tenants in common. Alanson Lamb died intestate in 1870, and his undivided half of the mortgaged premises descended to his daughter, the defendant Mary Lamb. In 1871, Daniel Lamb, and Mary Lamb, by her special guardian, conveyed the south half of the lot and the dwelling house thereon to one Palmer, under whom the defendant Clarissa Waterman claims, for the sum of \$1,650, the full value of the granted premises. The conveyance was by separate deeds. The deed executed by Daniel Lamb was with warranty, and the deed by the special guardian of Mary Lamb contained no covenants of title. Neither deed referred to the mortgage. The surviving mortgagor, Daniel Lamb, died intestate in 1873, and his undivided one half interest in the north half of the mortgaged premises descended to his daughters, Harriet Robinson and Lucinda Lamb, and his granddaughter, Mary Lamb. Lucinda Lamb died intestate, November 8, 1887, and her interest derived from Daniel Lamb descended to her sister, Harriet Robinson, and her niece, Mary Lamb. When this action was commenced, the title to the mortgaged premises was held as follows: The south one half was owned by Clarissa Waterman under the deeds executed in 1871; the north half had descended to and was owned by the defendants Harriet Robinson and Lucinda Lamb, one-fourth part by the former and three-fourths parts by the latter. No part of the principal sum secured by the mortgage has been paid. The mortgagors, in their lifetime, paid the interest up to September 21, 1865 (the day when the whole principal sum became due), and the payments were indorsed on the mortgage. No subsequent payment was made at any time until August 8, 1885, when, as is found by the trial judge, the sum of one dollar was paid and applied on the bond and mortgage "by Lucinda Lamb, on behalf of Lucinda Lamb, Harriet Robinson, and Mary Lamb, in their presence, and with their knowledge and approval, and in recognition of the mortgage lien." This is the payment relied upon to take the case

out of the statute. It was made nearly twenty years after the mortgage became due, and the same period after the last preceding payment had been made. It was held by the trial court that this payment kept the mortgage in life, not only as against the part of the mortgaged premises then owned by the parties by whom the payment was made, but also as against the part of the premises owned by Clarissa Waterman, who was not a party to that transaction, and who neither authorized, consented to, nor ratified such payment. The payment was made on an occasion when the mortgagees called at the house on the mortgaged premises occupied by Harriet Robinson, Lucinda and Mary Lamb, and informed them that the mortgage was about to outlaw, and required that a payment be made in order to prevent a foreclosure.

It appears from the evidence that Palmer went into possession of the south house and premises under the deed of 1871, and that he and his grantees have remained in visible occupation since that time; and there is no ground for doubt that the mortgagees, on the 8th day of August, 1885, when the payment of one dollar was made, fully understood the facts respecting that conveyance and the possession thereunder, and the history of the devolution of the title of the other half of the mortgaged premises by reason of the death of Alanson Lamb. No administrators of the estate of either Daniel or Alanson Lamb have been appointed. We entertain no doubt that the finding that the payment of one dollar made August 8, 1885, was made in behalf of and with the knowledge and approval of all the three owners of this north half of the mortgaged premises, and in recognition of this mortgage lien, is supported by evidence. Nor is there any doubt that the payment operated to continue the lien of the mortgage for twenty years thereafter (unless sooner paid) as against the part of the premises then owned by the descendants of Alanson and Daniel Lamb. It was an unequivocal acknowledgment by them of the mortgage. The serious question arises as to the effect of this payment upon the lien of the mortgage upon the part of the premises owned by Mrs. Waterman, who confessedly was not a party to the payment. The question is whether a payment on a mortgage made by the heirs of the mortgagor, who have inherited part of the mortgaged premises, made after the death of the ancestor, to protect their title, arrests the running of the statute as against the lien of the mortgage on a part of lands embraced therein, conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty and who was under no obligation to pay the mortgage debt. The statute (Code Civ. Proc. §§ 880, 881) fixes the period of twenty years after the cause of action has accrued for the commencement of an action upon a sealed instrument, and this applies to an action for the foreclosure of a mortgage. *Acker v. Acker*, 81 N. Y. 143. The rule was the same under the former code. Section 90. Under the revised statutes the lapse of twenty years

from the accruing of a right of action on a sealed instrument for the payment of money created a presumption of payment, which might be repelled by proof of payment of some part, or by a written acknowledgment of such right within that time. 2 Rev. Stat. 301, § 48. Prior to the revised statutes, an action for the foreclosure of a mortgage was not within any statute of limitations in this state, but courts of equity, in analogy to limitation at law, held that, in the absence of explanation, the remedy by foreclosure was barred where there had been a delay of twenty years between the accruing of the right of action and the filing of the bill, on the presumption that the mortgage had been paid. *Giles v. Baremore*, 5 Johns. Ch. 545, 2 L. ed. 1169. The Statute, 21 Jac. I. chap. 16, upon which most of the statutes of limitation in the several states prescribing the period of limitation to actions at law have been modeled, contained no provision on the subject of the effect of acknowledgments or payments in renewing or continuing the debt, but the courts of England, by a species of judicial legislation, grafted onto the statute exceptions founded on these circumstances, and they have been embodied in the subsequent English statutes. *Lord Tenterden's Act* (9 Geo. IV. chap. 14, § 1) required that where an acknowledgment was relied upon to take a case out of the statute, the acknowledgment should be in writing, signed by the person to be charged thereby; but it did not deal with the effect of a part payment, nor define by whom it might be made nor who should be bound thereby. It left the subject to be regulated by the courts. See *Chitty, J.*, in *Re Hollingshead*, L. R. 37 Ch. Div. 651. The statutes of this state have in the same way left the subject of what constitutes a part payment and its effect to judicial exposition. The revised statutes contained no express provision that a part payment of a debt within the period limited should operate to renew or continue it, nor except inferentially did they recognize that such would be its effect. The provision of the present code, which is substantially a re enactment of section 110 of the former Code, is the only statutory rule in this state on the subject. It declares that: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest." The section primarily relates to actions on contracts for the payment of money. But it leaves the effect of a part payment undefined. It does not declare that the payment must be made by the debtor, or by a person obligated to pay the debt, or, if made by one of several joint debtors, whether such payment shall operate against all. The effect of a part payment in any case, and against whom it shall operate, is to be determined by the principles established by the decisions of the courts applicable to the subject. The question has most frequently arisen in actions of assumpsit, brought upon promises for the payment

of money, against the party to the contract, in which the statute of limitations has been interposed as a defense; and the general principle has been asserted with great uniformity that a part payment, available to take the case out of the statute, must have been made by the debtor or his authorized agent, or, if made originally without his authority, it must have been subsequently adopted by him as his act. This view is founded upon the reason upon which a part payment is held to renew or continue a debt. Part payment of a debt by a debtor constitutes an admission by the person obligated to pay of his liability for the whole debt upon which the partial payment is made, and justifies an inference of a new promise, made at that time, to pay the portion remaining unpaid. The courts acting upon this admission, and inferring therefrom the new promise, treat the contract as renewed from the time of the part payment, and the payment as giving a fresh start to the running of the statute.

It is obvious that a payment by a stranger, or by a person not authorized to represent the debtor, affords no ground for assuming any admission on his part, or for inferring a new promise by him, to pay the balance of the debt; and a payment not made by him or by his authority cannot, therefore, arrest the running of the statute. But in the application of the doctrine that a part payment, within the statute, must be made by the debtor or by his authority, there has been much diversity of judicial opinion. The effort has been frequently made to have it adjudged that whenever the person making the payment is under a liability to answer for the debt upon which the payment is made, a part payment by him will inure as a payment by all the parties bound by the same obligation, and will be treated in applying the statute as if made by all. The decision of Lord Mansfield in the leading case of *Whitcomb v. Whiting*, 2 Dougl. 652, that a payment made by one of four joint and several makers of a promissory note took the case out of the statute as to all, was placed on the ground that there was a quasi agency created by the contract, whereby the act of one was binding upon the others. The case of *Whitcomb v. Whiting* was followed in some of the earlier cases in this state, but was finally repudiated in the case of *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, and it has come to be the established doctrine here that a part payment of a debt by one of two or more joint contractors does not take the case out of the statute as to the others, and this whether such payment is made before or after the debt has been barred. *Shoemaker v. Benedict*, 11 N. Y. 177, 62 Am. Dec. 95. The existence of a common liability of several for a debt does not of itself make each the agent of the others, to bind them by part payment. The court has in a great variety of cases enforced with great strictness the rule that a part payment must be made by the debtor, or by his authority, in order to take the case out of the statute. This has been held in respect to a payment by a surety, unless at the request of the principal (*Winchell v. Hicks*, 18 N. Y. 558); by

the assignee of an insolvent debtor (*Pickett v. Leonard*, 84 N. Y. 175); by the application by the creditor of money derived from collateral securities assigned to him by the debtor (*Harper v. Fairley*, 53 N. Y. 442); by the maker of a note, of interest, as against the indorser. *McMullen v. Rafferty*, 89 N. Y. 456.

In determining the question whether the payment by the heirs of Alanson and Daniel Lamb of the sum of one dollar on the mortgage continues the lien as against Mrs. Waterman, it is important to consider her and their relation to the debt and the property embraced in the mortgage. Neither Mrs. Waterman nor her grantors had assumed or were under any personal liability for the mortgage debt. The mortgage remained a lien on the land conveyed to Palmer in 1871, but in equity the north half of the lot was chargeable with the mortgage debt, and was first liable to be sold on foreclosure. The fact that Palmer paid full value for the south half of the lot did not alter the rights of the mortgagees. Their mortgage remained a lien as well on the part of the lot sold to Palmer as upon the part remaining unsold. But Palmer and his grantees, so far as appears, had never been called upon for payment. The Lamb heirs stood in a double relation to the mortgage debt. Their half of the lot was subject to the mortgage, and primarily chargeable. They also, as heirs of one of the other of the mortgagors, having acquired title to the mortgaged premises by descent, were liable under the statute (1 Rev. Stat. p. 749, § 4) to satisfy or discharge the mortgage out of their own property. The statute was recently construed in *Hausell v. Patterson*, 124 N. Y. 849, and it was held, in substance, that the liability of heirs or devisees was limited to the property descended or devised, or its value in case of alienation. Assuming that the right to a remedy under this statute was not barred by the lapse of time, the Lamb heirs, who made the payment of August 8, 1885, may have been under a liability which could have been enforced against their property other than that embraced in the mortgage, depending upon whether they took any other than the mortgaged premises by descent. But in no other way were they liable for the mortgage debt. The mortgagees demanded and accepted from the Lamb heirs the nominal payment made August 8, 1885, with full knowledge of the conveyance to Palmer in 1871, as a condition of forbearing a foreclosure of the mortgage, and it was paid by them for the sole purpose of protecting their title. It undoubtedly preserved the lien of the mortgage upon the part of the land owned by them. But to give it the further efficacy of continuing the lien on the part of the property in which they had no interest, implies that they were the agents of Mrs. Waterman to renew the mortgage as to her, a relation which has no support in the evidence. It could not, we apprehend, be successfully contended that the payment by the Lamb heirs would have renewed the debt as against the administrators of the mortgagors; and much less, we think, can it be claimed that it con-

tinued the lien of the mortgage as against Mrs. Waterman. It was held by the chancellor in *Moore v. White*, 6 Johns. Ch. 373, 2 L. ed. 155, that an acknowledgment by an executor or administrator would not bind the real assets in the hands of the heir or devisee so as to affect the right of either under the statute of limitations. The question is not the same as it would have been if, during the running of the statute, but after their conveyance, the mortgagors had made a partial payment on the debt. It has been held that a partial payment by a mortgagor on the debt, even after he had conveyed the premises mortgaged, would continue the lien of the mortgage. *New York Life Ins. & Trust Co. v. Covert*, 6 Abb. Pr. N. S. 154; *Hughes v. Edwards*, 23 U. S. 9 Wheat. 489, 6 L. ed. 142. The mortgage is an incident to the debt, and, when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with the equity of redemption. If the mortgage is recorded, the purchaser has constructive notice of its existence, and a dealing with the debt between the debtor and creditor in the usual course is to be expected. The mortgagors, until at least the debt is barred, represent all persons interested in the land. If not recorded, and the grantee purchased in good faith for value without notice then the lien of the mortgage is destroyed. But upon the death of a mortgagor personally bound to pay the debt a new situation arises. His personal representatives become liable to the extent of the personal assets. If the mortgaged premises descend to his heirs, or are devised, they are the primary resource in exoneration of the personalty, unless (in case of a will) the testator otherwise directs. 1 Rev. Stat. 749, § 4. If, during his life, the mortgagor had conveyed the equity of redemption, his grantee does not become personally liable for the debt, unless he assumed its payment; but the land remains subject to the pledge, whatever may be the form of the conveyance. But upon the death of the mortgagor, after having conveyed the land, the personal liability is separated from the ownership of the land. Where the equity of redemption has been conveyed in parcels, without any personal covenant by the grantees to pay the debt, the land alone, as between them and the mortgagees, is liable. The judgment below proceeds upon the doctrine that the owner of one parcel, acting separately, and independently of the owner of the other parcels, may, by payment, continue the lien of the mortgage beyond twenty years, not on his own parcel alone, but on all the parcels. He could not do this by a written acknowledgment, as such an acknowledgment must, under the statute, be made by "a person to be charged thereby;" and a payment by the owner of one parcel ought not, we think, to be given any greater effect. It would be an admission of the debt, but an admission *sub modo*, affecting only the party making it. The payment would create no personal liability, even against him. He could not bind the owners of the other parcels by his admission, because he

would, neither in law nor in fact, represent them. Payment by an heir or devisee, as such, is, we think, subject to the same limitation. It would continue his liability under the statute to the extent of the real assets in his hands, but would have no effect against the owners of the equity of redemption in arresting the running of the statute. A partial payment continues the debt on the theory that it implies a new promise, but the new promise can be implied only against the person making the payment, or when made in his behalf by one who, in law or in fact, is authorized to bind him.

We have found no authorities directly upon the question presented in this case. The case of *Roddam v. Morley*, 1 DeG. & J. 1, involved the question whether a payment by a devisee for life of interest on a specialty of his testator, in which the heirs were bound, was an acknowledgment "by the party liable by virtue of such specialty," within the meaning of the fifth section of the Act 3 & 4 Wm. IV., chap. 42, and as such was sufficient to keep the right of action alive against the parties interested in remainder, and it was held that it was. The principle of this decision is very clearly set forth by Chitty, J., in the case *Re Hollingshead*, L. R. 37 Ch. Div. 651-659, which involved a similar question as to the liability of devisees on a simple contract of the testator. Speaking of *Roddam v. Morley*, he says: "The right principle to adopt is that, so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt, affecting the real estate of which he is in possession; it is sufficient evidence of the continuance of the testator's contract to pay the debt, or (if it be necessary to have recourse to the somewhat subtle doctrine of a promise to pay) it is a promise to pay out of such real estate, which he, as the person in possession of such real estate, is competent to give on behalf of the real assets generally, and so as to bind them who take in remainder." These two cases proceed distinctly on the ground of agency. In *Cooper v. Cresswell*, L. R. 2 Ch. 112, Lord Chelmsford questioned the decision in *Roddam v. Morley*, although not governing the case then before him. In *Cooper v. Cresswell* the bill was filed in behalf of certain specialty creditors of a decedent to have the debt raised out of certain devised estates. The testator devised certain real estate to trustees in trust for E. for life, and other real estate to the same trustees for the payment of debts. All the real estate was, under the English statute, assets for the payment of debts. The owner of the equitable life estate pleaded the statute of limitations, and the court sustained the defense, holding that payment within twenty years of interest on the debt by the trustees was not sufficient to take the case out of the statute as to the equitable life tenant. In *Dickinson v. Tensdale*, 1 De G. J. & S. 52, it was held by Lord Chancellor Westbury, that where there were sepa-

rate devise of lands, to two nephews of the testator, all of which were charged with the payment of his debts, that payments made on the bond in question by one of the devisees after the death of the testator was not an answer to the plea of the statute by the other. *Pears v. Laing*, L. R. 12 Eq. 41, was a decision by Sir James Bacon, V. C., upon very complicated facts, involving the statute of limitations. Certain payments of interest had been made by Ann Heron, a devisee and legatee, after the death of the testator on a mortgage executed by him in his lifetime, and the question was whether the mortgage was barred by the statute. The defense was overruled on two grounds,—the payments made by Ann Heron; and, second, payments made by the trustee who held the title to the entire estate, which latter ground was regarded by the judge as controlling and decisive. Upon the facts assumed by the court in passing upon the effect of the payments by Ann Heron, the decision seems to have little bearing upon the present discussion. In *Harlock v. Ashberry*, L. R. 19 Ch. Div. 539, it was held by Sir George Jessel, M. R., that payment by a tenant of part of a mortgaged estate of rent due, made to the mortgagee on his demand, but without authority of the mortgagor, was not a payment within 3 & 4 Wm. IV., chap. 27, § 40, or 1 Vict., chap. 28, which will take a case out of the statute. See also *Chinnery v. Evans*, 11 H. L. Cas. 115.

The question presented in the case before us is important. It should be determined, in the absence of express authority, in the light of the principles upon which partial payments are held to be an answer to the statute. The guiding and controlling consideration is that the payment must be made by a party to or bound by the obligation, or by his authorized agent. If the payment by one is relied upon to take the contract out of the statute as to another, it must be shown that the party who made the payment was in fact or in law the agent of the other in respect to his liability. When the person paying is bound to those in privity with him may be bound also. There is lacking, in respect to the payment relied upon in this case to bind Mrs. Waterman, (1) Any agency on the part of the Lamb heirs to act for her, or to bind her interest in the land; (2) any power growing out of or incident to their relations to the land or to the debt, from which the law will imply an authority, and (3) the admission, inferable from the payment construed in the light of the circumstances, was an admission simply that the mortgage was a subsisting lien on the land then owned by them. Our conclusion is that the judgment of the general and special terms should be reversed, with costs in all courts as to Mrs. Waterman, and that the judgment of the General Term be affirmed with costs as against the other appellants.

Judgment accordingly.

All concur.

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Joseph BIRD, Receiver, etc., of the Estate of George F. Merkle, Deceased, *Resp't.*,
v.

Adaline M. MERKLEE *et al.*,
and
BEDFORD STREET METHODIST EPISCOPAL CHURCH *et al.*, *App'ts.*

(144 N. Y. 544)

A residuary bequest to certain churches according to the number of members, to buy coal for the poor of the churches, is a direct gift to the churches and does not create a trust for unascertained or indefinite beneficiaries.

(February 5, 1895.)

APPEAL by defendants, certain churches, from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County sustaining the residuary clause in the last will and testament of George Merkle, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. Lemuel Skidmore, for appellants Bedford Street Church *et al.*:

It is not essential to the validity of a bequest to a religious corporation that it should be given generally for all the purposes for which it may be legally used, or for any to which the trustees may see fit to devote it.

Williams v. Williams, 8 N. Y. 525; *Theological Seminary Trustees of Auburn v. Kellogg*, 10 N. Y. 89; *Beekman v. Benson*, 23 N. Y. 810, 80 Am. Dec. 269; *Prichard v. Thompson*, 95 N. Y. 81, 47 Am. Rep. 9; *Weismore v. Parker*, 52 N. Y. 457; *Holland v. Alcock*, 108 N. Y. 837; *Foedick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 594.

As the gift is absolute, the expression "to purchase coal for the poor of said churches" should merely be held to indicate a wish or desire on the part of the testator that the moneys so given should be used for one only out of the many objects of said church corporations.

Re Teed, 59 Hun. 69; *Re Williams*, 64 Hun. 164; *Thorp v. Owen*, 2 Hare. 607; *Ex parte Payne*, 2 Younge & C. Exch. 636; *Paisley's App.* 70 Pa. 158; *Re Rochester*, 110 N. Y. 166; *Gross v. Moore*, 68 Hun. 412; 2 Roper, Legacies, Am. ed. p. 1708; *Fowler v. Garlike*, 1 Russ. & M. 232; *DuBois v. Ray*, 35 N. Y. 165; *Schult v. Moll*, 183 N. Y. 127.

When a bequest is made to a class, if any members of the class can take, they take the whole.

1 Jarman, Wills, 535; 2 Redf. Wills, 119; *Downing v. Marshall*, 23 N. Y. 874.

Mr. William D. Udell, for appellant Jane Street Church:

Courts look with favor upon donations for a charitable or religious purpose, and will endeavor to carry them into effect, if it can be done consistently with the rules of law.

NOTE.—For other cases in this series of charitable gifts for the benefit of "the poor," see Bullard v. Chandler (Mass.) 5 L. R. A. 104; Foedick v. Hempstead (N. Y.) 11 L. R. A. 715; Kelly v. Nichols (R. I.) 19 L. R. A. 412.

Perry, Tr. §§ 699, 701; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 880; *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550; *Williams v. Williams*, 8 N. Y. 525; *Levy v. Levy*, 33 N. Y. 97; *Wetmore v. Parker*, 53 N. Y. 450.

The legatees being so defined that the direction as to the use of the legacy can be carried out, there is no force in the contention made by the contesting defendants that the beneficiaries are too indefinite or uncertain.

Williams v. Williams and Power v. Cassidy, supra; *Beekman v. Benson*, 23 N. Y. 298, 80 Am. Dec. 269; *LeCouteulx v. Buffalo*, 33 N. Y. 833; *Fosdick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 581; *Vail v. Long Island R. Co.* 106 N. Y. 288, 60 Am. Rep. 449.

Mr. Fernando Solinger, for appellant African Methodist Episcopal Zion Church:

There is neither wanting certain, tangible beneficiaries nor a trustee to meet the bequest and to take the funds in hand in the first instance, also ascertain beneficiaries. There is no uncertainty or want of a person or certain body to take. The bequest to the churches is a direct gift.

Re Look's Will, 5 N. Y. Supp. 50; *Re Look's Will*, 54 Hun, 685, mem.; *Ruppel v. Schlegel*, 55 Hun, 188; *Re Bailey*, 24 Abb. N. O. 206; *Re Howard's Estate*, 5 Misc. 295.

Mr. James Otis Hoyt, for respondent, the receiver:

A gift to a duly incorporated body, whether incorporated for charitable or other purposes, is a valid gift if it be for one of the purposes for which the corporation was formed.

Williams v. Williams, 8 N. Y. 525; *Wetmore v. Parker*, 53 N. Y. 450; *Vail v. Long Island R. Co.* 106 N. Y. 288, 60 Am. Rep. 449; *Le Couteulx v. Buffalo*, 33 N. Y. 833; *Holland v. Alcock*, 108 N. Y. 812.

The words "to buy coal for the poor" do not constitute a trust.

Weeks v. Cornwall, 104 N. Y. 825; *Re Ver Planck*, 91 N. Y. 448; *Vanderpool v. Loew*, 112 N. Y. 175; *Ozley v. Lane*, 35 N. Y. 340.

Mr. S. St. J. McCutchen, for respondents Adaline M. Merkle and *et al.*:

It was the poor and not the churches that testator had in mind.

Gross v. Moore, 68 Hun, 412, affirmed in 141 N. Y. 559.

No absolute gift to the churches being intended by the testator, he must have purposed trusts of an ascertainable fund (the residue) in trustees (the churches) for a definite purpose (to buy coal) in favor of beneficiaries (the poor of said churches), and such trusts must fail for lack of definiteness in the beneficiaries.

1 Jarman, Wills, 5th Am. ed. 640; Perry, Tr. § 115; *Levy v. Levy*, 33 N. Y. 101; *Holland v. Alcock*, 108 N. Y. 812; *Fosdick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 581; *Tilden v. Green*, 14 L. R. A. 33, 130 N. Y. 29; *White v. Fisk*, 23 Conn. 50; *Beall v. Drane*, 25 Ga. 430; *Tripps v. Frazier*, 4 Harr. & J. 446; *Dashiell v. Atty-Gen.* 5 Harr. & J. 892, 9 Am. Dec. 573; *Wilderman v. Baltimore*, 8 Md. 551; *Needles v. Martin*, 33 Md. 609.

Mr. T. M. Tyng, with *Messrs. James H. Wood, Henry Ferris, and Samuel Lobenthal*, for respondents Ludwig, Dodge, Frank Merkle and *et al.*:

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The intention of the testator was clearly to create trusts for the purchase and distribution of coal.

1 Jarman, Wills, 5th ed. 604; Perry, Tr. § 115; *Gross v. Moore*, 68 Hun, 412, affirmed in 141 N. Y. 559; *Fosdick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 581; *Re Ingersoll's Will*, 131 N. Y. 578.

The trusts created by the will were void for want of ascertainable beneficiaries.

Tilden v. Green, 14 L. R. A. 33, 130 N. Y. 29; *Re Ingersoll's Will, supra*; *Hope v. Brewer*, 18 L. R. A. 458, 136 N. Y. 126; *Fosdick v. Hempstead, supra*.

Bartlett, J., delivered the opinion of the court:

This is an action to construe item 20 in the last will and testament of George F. Merkle, deceased, which reads as follows: "Item 20. If, after all the legacies are paid in full, there should be anything left of my estate, the same to be divided and paid to the Methodist Episcopal churches in the Ninth ward of the city of New York, according to the number of members, to buy coal for the poor of said churches." The general term of the First department reversed the judgment of the special term adjudging this to be a valid bequest to the churches named, and held that a trust was sought to be created which was void, as the beneficiaries were unascertained and indefinite. We are unable to agree with the learned general term, and are of opinion that the testator contemplated no trust, but made a valid bequest to the churches. This court, in *Wetmore v. Parker*, 53 N. Y. 450, held that a bequest similar in its essential features to the one at bar did not create a trust. In that case the testator gave \$25,000 to the Utica Orphan Asylum, to be perpetually invested by the trustees or managers in a certain manner, and the interest and income to be expended for the support and maintenance of the asylum. This bequest was claimed to be invalid upon the ground that it created a perpetuity in violation of the statute prohibiting the suspension of the absolute ownership of personal property beyond two lives in being. After disposing of this objection, and holding that the provisions of the statute against perpetuities did not apply to such a bequest, *Church, Ch. J.*, writing the opinion of the court, uses this language: "The income only of the permanent endowment of such an institution can be used with safety to its very existence. Any other course would frustrate, and, sooner or later, destroy, its usefulness. No mortmain law, restrictive as they have sometimes been, ever prevented the donors from making their gifts in such terms as would preserve the principal from dissipation. It does not create a trust in any such sense as that term is applied to property. The corporation uses the property in accordance with the laws of its creation for its own purposes, and the dictation of the manner of its use, within the law, by the donor, does not affect its ownership, or make it a trustee. A person may transform himself into a trustee for another, but he cannot be a trustee for himself." In the case before us there is nothing in the language em-

ployed by the testator that indicates an intention to create a trust. In the first place, he seems to have been in doubt as to his estate resulting in a residue after carrying out the provisions of his will. His language is: "If, after all the legacies are paid in full, there should be anything left of my estate, the same to be divided and paid to the Methodist Episcopal churches of the Ninth ward of the city of New York, according to the number of members, to buy coal for the poor of said churches." We have here a direct and simple gift made in terms that exclude any idea of trust. There is not even a direction to invest the principal and expend the income. It is admitted that the churches designated are duly incorporated and have the power to take. The validity of such a gift has not been legally open to question in this state since the case of *Williams v. Williams*, 8 N. Y. 525, where a bequest to the trustees of the Presbyterian church and congregation in the village of Huntington, in trust for the support of a minister of that church, of the income of an invested fund, was sustained as a valid bequest. It was there held that the provisions of the revised statutes against perpetuities do not affect the property given in perpetuity to religious or charitable institutions. While this case has been disapproved as to another bequest involving the existence of the English system of charitable uses in this state, its decision sustaining the bequest referred to has not only never been questioned, but has been expressly approved in subsequent cases in this court. *Vide Wetmore v. Parker*, 52 N. Y. 457; *Holland v. Alcock*, 108 N. Y. 837. In *Holland v. Alcock*, *supra*, Judge Rapallo, after commenting upon the present condition of the law on this subject, says: "Under this system many doubtful and obscure questions disappear, and give place to the more simple inquiry whether the grantor or deviser of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift." In the case at bar both these questions must be answered in the affirmative. It is not denied that the gift of money to buy coal for the poor of the churches named is directly within the provisions of the various statutes defining the powers and objects of the corporations interested. They are empowered to acquire real and personal property, in a limited amount, for the use of the church, or other pious uses, and they are permitted to employ such property, among other objects, for the relief of the poor. The fact that the testator has designated the purpose for which this legacy must be used does not indicate a desire upon his part to create a trust. If it were necessary, in order to sustain the bequest, these words of designation by the testator might be treated as merely precatory, but we think it was entirely competent for him to apply his bounty to the whole or any one or more of the various purposes for which the corporations are authorized to hold property. This is fully reasoned by Judge Denio in *Williams v. Williams*, 8 N. Y., bottom page 530.

The fundamental error in this case in the court below, and in cases that are frequently
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coming to the attention of this court, is the failure to recognize the fact that gifts to religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense, do not offend against the statutes of perpetuities, and are not to be judged by any of the well-known rules pertaining to the law of trusts as applied to private individuals. It would be impossible at this late day to add anything to the learned discussion of the foremost judges and counsel of this state in a legal contest which assailed the case of *Williams v. Williams*, *supra*, in so far as it sustained the English doctrine of trusts for charitable uses, and resulted in establishing that the doctrine had no place in our jurisprudence, but that a system created by the statute law of the state of organized corporate bodies with power to administer public charities, and legal capacity to receive and hold property for that purpose, was intended to take its place. *Holland v. Alcock*, 108 N. Y. 812. Gifts to these corporations can be made without invoking the aid of trusts. The mortmain policy of this state is very simple, and is illustrated in the charters of our religious and charitable corporations. The amount of property which they may take and hold in mortmain is restricted, but their ownership is absolute, and only qualified by their artificial nature. *Wetmore v. Parker*, 52 N. Y. 458.

The respondents urged that the case of *Fosdick v. Hempstead*, 125 N. Y. 581, 11 L. R. A. 715, is an authority sustaining the views of the general term. The point decided in that case leads to no such conclusion, and the decision is in harmony with the views we here express. In that case a bequest to the town, in trust, in perpetuity, for the benefit of the poor of the town, not confined to those for whose support it was under a statutory liability, was held invalid for want of an ascertained beneficiary. It was further held that, in the absence of a special grant of power by statute, a town cannot act as trustee of property given for charitable purposes. Judge Peckham, after a review of many of the authorities, beginning with the *Williams Case*, uses this language: "It is this circumstance, that the gift in this case is not for corporate purposes, which takes it out of the principle on which the cases cited were decided. The cases of *Wetmore v. Parker*, 52 N. Y. 459; *Le Conte v. Buffalo*, 83 N. Y. 838; *Vail v. Long Island R. Co.* 106 N. Y. 288, 60 Am. Rep. 449,—were all instances of a gift to a corporation having power to take for the purposes for which the gift was intended, and hence a direction accompanying the gift that it was to be used only for a corporate purpose, or that the income only was to be used, did not create a trust. It was simply saying that the gift was for the purpose of aiding the corporation in the discharge of some of its corporate functions."

The judgment appealed from should be reversed and the judgment of the special term affirmed, with one bill of costs to the defendant churches.

All concur.

ALABAMA SUPREME COURT.

FIRST NATIONAL BANK OF BIRMINGHAM, *Appt.*,

B. M. ALLEN.

(100 Ala. 478.)

A bank depositor owes to the bank the duty of examining returned vouchers and reporting forgeries to the bank.

3. A bank depositor who entrusts the duty of examining vouchers to a clerk who has forged his employer's name on checks is charged with the clerk's knowledge of the forgery.
3. A bank depositor will be held responsible to the bank for failure to impart to its knowledge of forgeries of checks possessed by his clerk if he entrusts to his clerk the duty of examining the vouchers, although the clerk deceives him and keeps him in ignorance of the forgeries.
4. In case the bank depositor fails to notify the bank of forged checks returned in his vouchers, the bank is entitled to hold him liable for damages caused to it by such failure.
5. A stated account is open to rectification upon proof at any time before the limitation period has run, from the time of its rendition.

NOTE.—Duty of depositor in respect to forged checks charged to him by the bank.

- I. In general.
- II. As to forged indorsements.
- III. As to raised or altered checks.
- IV. Examination entrusted to agent.

I. In general.

The above case touches questions of practical importance on which the decisions are in some conflict. That a bank is in fault and liable, in the first instance at least, for the loss sustained by its payment of a forged check is unquestionably settled law and is assumed if not decided to be so in all the decisions on this subject. As for instance in *Crane v. Dexter Horton & Co.* (1893) 5 Wash. 479, in which the question was one of fact respecting the alleged forgery of a check.

The same doctrine is illustrated in *Georgia R. & Bkg. Co. v. The Love & Good Will Soc.* (1890) 85 Ga. 293, where a bank paying a forged check, knowing the depositor could not write, but relying on the statement of the person presenting the check that he signed the depositor's name with authority to do so, was held liable to the depositor.

Although in *Hager v. Buffalo Sav. Bank* (1894) 10 Misc. 455, a cashier paying forged checks, especially after his suspicion was aroused, was held negligent and the decision put upon that ground, the authorities are amply sufficient to make a bank liable in such case irrespective of the cashier's negligence, as a payment on a forged check is as to the depositor in reality no payment.

Even lack of care in keeping a check book is held not sufficient to make a depositor liable for the payment of a check forged by his clerk. *Mackintosh v. Eliot Nat. Bank* (1877) 123 Mass. 368.

A savings bank is also held liable to a depositor for the payment of forged checks to a person having possession of the pass-book where the checks were not witnessed as required by by-law, even if the depositor was guilty of contributory negligence

6. Damages which a bank is entitled to claim against a depositor because of his failure to promptly notify it of forged checks returned in his vouchers, is, in case the forger is arrested and a part of the money recovered, the difference between the amount paid on the checks and the amount so recovered.

7. A depositor who fails to notify a bank of forged checks returned in his vouchers is estopped from holding the bank liable for subsequently paying similar forgeries.

8. In balancing an account between a bank and its depositor, whose clerk has forged checks which were cashed by the bank, when the vouchers are lost so that the stubs of the checks are relied on to show the amount for which checks were drawn, the court is not authorized to charge the bank for the whole amount of the check for which there is a stub corresponding in number but not in amount, unless it is shown that the depositor did not owe money or draw checks for the amount expressed in the stubs.

9. If upon discovering the forgery of checks, the bank, without knowing that it has previously paid similar checks, makes good the amount to the depositor, who has failed to notify the bank of previous forgeries, it may use the amount so paid as a counterclaim when sued for the amounts represented by the prior forgeries.

10. The depositor may be required to

in failing to keep possession of the book. *People's Sav. Bank v. Cupps* (1879) 91 Pa. 315.

But a question as to which the courts are at variance is as to the effect of a depositor's failure to discover the forgery of checks charged to him by the bank after the account has been balanced and his checks returned to him. One line of cases treats the question from the standpoint of an account stated and hold that the balance shown by the bank statement is *prima facie* correct, but is not conclusive against the depositor. This is the doctrine of *American Nat. Bank v. Bushey* (1881) 45 Mich. 135, where a depositor on notification by the bank some time after he supposed that his account was all drawn, that he had a balance there, immediately drew it out, but subsequently claimed that forged checks had been charged against him.

Somewhat more guardedly stated it is held in *Hardy v. Chesapeake Bank* (1879) 51 Md. 533, 34 Am. Rep. 325, that a depositor is not bound at his peril and under all circumstances to detect the forgery, but that he is simply bound to refrain from any act to mislead the bank to its hurt or injury and not to fail to do any act which duty requires of him for the protection of the bank. It is further declared that after a reasonable time from the return of the checks and his balanced book, the statement is presumed correct, but is only *prima facie* so. The court holds that knowledge of the depositor or else carelessness and indifferent failure to inform himself by the exercise of ordinary diligence required of business men must be shown to make him liable for the payment of a forged check and that to raise an estoppel the bank must be misled to its injury.

A series of New York cases also hold that the most that can be claimed against a depositor by reason of his failure to discover the forgery of checks is that retaining his account without objection after reasonable time is deemed an acquiescence and an admission of its correctness as by

separate the true from the false signatures upon the witness stand in an action by him against the banks for the amount of the forged checks charged against him, and his inability to do so is a circumstance for the jury in weighing the evidence.

(December 20, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover money deposited with a bank which was shown to have been paid out on forged checks. *Reversed.*

The facts are stated in the opinion.

Mr. E. K. Campbell, for appellant:

The relations of banks with their depositors are those of debtors and creditors.

2 Morse, Banks & Banking, 8d ed. § 568.

The balancing of the depositor's pass-book and its return with the vouchers or paid checks by the bank constitute an account stated, and cast on him the burden of impeaching its correctness.

2 Morse, Banks & Banking, 8d ed. 756;

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811.

There was a duty growing out of the relations of plaintiff and defendant which called for an examination by him of the returned vouchers and pass-book.

Leather Mfrs. Nat. Bank v. Morgan, *supra*;

American Nat. Bank v. Bushey, 45 Mich. 140;

Dana v. National Bank of the Republic, 132

Mass. 158; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 825.

If plaintiff committed the examination to his clerk, he is bound by the knowledge which the examination by himself would have disclosed.

Dana v. National Bank of the Republic, and *Leather Mfrs. Nat. Bank v. Morgan*, *supra*.

If the depositor was negligent, or failed in his duty in reference to examining his pass-book and vouchers, and if by reason of any negligence on the part of the depositor, or by reason of his delay in examining or reporting errors in his bank account when the pass book and vouchers are returned, the bank sustains damages or loss which it otherwise would not have sustained, the depositor may be held to have ratified the payments by the bank or be estopped to deny them.

Leather Mfrs. Nat. Bank v. Morgan, *supra*; *Weinstein v. National Bank of Jefferson*, 69 Tex. 38; *Janin v. London & S. F. Bank*, 14 L. R. A. 820, 92 Cal. 14; *American Nat. Bank v. Bushey*, *Dana v. National Bank of the Republic*, and *Hardy v. Chesapeake Bank*, *supra*; 2 Morse, Banks & Banking, 8d ed. 756; 3 Am. & Eng. Encyclop. Law, p. 223, title *Checks*.

It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the alleged forger.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 115, 29 L. ed. 818.

Mr. B. M. Allen, appellee *in propria persona*:

The balancing of plaintiff's pass-book, and

account stated, but that this is only *prima facie* and not conclusive. *Welser v. Denison* (1864) 10 N. Y. 68, 61 Am. Dec. 731. This case holds also that if the bank has not been induced by the silence of the depositor to take any action and has not lost any rights by reason of his silence, the only effect is to cast on him the burden of proof of any fraud, error, or mistake in the account.

This case is followed in *Welsh v. German American Bank* (1878) 73 N. Y. 424, 29 Am. Rep. 175, affirming 10 Jones & S. 462; *Wachman v. Columbia Bank of the City of New York* (1894) 8 Misc. 280, affirming 6 Misc. 62; *Frank v. Chemical Nat. Bank* (1874) 5 Jones & S. 28, (1881) 84 N. Y. 209, 38 Am. Rep. 301, affirming 13 Jones & S. 462. See also *infra* as to forged indorsements.

In *Welsh v. German American Bank*, *supra*, it is said that *Welser v. Denison*, *supra*, "held that a depositor owes no duty to a bank which requires him to examine his pass-book or vouchers with a view to the detection of forgeries of his name."

And this doctrine is also declared in *Wachman v. Columbia Bank of the City of New York* (1893) 4 Misc. 62, but this seems to be an extreme statement of the doctrine of *Welser v. Denison*. That case in fact can hardly be said to decide any more on this point than the case of *Frank v. Chemical Nat. Bank*, *supra*, affirming 13 Jones & S. 462, which states the doctrine to the effect that a depositor's duty is only that of ordinary care, and that such care exercised by himself or his agents is sufficient to relieve him from responsibility, although he fails to discover a forgery of checks until it is too late for the bank to obtain a remedy against other parties.

This doctrine is stated in substantially the same way in *Wachman v. Columbia Bank of the City of New York* (1894) 8 Misc. 280, affirming 6 Misc. 62.

It is not quite easy to say whether or not the 27 L. R. A.

above decisions establish in either of the respective jurisdictions so broad a doctrine as that a depositor owes no duty to make any examination of his account and returned checks among which are forgeries. It is doubtful if the courts within those jurisdictions would consider themselves bound to hold that doctrine. In fact the duty to exercise some care seems to be recognized in the decisions last cited. If that were conceded the question in dispute would be simply as to the degree of care and diligence required.

That such a duty does exist is declared in several well-considered cases which have carefully reviewed the cases above cited. Thus in *Janin v. London & S. F. Bank* (1891) 14 L. R. A. 820, 91 Cal. 14, it is explicitly declared that a depositor owes to the bank the duty of examining his checks within a reasonable time after they are returned to him in order to discover and give notice of any forgeries, but that his delay in doing so will not throw on him the loss of the payment of a forged check by the bank unless the bank was injured by the delay.

The same doctrine is declared in *Weinstein v. National Bank of Jefferson* (1897) 69 Tex. 38, in which case it was held that two months' delay in discovering the forgery would not constitute an estoppel without proof that the bank was damaged thereby, and that the question whether or not the bank was prejudiced was for the jury.

The same doctrine is declared in *Leather Mfrs. Nat. Bank v. Morgan* (1885) 117 U. S. 96, 29 L. ed. 811, which is further cited *infra* under the division as to altered checks.

A depositor who returned a forged check within a few hours after his book was balanced and checks returned was held to act with due diligence, although he knew before that his account was overdrawn where the overdraft was not caused by

returning same to him, with the canceled checks or vouchers, had no other effect than to render said balances accounts stated, subject to correction. The plaintiff having received and accepted said balances as a correct statement of his account, the burden of proof is on him to show errors in the same.

First Nat. Bank of Washington v. Whitman, 94 U. S. 848, 24 L. ed. 229; *Manhattan Co. v. Lydig*, 4 Johns. 877, 4 Am. Dec. 289; *Phillips v. Belden*, 2 Edw. Ch. 1, 6 L. ed. 285; *Kinsman v. Barker*, 14 Ves. Jr. 578; *Bullock v. Boyd*, 2 Edw. Ch. 293, 6 L. ed. 405; *Barrow v. Rhinelander*, 1 Johns. Ch. 550, 1 L. ed. 242; *Sherman v. Sherman*, 2 Vern. 278; *Perkins v. Hart*, 24 U. S. 11 Wheat. 237, 6 L. ed. 463; *Hall v. Huse*, 10 Mass. 40; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111.

The plaintiff was under no obligation to the bank to examine his pass-book and vouchers.

Weisser v. Dennison, 10 N. Y. 68, 61 Am. Dec. 731; *Welsh v. German American Bank*, 78 N. Y. 424, 29 Am. Rep. 175; *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576.

The doctrine of estoppel invoked by plaintiff in error cannot prevail, because there is nothing to show that had the bank had earlier knowledge, it could have recouped against the forger.

Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; *Herman*, Estoppel, pp. 8, 384, 385; *Dezell v. Odell*, 8 Hill, 223, 88 Am. Dec. 628; *People v. Brown*, 67 Ill. 435; *Martin v. Zellerbach*, 88 Cal. 300, 99 Am. Dec. 865; *McKensie v. British Linen Co.* 44 L. T. N. S. 481.

The balancing of the depositor's account and

the rendition of the vouchers, including the forged ones, only makes an account stated. The depositor is not bound personally to examine the same. If the examination is confided to a clerk, it is sufficient. If the clerk uses his position to perpetrate forgery, the loss is still on the bank.

Weisser v. Dennison, and *Welsh v. German American Bank*, *supra*; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 88 Am. Rep. 501; *Manufacturers Nat. Bank v. Barnes*, *supra*; *Morse, Banks & Banking*, p. 358; *First Nat. Bank of Leavenworth v. Tappan*, 6 Kan. 456, 7 Am. Rep. 568.

When forged checks have been paid and charged to the account of the depositor and returned to him, he is under no duty to the bank to so conduct the examination that it will lead necessarily to the detection of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, was the loss of the bank.

Frank v. Chemical Nat. Bank, *supra*.

The plaintiff was not chargeable with notice of the wrongful acts of Tomlin; such acts were not within the scope of his agency or employment.

Weisser v. Dennison, 10 N. Y. 76, 61 Am. Dec. 731; *Foster v. Essex Bank*, 17 Mass. 478, 9 Am. Dec. 168; *Lewis v. Read*, 13 Mees. & W. 834; *Lyons v. Martin*, 8 Ad. & El. 512; *Schmidt v. Blood*, 9 Wend. 268, 24 Am. Dec. 143; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 470, 51 Am. Dec. 815.

the forged check. *Laborde v. Consolidated Asso. of Planters* (1843) 4 Rob. (La.) 190, 39 Am. Dec. 517.

A drawer was held negligent in not returning a forged check or demanding payment where he told the drawee bank to keep still and that bank with knowledge of the forgery told another bank to which payment of the check was made that it was all right, this being done to permit investigation of the forgery. *Van Wert Nat. Bank v. First Nat. Bank* (1891) 6 Ohio C. C. Rep. 120.

Failure of the depositor to discover that unauthorized checks had been made by his clerk after the expiration of the time named in a power of attorney held by the bank was not negligence such as to relieve the bank from loss where the checks showed on their face that they were made by the clerk. *Manufacturers Nat. Bank v. Barnes* (1872) 65 Ill. 69, 16 Am. Rep. 576.

Analogous to these cases is the decision that after nearly three years' delay a county which has received forged county warrants cannot recover on account of them if it is not shown that the other parties' rights remain unimpaired. *State v. Abramson* (1893) 57 Ark. 142.

Similar to the question of repudiating a forged check is the case of the delay of an acceptor of a draft in discovering the forged acceptance of a duplicate draft which was returned to him on sending a check to pay his supposed draft before maturity on notice from the holder. This was held not negligence such as to charge him with the loss. *First Nat. Bank of Leavenworth v. Tappan* (1870) 6 Kan. 456, 7 Am. Rep. 568.

II. As to forged indorsements.

The question of the duty of a depositor to discover and report forged indorsements on his checks is distinguishable from that of his duty to discover the forgery of his signature. Nevertheless

the cases have been cited interchangeably in some of the decisions.

The same rule of reasonable diligence may apply, but it would seem that reasonable diligence might often be entirely ineffectual to discover forged indorsements as it cannot be presumed that the depositor is acquainted with the handwriting of the payee or other persons who may indorse his check.

As the depositor of a bank is not presumed to know the signature of the payee of his check he is not guilty of negligence in failing to discover a forgery of the payee's indorsement on receiving his pass-book. *Brixen v. Deseret Nat. Bank* (1888) 5 Utah, 504. In this case the forgery was not discovered until a year after the check was returned by the bank, but it was held that this did not relieve the bank, at least without showing that it was actually damaged by the delay.

In *Atlanta Nat. Bank v. Burke* (1888) 2 L. R. A. 66, 81 Ga. 597, it is decided, distinguishing the case of *Leather Mfrs. Nat. Bank v. Morgan* (1885) 117 U. S. 96, 39 L. ed. 811, that the depositor was relieved from any diligence whatever or any obligation to look to see whether the check was paid upon a forged indorsement or not by the fact that the bank reported in his account that it was paid to the person named as payee, and that there was nothing in the account to put him on notice that there was a forged indorsement.

In *Third Nat. Bank of City of New York v. Merchants Nat. Bank* (1894) 76 Hun, 475, it is held that a bank paying a check on a forged indorsement cannot get rid of its liability by showing negligence in discovering the forgery, and that the depositor is under no duty to unearth the forgery but has a right to presume that all signatures and indorsements are genuine. Yet the case holds that after discovering such forgery it is his duty to give notice promptly, although delay in this respect will

Coleman, J., delivered the opinion of the court:

The plaintiff, Allen, a depositor, sued to recover money which had been paid by the defendant bank upon checks to which plaintiff's name had been forged by his clerk, Tomlin. The forgeries covered a period extending from about the 5th of September, 1890, to March 4, 1891, at which latter point of time the forgeries were first actually known to the depositor. It was a rule of the bank about once a month to post up the depositor's pass-book, and render him a statement, showing the deposits and checks and the balance. This rule was observed regularly in this case, and the forged checks, with other vouchers, were delivered to the depositor monthly from September, 1890, to March 4, 1891, with his pass-book. The material defense of the defendant is stated in its special pleas marked D and E, the former of which, after stating the rule of the bank, and the rendition of the monthly statement, and facts to show it acted with due care, avers that the plaintiff was negligent in his duty in not making proper examination of the monthly accounts rendered the plaintiff and vouchers, which would have led to the discovery of the forgeries, and prevented the consequent loss to defendant. The latter plea (E) avers substantially that defendant was furnished with the means in the pass-book and vouchers to detect the forgeries, and was so chargeable with notice thereof, and a neglect of duty on the part of the plaintiff to the defendant in not discover-

ing the forgeries and informing the defendant in time to prevent the successful repetition of forgeries and subsequent loss to defendant. The court overruled a demurrer to these two pleas, and issue was joined upon them. The case was tried without the intervention of a jury, and judgment rendered for the plaintiff, from which judgment the defendant appeals.

It will be seen from this statement of the pleadings that the defendant received the benefit of the principle of law invoked by the defendant in pleas D and E, that a depositor owes a duty to the bank to examine within a reasonable time and with due care the account rendered in the pass-book and the vouchers returned by the bank to the depositor. We will refer to this principle again. As the court found for the plaintiff, it must have found that the plaintiff, under the facts, was not negligent, and was not chargeable with knowledge of the forgeries in time to have prevented loss to the defendant, in consequence of forgeries perpetrated after the return of prior forged checks to the depositor with his pass-book. Were the conclusions of the court authorized by the evidence? If, as matter of law, as is insisted by the plaintiff, Allen, the depositor owed no duty to the bank to examine the vouchers, then the conclusion of the court must be sustained, upon this principle, however negligent the depositor may have been in his examination of the pass-book and vouchers. On this proposition the authorities are not in harmony. The case of *Weiss v. Denison*,

not make him liable unless it results in damage to the bank.

It is also held in *Harlem Co-Operative Bldg. & L. Assn. v. Mercantile Trust Co.* (1894) 10 Misc. 680, that delay in discovering forged indorsements on a check will not throw loss on a depositor without proof of damage from the delay.

The case of *August v. Fourth Nat. Bank of New York* (1888) 15 N. Y. S. R. 956, following *Weiss v. Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731, held that a depositor's delay in discovering the forgery of indorsements on checks merely threw the burden of proof on him to show that the account stated by the bank was incorrect.

In *Bank of British North America v. Merchants Nat. Bank* (1881) 13 N. Y. Week. Dig. 374, it is declared that a depositor is under no obligation to examine his pass-book for the purpose of discovering the forgery of indorsements on his checks. This decision is affirmed in 91 N. Y. 106, without discussion of this question, where the court merely decides that the action was not barred by the statute of limitations. See, in connection with these cases, the New York cases cited in preceding division.

In *Shipman v. Bank of the State* (1891) 13 L. R. A. 791, 126 N. Y. 818, the court found that the failure to discover forged indorsements on checks was not due to any negligence of a depositor who had committed the examination of the vouchers when returned from the bank to a faithful and competent cashier, and said the law imposed no duty on the depositor to do more than he did to ascertain whether the indorsements were genuine, but it was declared in the case that when a bank returns a check to the depositor the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. It was also

said the drawer is not presumed to know and in fact seldom does know the signature of the payee.

III. As to raised or altered checks.

Where numerous raised checks were included in accounts balanced which were stated several times in about six months before the forgery was discovered and the forger absconded, before notice to the bank, the depositor was held liable for his failure to discover the forgery. *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 94, 29 L. ed. 611. The court declared that it was the depositor's duty to discover the alteration of the checks within a reasonable time, but that his duty did not extend necessarily to so close and thorough an examination as would preclude the possibility of overlooking an error.

On the other hand, in *Cincinnati Nat. Bank v. Creasy* (Cin. Super. Ct.) (1897) 18 Week. L. Bull. 410, it is held sufficient for the depositor to give notice of the forgery of his checks as soon as the forgery is discovered, and that the duty to give notice in a reasonable time which has been held to exist in the case of raised checks does not exist in the case of a forgery of the signature of the drawer.

The alteration of the payee's name on a check was considered in the case of *Dana v. National Bank of the Republic* (1882) 133 Mass. 154, where it was held that the depositor must exercise due diligence in examining his returned checks to discover such forgery.

IV. Examination intrusted to agent.

The cases seem irreconcilable on the question of the effect of intrusting the examination of returned checks and pass-book to the agent if he happens to be the forger.

That it is sufficient to intrust the examination to

10 N. Y. 69, 61 Am. Dec. 731, may be considered as an authority sustaining the proposition that a depositor owes no duty to the bank, in the matter of the examination of the pass-book and vouchers. In the same line, but not so positive, may be cited *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 89 N. Y. 209, 38 Am. Rep. 601; *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576. In the case of *Frank v. Chemical Nat. Bank*, *supra*, we observe the court uses this language: "It does not seem to be unreasonable, in view of the character of business, and the custom of banks to surrender its vouchers, on the periodical writing up of the account of its depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank which it would not have suffered if such examination had been made, and the bank had received timely notice of objections, preclude the depositor from afterwards questioning its correctness." In a yet later case, — *Shipman v. Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791, — by a careful reading it will be seen that, while the court held to the rule that the bank must know the signature of its depositors, and must ascertain at its peril that the payee has in fact indorsed the check, it does not affirm the rule that a depositor owes no duty to the bank to examine the account and checks returned. On the contrary, the conclusion of the court is rested upon the fact that the agent of the depositor, whose duty it was to examine the account as stated, and the checks returned, did his duty fully, and that, notwithstanding the performance of his duty in this respect, the forgeries escaped detection. In the case last cited (126 N. Y.), the facts

show that it was not the duty of the forger, who was also in the employment of the plaintiff, to examine the pass-book and vouchers, but this duty devolved upon another employé. These New York cases were fully reviewed in the case of *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, in which a different rule is declared, and it is held that "a depositor in a bank, who sends his pass-book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent, and with due diligence, to examine the pass-book and vouchers, and report to the bank without unreasonable delay any errors which may be discovered in them; and, if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass-book." The case of *Dana v. National Bank of the Republic*, 183 Mass. 156, was one in which one Piper, the clerk of the plaintiff, erased the name of the payee, and inserted the name of "bearer" and himself received the money. This check was returned with the pass-book and monthly statement as a voucher. The court uses this language: "The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized, and this included due diligence, not only in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty, and adoption of the check and ratification of the payment will be implied." And in the case of *Weinstein v. National Bank of*

a faithful and competent employé is found in *Shipman v. Bank of the State* (1891) 12 L. R. A. 791, 126 N. Y. 318.

The case of *Weisser v. Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731, decides that where a depositor intrusted the examination of his account to a confidential clerk, who was in fact the forger of checks, the clerk's concealment of the forgery was a continuation and carrying out thereof which imposed no more obligation on his employer than the receipt of the money in the first instance. In this case the bank-book had been written up and balanced several times after the forgeries began.

The same doctrine is followed in *Welsh v. German American Bank* (1878) 73 N. Y. 424, 29 Am. Rep. 175, although it was found in that case that the fraud would not have been disclosed by the examination of the pass-book and vouchers alone without comparing the checks with the accounts of the payee whose indorsement was forged.

In *Wachsman v. Columbia Bank of the City of New York* (1894) 8 Misc. 28, affirming 6 Misc. 63, it was held that the depositor exercised ordinary care by intrusting the duty of examining the book and vouchers to the usual agent in the ordinary course of business, although he was the forger, and that it did not appear unusual to permit a book-keeper who wrote out the body of checks and made the entries on stubs to compare the returned checks with the stubs without any supervision.

In *Hardy v. Chesapeake Bank* (1879) 51 Mo. 522, 34 Am. Rep. 335, it is also held that the knowledge of 27 L. R.

the agent who did the forgery cannot be imputed to the principal in such a case.

In *August v. Fourth Nat. Bank of New York* (1886) 15 N. Y. S. R. 956, the court seems to depart from the doctrine of the New York cases and holds that the same rule should be applied as if the checks had been returned to the depositor himself and he had failed to examine them, where the book-keeper who forged checks received and examined them on their return. The court said the depositor committing the examination of these accounts to the employé became responsible for his frauds and his knowledge was the knowledge of the depositor; but the effect of such knowledge is held in that case merely to throw the burden of proof on the depositor to show the forgery.

But differing from the above cases and agreeing with the main case of *FIRST NAT. BANK OF BIRMINGHAM v. ALLEN* it is held in *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, that while a depositor may intrust the examination of his account to a competent agent or clerk, yet if the agent was the forger and has an interest in concealing the facts the depositor is in no better position than if he had caused no examination to be made, unless he exercises diligence in supervising it.

So in *Dana v. National Bank of the Republic* (1882) 182 Mass. 156, it is held that an examination made by a clerk who committed the forgery charges the depositor with notice. B. A. R.

Jefferson, 69 Tex. 88, the rule was distinctly recognized that, if loss or injury resulted to the bank in consequence of the negligence of the depositor to examine the account and vouchers within a reasonable time, which duty, if performed, would have led to the detection of forged checks, and prevented the loss, such neglect of duty was available to the bank in a suit by the depositor to recover the amount of the forged checks. So in the case of *De Foriet v. National Bank of America*, 23 La. Ann. 810, 8 Am. Rep. 597, it was held that a depositor should not recover the amount of a second forged check, he having failed to denounce as a forgery a previous check forged by his bookkeeper of which the depositor had knowledge, and failed to disclose the forgery of the first check to the bank. Other cases might be cited. The weight of authority and the best considered cases hold that the depositor owes a duty to the bank; and when the character of the business, the relations of the depositor and bank to each other, and the purposes for which at prescribed intervals the account is stated, and pass-book and vouchers (the evidence of the bank) delivered to the depositor are taken into consideration, the conclusion of these authorities is supported by sound reason and just principles.

Does the evidence show such omission of duty on the part of the plaintiff as to make him liable, and did loss result proximately to the defendant from such omission? The evidence shows that on each occasion after the return of the pass-book and checks, the plaintiff, with the assistance of his clerk, Tomlin, the forger, examined the account as rendered, and the checks or vouchers. We may conclude the evidence shows that the plaintiff himself personally was without fault in this respect, and, but for the fact that his clerk, Tomlin, was the forger, the false checks would have been discovered by the examinations which were in fact made. The evidence shows that in these examinations Tomlin either called from the pass-book and the plaintiff the checks, or *vice versa*, and Tomlin, knowing when a forged entry or check was reached, answered in such a way as to deceive the plaintiff. Tomlin, the clerk and forger, had knowledge of the forged checks. Was such knowledge of the agent chargeable to his principal? The case in 183 Mass., *supra*, holds that the principal is chargeable with notice under such circumstances, and we are of opinion the conclusion is supported by reason and sound principles of law. It is clear that in forging the checks Tomlin did not act within the scope of his authority, but upon what principle can it be said that in the matter of examining the pass-book and vouchers he was not acting within the scope of his authority? He was appointed and directed by the plaintiff to do this very thing. If Tomlin had not been the forger, and in no manner interested in concealing the forgeries, and in making the examination of the pass-book and vouchers had discovered that numbers of the checks were forgeries committed by other persons, would not such knowledge on his part be chargeable to the

principal? The law is that the principal is chargeable with the knowledge of such facts as the agent acquired acting within the scope of his business. Is the rule to be changed because of the dishonesty of the agent? His dishonesty cannot change his relationship to his principal, to the detriment of third parties. If the duty would have been within the scope of an honest clerk, it is none the less within the scope of duty of a dishonest clerk. We have held that it was the duty of the depositor by himself or an authorized agent to examine the account and vouchers or checks. If the agent employed by him to perform this duty is culpably negligent, is not the principal to be held liable for such want of due care on the part of the agent? Or if the agent, in making such examination, detects palpable forgeries, is not the principal chargeable with the knowledge of his agent? It can make no difference that the agent himself was the forger, and did not act within the scope of his authority in perpetrating the forgery. He was acting within the scope of his employment in the examination of the vouchers, and it then became his duty to his employer to make known the forgery, as much so as if the forgeries had been perpetrated by some other person, which were discovered by him in the examination made. Our opinion is that, under the circumstances, the plaintiff was chargeable with the facts within the knowledge of his agent and clerk at the time of the examination of the pass-book and vouchers, and which should have been communicated to the principal or the bank. Certainly the bank should not suffer because of the fact that plaintiff's dishonest clerk prevented the plaintiff from doing his duty to the bank. 183 Mass., *supra*.

What is the proper measure of relief to which the bank is entitled in such cases? Some of the courts have held that, if injury results to the bank by the negligence of the depositor, he will be held to have adopted and ratified the payment of the forged checks. By others, under like circumstances, the doctrine of estoppel has been applied, and the depositor held to be estopped from asserting a claim to the money paid on the forged checks. We do not think that either the doctrine of ratification or estoppel can be applied as a just and equitable principle in all cases. Ratification refers to a past act or transaction, and, as now being considered, refers to the unauthorized act of an agent, or the adoption of a past act or transaction as his own act, made or executed by another, who was not an agent. It would strain the doctrine of ratification to hold that a person had ratified or adopted as his own the unauthorized act of another, of which he had no information, or which was promptly repudiated as soon as brought to his knowledge. So, where a bank pays a forged check drawn in the name of one of its depositors, and the depositor is wholly free from neglect or fault, the bank owes the amount to the depositor. There was no act, omission to act, or silence in such a case on the part of the depositor which induced the bank to pay the forged check, or influenced the action of the

bank in the payment of the check. No principle of the law of estoppel can be invoked by the bank against the depositor under such circumstances. The depositor owed the bank a duty, which was to examine the pass-book and vouchers with reasonable care and diligence. If the depositor failed in his duty in this respect, and the bank was injured in consequence of such omission of duty, the depositor became liable to the bank for all such damage. The extent of the liability of the depositor is commensurate with the loss sustained in consequence of his neglect of duty; no more, no less. It would be unjust, unfair to the depositor, not sanctioned by any correct principle of law, to permit the bank to invoke the doctrine of ratification or estoppel which would exempt the bank from all liability incurred by its own neglect in the payment of the forged check, and in many cases inflict upon the depositor a greater loss than that caused to the bank by his neglect of duty. The damages sustained by the bank as the result of neglect of duty by the depositor are as susceptible of proof and measurement as arise in any other case of breach of duty imposed by contract. The pleadings may be framed to present the issue in a proper manner.

An account rendered, to which no objection is made after a reasonable time allowed for examination, will be held in law as prima facie correct, but the presumption may be overcome by proof, either when the debtor is sued upon the account, if there is an error to his prejudice, or by the plaintiff by suing for the proper amount. An action for money had and received is not barred in this state until six years have expired, and up to that time a stated account is open to rectification upon proof. Neither will the fact that the bank has by mistake omitted from the account rendered and vouchers returned a proper charge prevent the bank within any reasonable time from correcting the error, and recovering back the omitted check, no injury having resulted to the depositor. Although a depositor may have failed in his duty in not making the examination of his pass-book and vouchers, or did not exercise due care in the examination, or, having knowledge of a forged check, failed to make it known to the bank, and thereby become liable to the bank for an omission of duty, yet if, after this liability has accrued, the forger is arrested, and the money, in whole or in part, is recovered by the bank, the damage to the bank by reason of the negligence of the depositor is not the whole amount wrongly paid out on the forgery, but the difference between that amount and the amount recovered back by the bank. So, also, if the depositor makes timely discovery of the forgery, and discloses it to the bank, the bank is liable for the whole amount of the forged check to the depositor, notwithstanding by all diligence the bank failed to realize anything from the forger. The correct principles by which the respective liabilities of the bank and depositor are determined are these: The bank is bound to know the signatures of its depositors, and the payment of a forged check, however skill-

fully executed, cannot be debited against the depositor. From the relations the depositor and the bank bear to each other there is a duty also upon the depositor to examine his account and vouchers, and to make known to the bank any improper vouchers or charges returned, and, where injury results to the bank from the failure of the depositor to do his duty in this respect, the law holds the depositor liable for such injury, the result of the depositor's omission.

These principles of law apply in the present case to the forged checks which were paid by the bank in the first instance, and before the plaintiff was chargeable with knowledge of the forgery. Their application violates no established rule of law, gives neither an undue advantage of the other, and holds both responsible for the obligations growing out of their respective relations to each other. The evidence shows that several checks were forged by Tomlin and paid by the bank subsequent to the time that Allen, the plaintiff, was chargeable with notice that his clerk was making such unauthorized use of his name. As to all such subsequent payments of forged checks the bank is entitled to invoke the equitable doctrine of estoppel. As to these, it may be fairly said the bank was induced to pay and did pay in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. A very interesting and instructive collection of leading cases on the questions under consideration may be found in volume 26 of American Law Review for March and April, 1892, page 274. We cannot believe from the evidence that if the plaintiff had promptly made known to the bank the forgeries of his clerk at the time he was chargeable with a knowledge of their existence, the subsequent forgeries could have been successfully carried out. The evidence shows that upon his discovery of the forgery the plaintiff had Tomlin arrested, but his arrest, and even his conviction, would not necessarily reimburse the bank, or exclude the doctrine of estoppel; and, as to the subsequently forged checks, we cannot see that the bank was under any obligation to prosecute the forger. As to the subsequent forged checks, the fault was with the depositor. Our conclusion is the evidence supported the special plea E of the defendant.

We are of opinion the court erred in arriving at the balance of money due the plaintiff. The evidence is not clear as it might be made, but, as we understand the record, it shows that the forged checks, the cause of the present action, had been abstracted from the plaintiff's book, presumably by his clerk, who had access to it and the vouchers at all times. The plaintiff had a check book with marginal space, on which was entered the number of the check, the name of the payee, the amount of check and date, and when the check was taken off the stub showed these memorandums; and plaintiff testified that he was careful in every instance, before signing the check, to see that it corresponded with the stub. The balance against the bank was ascertained by charging to the bank payments made on checks for which there were no cor-

responding amounts entered on the stub of plaintiff's check book. Under the evidence in this case, we do not think this was sufficient data upon which to base a charge, for the following reasons: Tomlin, introduced as a witness by plaintiff, testified "that he frequently filled out the stubs, and also the checks for plaintiff's signature, but that he (Tomlin) had no authority to sign plaintiff's name; that several times, in attempting to sign plaintiff's name, he had not made what he considered a skillful forgery, and he destroyed such checks without uttering them, and that the stubs corresponding with such checks were left in the check book, filled out. That sometimes when he committed a forgery he wrote the stub for one amount and the check for a different amount." It seems that neither the plaintiff nor the witness Tomlin, by an examination of the stub of the check book, could point out the instances in which forged checks were uttered. The defendant's evidence showed that its cash book did not disclose to whom the money on checks was paid, but only the date and amount; "that there were the same number of stubs on the plaintiff's check book as there were of charges on the bank book, but the several sums on the stubs were not the same, but usually smaller, than the charges on the bank book." Ordinarily it would seem that the plaintiff ought to be able to ascertain to whom he was indebted, and the amount of such indebtedness, and, if he did not have the data himself, the payee, as shown by the stub on the check book, was competent to testify, and ought to be examined on this point. If a genuine check was signed, and the amount raised by Tomlin, and the payee in fact received the amount due him, the drawer's loss would be the difference between the amount expressed in the check as originally drawn and the amount paid by the bank and charged to the drawer. We do not know that any such case exists, but, in view of the evidence that the checks paid by the bank were returned as vouchers to plaintiff, and while in his possession were lost or stolen, and as plaintiff, by an examination of the stubs of his check book alone, could not determine which were genuine and which were false checks, and as there were stub entries corresponding in number but not in amount to those paid by the bank, and as the plaintiff's clerk and witness himself was the forger, and testified that sometimes the check was altered by inserting a larger amount than entered on the stubs of the check book, we are of opinion the payees of the check as shown by the stub should have been examined, if within the jurisdiction of the court. Without some proof that the depositor did not own and draw checks as shown in the stubs, the court was hardly authorized to charge the bank with the full amount of a payment, simply because the stub of the check book showed no corresponding amount, when there was a stub which corresponded in number, but for a less amount. If the stub's corresponding in number was conclusive to show the check was forged because the check called for a larger amount than the stub, it would not follow from this fact alone that the stub also was a

forgery. There should be other evidence introduced on this point. The evidence shows that when Tomlin was arrested, in March, 1891, he then had on his person eight of the last forged checks. In ignorance of the fact that the bank had knowingly paid forged checks drawn by Tomlin covering a period from September 6th previous to the date of these eight checks, the bank promptly made good to the depositor the amount of the eight checks found on the person of Tomlin. If the payment of these eight checks by the bank resulted from the omission of duty on the part of the plaintiff properly to examine his pass-book and vouchers prior to that time, and his neglect, if he was guilty of such neglect, in not making known to the bank the existence of previously forged checks, and the money was paid under a mistake of fact, there is no legal reason why the amount of the eight checks does not constitute the basis of a counterclaim available to the defendant under proper pleas. This conclusion would follow from the principles we have laid down as law. There was no error in holding that checks which the stubs of the check book showed were in favor of city employes were forgeries, as we construe the evidence on this point. Plaintiff testified positively that he kept an order book also, with a margin for stubs; that whenever he loaned or advanced money to a city employé he invariably took the order of the borrower on the city treasurer in the order book; and that on the stub of the order book the name of the employé, the date, and amount were entered at the time of giving a check on the bank to such employé, and that there were no entries on the stub of the order book to correspond with the stub of the check book. From these data the plaintiff testified positively as to such checks, and thus supplied the omission which occurred as to the stubs in the check book of which he was unable to say whether he had signed checks or not, and which in number corresponded with checks paid by the bank, the difference being that the amounts did not correspond.

Only one other question remains to be considered. The defendant took some of the checks found on the person of Tomlin, and which were forgeries, and others admitted to be genuine, and arranged them so that nothing but the signatures of the drawer could be seen, and plaintiff was requested to point out the genuine and false checks. The plaintiff objected to this evidence and the court sustained the objection. We think this testimony admissible. It is a circumstance that the jury or court should consider in weighing his evidence. The inability of the plaintiff to distinguish the true from the false signatures would not be conclusive against him. He might be able to show by other evidence that certain checks were forged, although he could not himself determine the question by an examination of the signature. Doubtless in many cases a person's name is so skillfully forged that he could not distinguish it from his own proper signature, and yet he may know from the amount or payee or other facts absolutely that the instrument was forged. We think, however, the fact that he cannot

distinguish a signature which he admits to be genuine from that alleged to be false is a circumstance. The rule which prohibits a nonexpert from giving an opinion based upon a comparison of handwriting has no application where the party whose name is signed is himself being examined as to whether the signature in question is his signature or not.

Reversed and remanded.

MAGNETIC ORE CO., *Appt.*

v.

MARBURY LUMBER CO.

(.....Ala.....)

Failure to cut and remove timber within a reasonable time under an absolute grant thereof which specified no time for the removal does not forfeit the title of the grantees in favor of a subsequent purchaser of the land whose conveyance recites the prior sale of the timber.

(November 14, 1894.)

APPEAL by complainant from a decree of the Chancery Court for Chilton County sustaining a demurrer to a bill filed to cancel a deed which had been given to defendant conveying certain timber standing on land which was afterwards conveyed to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Houghton & Collier for appellant.

Mr. J. M. Falkner, for appellee:

Growing trees are a part of the realty, and a sale of these without a compliance with the terms of the statute of frauds does not pass the title.

Heflin v. Bingham, 56 Ala. 574; *McKensie v. Shove*, 70 Miss. 388.

By its deed appellee acquired an interest in the land described in the bill. Appellant had notice of appellee's interest in said lands.

Hirth v. Graham, 19 L. R. A. 721, 50 Ohio St. 57.

Trees while they are standing, fruit, so long as it is hanging to the trees, and crops until they are gathered, are things immovable or real estate, because they are attached to the ground.

Lawson, Rights, Rem. & Pr. § 2681.

The title of the soil, as such, including the surface, may be vested in one person, and that of the mines and minerals in it in another.

Lawson, Rights, Rem. & Pr. Par. 2683.

Coleman, J., delivered the opinion of the court:

We presume the present bill was filed under the provisions of an act of the legislature entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." Acts 1892-93, p. 42. The bill shows that in July, 1881,

NOTE.—As to sale of standing timber, see *Fish v. Capwell* (R. L.) 25 L. R. A. 156; *Mee v. Benedict* (Mich.) 22 L. R. A. 641, also (as to oral sales) *Hirth v. Graham* (Ohio) 19 L. R. A. 721, and *note*. 87 L. R. A.

the Louisville & Nashville Railroad Company, by deed of conveyance regularly executed, sold and conveyed absolutely the "saw timber" growing on certain lands. No mention is made in the conveyance as to when, if ever, the "saw timber" was to be cut and removed, but the "saw timber" is sold and conveyed wholly without condition or limitation. This, the bill avers, is the claim and interest of the defendant. The bill avers, and exhibits show, that the Louisville & Nashville Railroad Company, by deed of conveyance made in October, 1886, sold and conveyed the lands to H. F. De Bardeleben, with the following provision or reservation: "But it is understood and agreed that the timber with right of way to reach same has been sold," etc. On February, 1888, De Bardeleben conveyed to complainant. This is complainant's title. The prayer of the bill is that it be decreed that respondent has no interest in the lands, and that the deed of conveyance by the Louisville & Nashville Railroad Company of the "saw timber" to them be canceled. The respondent demurred to the bill, assigning several grounds of demurrer, the last of which was "that the bill was without equity." Both parties claim their respective rights and interests from the Louisville & Nashville Railroad Company, the respondent by deed of prior date, notice of which, under the averments of the bill, is chargeable to complainant. We regard it as settled law in this state that growing trees are such a part of the realty that the title to or interest in the same can be conveyed or transferred only by written instrument. The rule is not universal, under all circumstances. See *Leading Cases in the American Law Reports*, with notes by Sharswood and Budd. *Murphy v. Hubert*, 4 Sharswood & B. Lead. Cas. Real Prop. p. 515. The two deeds from the Louisville & Nashville Railroad Company, the first to the respondent, and the latter to complainant, conveyed different and distinct interests of the same realty. The bill does not show that the respondent has at any time, or does now, claim to own any interest except that purchased from and conveyed by the owner thereof. As we understand the averments of the bill, the complainant does not claim that by its deed in October, 1888, it acquired any legal right or title to the "saw timber." As we understand the bill, the prayer for relief is based upon the proposition that, as the deed of conveyance for the "saw timber" did not specify any time within which the timber was to be cut and removed, the law supplied a provision to the effect that it was to be cut and removed within "a reasonable time," and, the respondent having failed to do this within a reasonable time, the right to the "saw timber" was forfeited and became the property of complainant. We will consider this proposition further on. If it be true, as held in some decisions, that a deed of conveyance of trees or timber operates *ipso facto* as a severance of them from the realty, and that the trees are thereby converted into personality, the bill is without equity, as regards the "saw timber," as under such a rule there can be no claim by respondent under this

conveyance to any part of the realty. Under this view, the case made by the bill is not within the statute under which it is filed. It is simply a contention over personal property, which may be fully settled in a court of law. On the other hand, if the trees until cut remain realty, the case made by the bill is that the respondent is claiming only what it purchased, in which complainant has no interest, unless the respondent has forfeited its real estate by a failure to remove it within a reasonable time, and by the forfeiture the right and title of those who bought and paid for it became vested in the complainant, who never purchased it, and has no deed of conveyance for it. There ought to be some cogent reasons compelling such a conclusion, or decisions to that effect which have established a rule of property, before we should adopt it as law. The case of *Hoti v. Stratton Mills*, 64 N. H. 109, 20 Am. Rep. 119, cited by counsel for appellant in support of the doctrine, is an authority to the contrary. In that case it appears that one Very, in the year 1863, sold the timber standing to one Kingsley, stipulating that, if Very failed to deliver the timber at a designated place by a certain time, the grantee, his heirs and assigns, might enter the premises and take the timber. The grantor failed to deliver. No time was stipulated within which the grantee or his heirs were to enter and take the timber. In 1868 the timber was conveyed to defendants. In 1870, Very conveyed the land to the plaintiff. In 1871 the defendants cut and carried away some of the timber. The plaintiff brought an action of trespass *quare clausum* and *de bonis*. The court decided that when trees are sold, and no time is fixed for the removal of the timber, the purchaser has a reasonable time within which to enter and cut and remove the same, and, if he failed to act within a reasonable time, he thereby forfeited the right to enter the premises, and was liable in an action *quare clausum*; but it was expressly decided that the defendant was not liable *de bonis*. The opinion is somewhat lengthy, and the respective rights and remedies of the parties fully discussed. There is not a line in the opinion in which it is intimated that the purchaser of the timber forfeited his ownership of the trees, or that the grantor or his vendee of the land succeeded to the ownership of the timber upon the failure of the purchaser to enter and remove within a reasonable time. The court held that in such a sale there was no "foundation for an exception to the general rules of law, or make that a conditional conveyance of trees which would be an absolute conveyance of other property." Says the court: "The deed is absolute; the title passed to the grantee; and the defendants are not liable for the value of their own property removed after the expiration of a reasonable time." The case of *Heflin v. Bingham*, 56 Ala. 566, cited also by plaintiff's counsel, goes no further than *Hoti v. Stratton Mills*, *supra*. It lays down the proposition that when there is a conveyance of land and a reservation of growing trees, and no time is fixed for their

removal, a reasonable time only is allowed within which the entry can be made. Bingham, the defendant, having paid the purchase price, was in possession of the land under a valid parol purchase of the timber, but without a deed of conveyance. He had only an equitable title, with permission to enter. Heflin purchased the lands, but in his deed of conveyance there was a reservation of the timber sold to Bingham. Heflin sued in ejectment. Bingham disclaimed possession, except as to the interest reserved in the deed to Heflin, and as to this pleaded "not guilty." One of the vital questions was whether Bingham had delayed an unreasonable time under his license to enter and cut and remove the timber. If so, the court held that he was a trespasser, and plaintiff was entitled to recover. If not, then plaintiff was not entitled to recover on this ground. Had the plaintiff recovered in the ejectment suit, on the ground that defendant had delayed an unreasonable time, that would not necessarily have finally determined that the plaintiff became the owner of the growing timber which had been reserved in the deed to Heflin. Heflin never contracted to purchase and never purchased the trees. This part of the realty was never conveyed to him. He had no more right to the trees under his purchase and deed than any other person not a party to the transaction. The right to enter upon the land for the purpose of removing trees may have been lost by an unreasonable delay on the part of the purchaser of the trees, but it would not follow that the purchaser thereby became divested of his property in the trees, or that the vendor became reinvested with the ownership. As was held in the *Case of Hoti, supra*, the sale of the timber was not conditional, but absolute. The title passed to the purchaser, and we see no reason for giving to words used in a deed of conveyance of trees a different meaning than that given when used in a deed of conveyance of minerals or any other portion of the realty, there being nothing in the instrument to control or vary their usual legal signification. According to the bill, there is no misunderstanding or dispute of facts in the case. There is no claim of ownership or title set up in the bill by the complainant acquired by adverse holding. Complainant's whole case, as we construe the bill and the brief of counsel, is rested upon the proposition that, as defendant failed to cut and remove the timber within a reasonable time, it thereby forfeited whatever of property interest it purchased and acquired by the deed of conveyance from the owner, and the "saw timber," by reason of the forfeiture, became invested in the complainant, although it was expressly reserved from the sale to De Bardeleben, and excepted by De Bardeleben in the deed to complainant. We do not assent to the proposition. The court did not err in sustaining the demurrer to the bill.

Affirmed.

Petition for rehearing overruled February 9, 1895.

Joe LINDSEY, *Appt.*,
v.
Mayor, etc., of ANNISTON.

(.....Ala.....)

An ordinance requiring hackmen to keep outside a railroad depot while trains are there and leave a clear passageway at the entrance, cannot be limited in operation by a prior contract by which the railroad company has, "so far as it is lawful," granted to a hackman the exclusive right to enter the depot and trains for soliciting passengers.

(August 10, 1894.)

A PPEAL by defendant from a judgment of the City Court of Anniston, convicting him of violating a city ordinance against solicitation of patronage for transfer companies at the union depot. *Affirmed.*

The City of Anniston passed an ordinance that no hackman, agent of any transfer company or livery stable, hotel, porter or any other person should go within the depot for the purpose of soliciting passengers for his hack, transfer company, livery stable, or hotel under a prescribed penalty. Defendant went within the depot for the purpose of soliciting patronage for the Anniston Transfer Company, by which he was employed, claiming the right to do so by reason of the contract between such transfer company and the railroad companies which provided that the transfer company should have the exclusive right to enter upon the premises and trains of the companies for the sole purpose of soliciting such business as is to be done at Anniston.

Further facts appear in the opinion.

Messrs. Knox, Bowie & Pelham for appellant.

Mr. Benjamin Micou, for appellee:

The authority of the charter to regulate all occupations confers authority to confine the business of the transfer company to certain localities, and to prescribe the manner of carrying on such occupation.

Ex parte Byrd, 84 Ala. 20; *Horr & Bemis*, Mun. Pol. Ord. 32.

It will be presumed to be reasonable unless the contrary appears on the face of the ordinance itself, or is established by proper evidence.

Van Hook v. Selma, 70 Ala. 365, 45 Am. Rep. 85; *St. Paul v. Smith*, 27 Minn. 364, 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41.

Ordinances relating to the convenience and safety of the public are police regulations.

1 Dill. Mun. Corp. § 141.

Every citizen holds his property subject to the proper exercise of this power either by the state legislature directly, or by public corporations to which the legislature may delegate it.

Ibid.

All rights are held subject to the police regulations of the state.

Boston Beer Co. v. Massachusetts, 97 U. S.

NOTE.—For rights of hackmen and similar persons at depots, wharves, etc., see note to *Cole v. Rowen* (Mich.) 18 L. R. A. 648.

For congregation of them as a nuisance see *Pittsburgh Ft. W. & C. R. Co. v. Cheevers* (Ill.) 24 L. R. A. 166.

97 L. R. A.

25, 24 L. ed. 989; 2 *Morawetz, Priv. Corp.* §§ 1066-1068.

When one devotes his property to a use in which the public has an interest, he in effect grants the public an interest in that use and must submit to be controlled by the public for the common good.

Munn v. Illinois, 94 U. S. 118, 24 L. ed. 77; 2 *Morawetz, Priv. Corp.* § 1074; 1 *Waterman, Corp.* § 142, p. 519.

Constitutional provisions prohibiting impairing the obligations of contracts do not restrict the police power of a state.

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co. 115 U. S. 650, 29 L. ed. 517.

The contracts which the constitution protects are those which relate to property rights, not governmental.

1 *Waterman, Corp.* §§ 141, 142, pp. 518, 522, 523; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

Brickell, Ch. J., delivered the opinion of the court:

The amended charter of the city of Anniston confers on the mayor and council of the city large powers intended to promote good government within the corporate limits, and the public peace, order, and convenience. Among other powers, is the power "to license, tax and regulate hacks, carriages, drays, and all other vehicles, and to fix the rate to be charged for the carriage of persons and property within the corporate limits of the city, or to the public grounds or property without the city." Pamph. Acts 1890-91, p. 104. The ordinance the appellant was convicted of having violated was adopted by the mayor and common council in the exercise of the power to regulate hacks. The power of regulation is the more general of the powers the charter confers, and, as applied to business, occupations, or employments, is the power to prescribe rules for the conduct of the business, or the manner in which the occupation or employment is to be pursued. Hackmen, cartmen, and wagoners engaged in the carriage of goods or persons for hire by the common law are regarded as common carriers, and the power lies in the legislature, in the absence of constitutional restraint or limitation to regulate, to prescribe the rules according to which their business may be conducted. *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77. The power may be, and is often, delegated to municipal corporations, to be exercised for the promotion of the public convenience. When the power has been delegated in terms of the character employed in the amended charter, the validity of ordinances prescribing the times, places, and manner in which the employment is to be pursued has been uniformly sustained. *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *St. Paul v. Smith*, 27 Minn. 364, 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41. Such ordinances are in their nature and essence police laws or regulations, and when adopted in the exercise of an express legislative grant of power, there can be no inquiry into or discussion of their policy or reasonableness. "What the legislature says may be done cannot be set aside by the courts because they may deem it unreasonable or

against sound policy." 1 Dill. Mun. Corp. § 328.

The material contention of the appellant is that, if he be subjected to the operation of the ordinance, his principal, the Anniston Transfer Company, in whose service he was engaged when doing the act complained of, will be divested of a right and privilege which the railroad companies owning and constructing the depot had granted, on a valuable consideration, prior to the adoption of the ordinance. The contract into which the railroad companies and the transfer company had entered purports to be founded on a valuable consideration, and thereby the railroad companies do, "so far as it is lawful," grant to the transfer company the exclusive right, by the officers, agents, and employes, to enter the premises and trains of the grantors for the purpose of soliciting patronage. It is forcibly argued by the counsel for the appellee that the real object of the contract—the object the parties contemplated and proposed to accomplish—was the grant to the transfer company of the exclusive right and privilege to enter the premises and trains of the railroad companies for the solicitation and procurement of the patronage of passengers, and that of consequence the contract is illegal, offending public policy. It is a grave and important question, embarrassed by a serious conflict of authority, whether a railroad company may grant to hackmen, or to others pursuing a public employment, the exclusive right to enter its depot, or to enter and occupy the adjacent grounds, for the purpose of soliciting and obtaining patronage. The authorities have been carefully collected, reviewed, and discussed by Mr. Freeman in the elaborate notes to the case of *Kalamazoo Hack & Bus Co. Limited v. Sootama*, 22 Am. St. Rep. 699 [84 Mich. 194, 10 L. R. A. 819], and *Montana Union R. Co. v. Langlois*, 18 Am. St. Rep. 756 [9 Mont. 419, 8 L. R. A. 758]. The necessities of this case do not require a discussion or decision of that question. The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326. It is observed by Judge Cooley that the clause of the Constitution of the United States forbidding state legis-

lation impairing the obligation of contracts "does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." Cooley, Const. Lim. 6th ed. 707. The charter of the city is essentially a public statute; of it all the courts of the states take judicial notice; and obedience to it is due from all who are within its protection. It is not mere legal presumption, resting upon considerations of public policy, that the law silently incorporates itself into the contracts of parties. The incorporation, when the parties are dealing in good faith, most often comports with their actual intention, or they would have expressed all that the law may imply. The parties could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate the business of hackmen, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The juster presumption is that it was not intended the rights and privileges the contract may confer should endure if they became in conflict with the regulations ordained by the municipal authorities. However this may be, the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*. 1 Dill. Mun. Corp. § 141; *Vanderbilt v. Adams*, 7 Cow. 349. The individual shares in the public benefit which it is intended to promote, and this is the compensation deemed by the law adequate.

The act the appellant admitted was a violation of the ordinance, necessitating the judgment of conviction and it must be affirmed.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Respts.*,
v.
MILK EXCHANGE (LIMITED), *Appt.*

(145 N. N. 267.)

1. An incorporated milk exchange is

NOTE.—Similar to the above case in holding that a single corporation may constitute an illegal combination, is *Ford v. Chicago Milk Shippers Assn.* (Ill.) ante, 268.

The sugar trust case, *United States v. E. C. Knight Co.* (U. S. App. 8d C.) 24 L. R. A. 428, in which a monopoly of sugar refining is held not to

not engaged in buying and selling milk, where it merely looks up a dealer in each case to purchase the milk directly from the producer at a price fixed by the exchange.

2. An incorporated milk exchange which constitutes a combination of milk dealers and creamery men to fix and control the price of

come within the act of congress to protect commerce, is affirmed by the Supreme Court of the United States in 156 U. S. 1, 39 L. ed. 825.

For railroad combination, see *United States v. Trans-Missouri Freight Assn.* (U. S. App. 8th C.) 24 L. R. A. 73.

milk to be paid by them, thus putting them in position to control the market, is illegal and may be dissolved at suit of the attorney-general.

3. The fact that suit by the attorney-general to annul the existence of a corporation as an illegal combination to keep down the price of a commodity was instituted upon a petition of another association which was formed to enhance such prices, cannot affect the decision of the case.

(Peckham, J., dissents.)

(March 12, 1895.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, reversing a judgment of the Broome County Circuit in favor of defendant in an action brought to annul its charter. *Affirmed.*

The facts are stated in the opinion.

Mr. Alfred Ely, for appellant:

This is a purely statutory action.

People v. Miner, 2 Lana. 396.

Acts or omissions of the defendant falling under said section 1798, Code Civ. Proc., or one of its subdivisions, must therefore be charged and proved.

People v. North River Sugar Ref. Co. 9 L. R. A. 33, 121 N. Y. 608.

Section 1798 does not establish any rule of liability. It simply enumerates the classes of cases in which, if liability exists, the attorney-general may move.

People v. Atlantic Ave. R. Co. 125 N. Y. 516.

Such actions are not maintainable except some public interest is involved.

People v. Ulster & D. R. Co. 128 N. Y. 240; *Re Atty-Gen. v. Central Stamping Co.* 81 Hun, 541.

Each and all of the statutory grounds for this action rests solely and only upon what it, the corporation defendant, has done or not done.

People v. Atlantic Ave. R. Co. 125 N. Y. 518.

Injury to the public must be affirmatively shown.

Thompson v. People, 23 Wend. 584; *People v. Ulster & D. R. Co. supra*; *People v. Sheldon*, 23 L. R. A. 221, 189 N. Y. 265.

Mere nonuser or the omission by a private corporation which discharges no public function and enjoys no exclusive privilege, to act as a corporation or to transact business is not cause for an action by the people to annul its charter.

Slee v. Bloom, 5 Johns. Ch. 376, 1 L. ed. 1114; *Slee v. Bloom*, 19 Johns. 456, 10 Am. Dec. 278; *Atty-Gen. v. Bank of Niagara*, Hopk. Ch. 854, 2 L. ed. 448; *People v. Kingston & M. Turnp. Road Co.* 23 Wend. 193, 35 Am. Dec. 551; *People v. North River Sugar Ref. Co. supra*; *Skinner v. Smith*, 66 Hun, 449.

An illegal combination in restraint of trade between a corporation and its stockholders collectively, as a class, with reference to the lawful business of the company is impossible in law.

Stockholders in such a company are quasi partners.

Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 27 L. R. A.

278; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Marsh v. Russell*, 66 N. Y. 288; *People v. North River Sugar Ref. Co. supra*; *Chicago Milk Shippers Assn. v. Ford*, 46 Ill. App. 576.

Agreements in partial restraint of trade have never been held void or illegal.

Diamond Match Co. v. Roeber, supra; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 531; *Chappel v. Brockway*, 21 Wend. 157; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *Marsh v. Russell, supra*.

Every by-law contrary to the charter or to any existing law, either in its special provisions or its main purposes, is unauthorized and void.

1 Morawetz, Priv. Corp. § 494; *Seneca County Bank v. Lamb*, 26 Barb. 595; *First Nat. Bank of South Bend v. Lanier*, 78 U. S. 11 Wall. 369, 20 L. ed. 172; *Bullard v. National Eagle Bank*, 85 U. S. 18 Wall. 589, 21 L. ed. 923; *Re Long Island R. Co.* 19 Wend. 86, 83 Am. Dec. 429; *Kent v. Quicksilver Min. Co.* 78 N. Y. 182; *Kennebec & P. R. Co. v. Kendall*, 81 Me. 470; *Dunham v. Rochester Trustees*, 5 Cow. 463.

An illegal by-law is, therefore, void *ab initio*, and binds nobody.

The by-law referred to, if valid as an agreement, is not a by-law in restraint of trade, and obnoxious to the law.

Master Stevedores Assn. v. Walsh, 2 Daly, 1; *People v. New York Board of Fire Underwriters*, 7 Hun, 249.

An incorporated company has no power to make a by-law subjecting its shares to forfeiture for any reason.

Re Long Island R. Co. supra.

The only possible view, then, for plaintiff to take of this old by-law of 1882 is that it shows the intent of the incorporation of the defendant.

The intent or motive inducing a legal act cannot be inquired into and constitutes no cause or part of a cause of action.

Phelps v. Nowlen, 72 N. Y. 89, 28 Am. Rep. 93; *Kiff v. Youmans*, 86 N. Y. 824, 40 Am. Rep. 548; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Chenango Bridge Co. v. Paige*, 88 N. Y. 178, 38 Am. Rep. 407; *Moody v. Niagara County Supra*, 46 Barb. 659; *Barclay v. Com.* 25 Pa. 508, 64 Am. Dec. 715; *Randall v. Hazelton*, 12 Allen, 418; *Demarest v. Grant*, 13 L. R. A. 834, 128 N. Y. 205.

No mere agreement can be deemed a conspiracy or combination in restraint of trade.

2 Rev. Stat. 629, § 10; *People v. Sheldon*, 23 L. R. A. 221, 189 N. Y. 251.

Conspiracy is not in itself a cause of action, however atrocious.

Hutchins v. Hutchins, 7 Hill, 104; *Wood v. Amory*, 105 N. Y. 278; *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322; *Buffalo Lubricating Oil Co. v. Eberest*, 30 Hun, 586.

This action was not brought in the interest of the people, but by and solely in the interest of rival organizations.

The state does not concern itself with the quarrels of private litigants.

People v. North River Sugar Ref. Co. 9 L. R. A. 33, 121 N. Y. 608.

Mr. T. E. Hancock, Atty-Gen., for respondents:

Defendant has never bought or sold a quart of milk.

It was simply a factor; an agent, insuring the payment, it is true, but such insurance did not change the character of its business.

White v. Chouteau, 10 Barb. 208; *Horton v. Morgan*, 19 N. Y. 173, 75 Am. Dec. 811.

The remedy of forfeiture follows the persistent and continued suspension of business for the fixed period.

People v. Atlantic Ave. R. Co. 125 N. Y. 517.

A failure to commence business is a cause of forfeiture.

Re Jackson Marine Ins. Co. 4 Sandf. Ch. 559, 7 L. ed. 1908; *People v. Ulster & D. R. Co.* 128 N. Y. 240.

Any act of a corporation outside of its corporate authority and prejudicial to the public interest, is ground for the dissolution of the corporation, and for corporate forfeiture.

People v. Geneva College Trustees, 5 Wend. 211; *Bissell v. Michigan, S. & N. I. R. Co.* 23 N. Y. 285; *People v. Utica Ins. Co.* 15 Johns. 358; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *People v. Bristol & R. Turnp. Road*, 28 Wend. 238; *People v. North River Sugar Ref. Co.* 5 L. R. A. 886, 54 Hun, 875; *People v. Dispensary & Hospital Soc. of Women's Inst. of New York*, 7 Lans. 804; *Morawetz, Priv. Corp.* § 1024.

It is a sufficient cause of forfeiture if the act complained of is such as, in the nature of things, is calculated to produce injury.

3 *Waterman, Corp.* (1892) § 427; *Morawetz, Priv. Corp.* § 1024.

Any combination or aggregation tending to restrain competition or enhance prices, is in restraint of trade and illegal.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 484, 49 Am. Dec. 283; *Saratoga County Bank v. King*, 44 N. Y. 87; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 28 Am. Rep. 190; *People v. Stephens*, 71 N. Y. 545; *People v. North River Sugar Ref. Co.* 5 L. R. A. 886, 54 Hun, 866, 9 L. R. A. 53, 121 N. Y. 552; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 672; *Craft v. McDonoughy*, 79 Ill. 846, 22 Am. Rep. 171; *Ohio v. Standard Oil Co.* 27 Ohio L. J. 197; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 403; *Emery v. Ohio Candle Co.* 47 Ohio St. 320; *Hoffman v. Brooks*, 11 Ohio L. J. 258; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.* 121 Ill. 580; *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268; *People v. Kingston & M. Turnp. Road Co.* 28 Wend. 205, 85 Am. Dec. 551; *People v. North River Sugar Ref. Co.* 5 L. R. A. 886, 54 Hun, 871.

Haught, J., delivered the opinion of the court:

This action was brought to have the defendant, a domestic corporation, dissolved, its charter vacated, and its corporate existence annulled. This relief is sought upon two grounds: First, nonuser; second, an unlawful and illegal combination and conspiracy, made in restraint of trade, to limit the supply of milk, and to fix and control the price thereof in the city of New York and elsewhere. The defendant was organized on the

21st day of October, 1889, for the purpose, as stated in its certificate of incorporation, of "buying and selling of milk at wholesale and retail, the purchase of dairies of milk when deemed advisable, and the sale of the same to milk dealers." The complaint charges that the defendant was not engaged in this business. Upon the trial, at the close of the evidence, it was conceded by both counsel for the plaintiff and for the defendant that the question whether the defendant had been engaged in buying or selling milk, under the evidence, was a question of law for the court, and not for the jury. We so understand the evidence. There is no conflict, and we have but to ascertain the meaning and intention of the witnesses. The plaintiff's chief witness was Woodhull, the secretary and treasurer of the defendant. In his testimony he makes use of the expression that the exchange "has bought and sold milk;" but he then proceeds to state that he is familiar with the operations of the Milk Exchange in buying milk of the farmers and selling it to dealers, and then states the manner in which the business was conducted. He says: "It is this: A farmer brings his dairy into the exchange to be sold. I go out and find him a dealer who can use the milk, and write the farmer how to mark his milk. I make the collection of the dealer and pay it to the farmer, and we guarantee him the collection." He further testified that their commission was 8 per cent; that the milk was never shipped to the exchange, but was shipped directly to the dealer; that they sold the milk for the farmer at the exchange price, which they guaranteed to collect, and turn over to the farmer, less their commissions. Numerous witnesses speak of their arrangement made, or attempted to be made, with the exchange for the sale of milk; and in each case it was distinctly stated that the exchange did not buy milk; that they merely looked up a dealer, who would purchase it at the exchange price; and that they guaranteed the collection for 3 per cent commission. We think, therefore, that there can be no question as to the meaning of the witness Woodhull as to the expression made use of by him above referred to, for he immediately proceeded to explain how the milk was purchased and sold; and this evidence establishes the fact that the milk was not purchased by the exchange, but that it was sold in the manner described for the commission stated. The transactions, therefore, constituted a commission business, and were not, strictly speaking, the "buying and selling of milk at wholesale and retail." Whether the engaging in a commission business, such as we have described, is authorized by the defendant's charter, we do not deem it necessary now to determine. It may be that the commission business is so closely allied to that of buying and selling as to make the former legitimate and permissible under the defendant's certificate of incorporation.

We are thus brought to a consideration of the charge of unlawful conspiracy in restraint of trade. We have only called attention to the charge of nonuser for the purpose of showing the precise nature of the business conducted by the defendant as bearing upon the latter question. If the defendant was the purchaser of milk, or of dairies of milk, it

had the right to fix the price from time to time, that it would pay therefor. If, however, it was engaged only in the selling of milk upon commission, then its duty as a commission merchant, as ordinarily understood, was to get as high a price for the seller as could be reasonably obtained, and it was no part of its duty to otherwise fix the price of milk. It appears that the milk exchange, when organized, or shortly thereafter, had 80-odd stockholders, a large majority of whom were milk-dealers in the city of New York, or creamery or milk commission men doing business in that vicinity; that at the first meeting of the exchange after its incorporation the following, among other by-laws, was adopted: "The board of directors shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of this company, and to declare the stock of any and every stockholder herein who purchases milk at any other than the price so named by the board forfeited, subject to the conditions set forth in article 8, sections 4 and 5, of these by-laws. All stock so forfeited by said board of directors shall be subject to the order of the board of directors, and shall be disposed of as they direct." This by-law remained in force for a number of years, and until after there was an investigation as to the character and nature of the defendant's business, and a report made by a committee of the senate. The by-law was then amended by striking out that part thereof which authorized the forfeiture of the stock of a stockholder who purchased milk at another price than that fixed by the exchange. It was again amended in April, 1890, but that part thereof which provided that the board of directors shall have the power to determine and fix, from time to time, the exchange price of milk, was retained. Acting upon these by-laws, the defendant's board of directors have, from time to time, during its corporate existence, fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto. These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk. Was this lawful?

In *Judd v. Harrington*, 189 N. Y. 105, certain parties, who were dealers in sheep and lambs, entered into an agreement, by its terms organizing an association for the declared purpose of guarding and protecting their business interests from loss by unreasonable competition. The agreement was to pool their commissions, except such as should be agreed to be paid to a butchers' association, with which they had agreed only to sell to the butchers, and the butchers to buy only of the dealers, belonging to their respective associations. It was held that the real nature and purpose of the agreement was to suppress competition in an article of food, and to so control the market that they could enhance the price of the article.

In *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, certain coal dealers organized a

company known as the Lockport Coal Exchange. The object of the organization was to prevent competition in the price of coal among the retail dealers in that city by constituting the exchange the sole authority to fix the price which should be charged by the members for coal sold by them. Sheldon and others, members of the exchange, were indicted, charged with the offense of doing an act injurious to trade or commerce. The trial judge submitted the case to the jury upon the theory that, if the defendants entered into the organization for the purpose of controlling the price of coal and managing the business of the sale thereof, so as to prevent competition in the price between the members of the exchange, the agreement was illegal. The jury found the defendants guilty. It was held that the principle upon which the case was submitted to the jury was sanctioned by the authorities. Andrews, *Ch. J.*, in delivering the opinion of the court, said: "The question is, Was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law fixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Again, he says: "Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests, both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. . . . If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

In *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, the Butler Colliery Company and the Pittston & Elmira Coal Company were corporations engaged in mining and selling coal. For the purpose of monopolizing the trade and maintaining a high price for coal, the two companies entered into a contract, by which one agreed to take all of the coal which the other should desire to send north of the state line at the regular market price, and agreed not to sell coal to any other party to be shipped in that direction. It was held that the agreement was entered into for the purpose of enhancing the price of coal north of the state line, and that it was against public policy, and void. Rapallo, *J.*, in the opinion, says: "That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjud-

cated cases, to be questioned at this day." See *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *Hooker v. Vanderwater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 252; *Saratoga County Bank v. King*, 44 N. Y. 87; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728.

Applying the rule thus established to the evidence under consideration it appears to us that a case is presented in which the jury might have found that the combination alluded to was inimical to trade and commerce, and, therefore, unlawful. It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and, at their option, to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred.

It is asserted that this litigation was instituted upon the petition of members of the Milk Producers' Union, and that the purpose of that association was to enhance the price of milk. This may be, but the action was brought by the attorney-general, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the pleadings, and the parties have the right to have them determined upon the merits. If the Milk-Producers' Union is engaged in an unlawful business, which is a restraint upon trade and commerce, it may be dealt with in another action.

The order appealed from should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

All concur (*Andrews, Ch. J.*, and *Bartlett, J.*, on the ground of non-user, except *Peckham, J.*, who dissents upon the ground that there was proof sufficient of user, and that the action of the defendant did not fairly tend to enhance the price of milk to the consumer.

MISSOURI SUPREME COURT.

Anna STEINHAUSER, *Respt.*,

v.

Anna M. SPRAUL, *Appt.*

(.....Mo.....)

1. A wife in giving an order to a domestic employed by her husband, to climb a ladder to a loft for pigeons, is, when considered as the implied agent of her husband, not liable for an injury resulting to the servant from the falling of the ladder because it was not of the right length.

(*Per Sherwood and Robinson, JJ.*)

2. Ordinary care is all that is required of the master in furnishing a ladder of the proper length for use by domestics several times a year in reaching a pigeon loft.

(*Per Sherwood and Robinson, JJ.*)

3. A domestic knowing the length of a ladder which she had used previously to reach a pigeon loft assumes the risk of using it for that purpose when it is too long.

(*Bruce, Ch. J., and Gantt and Burgess, JJ., dissent.*)

(December 4, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Charles County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

NOTE.—While the decision in the above case is by such a division of the court that it cannot be said to settle any propositions of law as the majority of the judges who unite for reversal do so upon different grounds, the discussion of the question mentioned in the first headnote seems too valuable to be omitted.

27 L. R. A.

Statement by *Sherwood, J.*:

Action for damages. The substantial portion of the petition is as follows: "That heretofore, to wit, in the month of —, 1887, she was engaged by Erwin Spraul, then husband of defendant, but since deceased, as a cook at his residence, and that she continued in her said employment for said Spraul until about the first day of June, 1889; that while she was thus engaged she was under the direction and control of defendant, the wife and agent of said Erwin Spraul. And plaintiff further states that heretofore, to wit, on the eighth day of May, 1889, and while in the service aforesaid, and performing the duties as cook as aforesaid, under defendant's directions, defendant carelessly and negligently ordered plaintiff to climb up a ladder and into the pigeon loft which occupied the upper portion of a shed situated in the rear yard of said Spraul's then residence, No. 3040 South Ninth street, in the city of St. Louis, and fetch some pigeons therefrom, defendant well knowing that it was dangerous for a woman to climb into said loft, and well knowing that the ladder supplied for that purpose, and which she directed plaintiff to use, was not adapted to that use, but by reason of its length could not be used in climbing into said loft with safety; that defendant, knowing the dangerous character of the task she assigned plaintiff, and that the ladder furnished for performing it was not adapted for such use, but unsafe and dangerous for such purpose, nevertheless negligently commanded plaintiff to climb into said pigeon loft. Plaintiff further states that in attempting to comply with said command, and climb up said ladder into said loft, having ascended said ladder to the height of the opening into said loft, and while attempting to enter said opening, she, plaintiff, owing

to the improper length of said ladder, fell therefrom to the ground below, thereby fracturing her hip bone in such a manner that she was confined to her bed for many weeks, and will be permanently crippled. Plaintiff further states that she has suffered great pain of body and mind since the happening of said accident, has been prevented from following her occupation, and put to great expense for medicine and medical attendance, all as a result of said accident. Wherefore plaintiff prays judgment against defendant for \$20,000 and her costs." The answer was in effect a general denial, coupled with a plea of contributory negligence. The reply was also in substance a general denial of the allegations of the answer.

Plaintiff's testimony is substantially this: "I am the plaintiff. I know Mrs. Spraul. I worked at her house in St. Louis. . . . I began working December 18, 1887. Worked two years and five months, up to the time I was hurt. Just before I was hurt, she said: 'Anna, go up and get down the pigeons, so that grandmother can clean them before she washes the dishes.' I went there. I stood the ladder as always, and as I wanted to enter I lost my hold and fell. . . . The step of the ladder did not fit with the entrance. I had to stand the ladder against the smaller shed. The right side of the ladder was on the north side of the big shed. The top of the ladder extended over the little shed. The door, when open, did not go back against the shed. A little platform the pigeons sat on was there. Mrs. Spraul had sent me up the ladder before. She asked me why I did not stand the ladder over further, and said I would fall down there some time. I told her I could not stand it any other way, because the ladder did not fit. . . . I used the ladder from which I fell about four or five times. It was the height of the big shed. This was the only ladder about for the purpose of climbing into the shed. The ladder was made in the brewery. . . . I got the pigeons out of the loft four or five times a year. Mrs. Spraul had the ladder made for the purpose of getting the pigeons out. It was not used much otherwise. There was an old ladder there at first. It went to pieces. I have told all Mrs. Spraul said about getting the pigeons. . . . I got the ladder from a corner on the north side of the lot, and set it up against the shed, just the same as I always did. Mrs. Spraul did not tell me how to set it up. I set it up the best way I could. I had to crawl into the opening. I did not get quite to the opening. I opened the door the same as I had always done before. I had to lean over diagonally. It is about a good step. I had made that step as often as I went up. I took hold of the door. . . . I lost the hold of my hands and feet. When I was off the ladder, and wanted to enter the opening, I lost my hold of the loft at the opening. I stood on the ladder and put my hands on the opening. I wanted to step into the hole, and in so doing I lost my hold on the loft, and fell. I had to get off the ladder. I had gotten off the ladder, and got on the pigeon loft. . . . I fell on the bricks, not on the wood lying there. I was hanging

by my hands from the bottom of the loft, and fell down. From the bottom of the opening, where I laid my hands, to the walk was about eleven feet. . . . I did the best I could. Nobody told me how to enter. I am thirty years of age. The ladder was new. . . . I could not help letting loose. I held on as long as I could. I called to no one to help me. . . . When I went up there I did not know I was going to fall down, or I would not have went up there. I just noticed that it was dangerous after I had fallen down. I did not take any notice of whether the ladder was perfectly good to do that thing with, or not. The old ladder was better. I could put that under the opening and get right into the loft. The other ladder I had to stand at this place and get in sideways. The old ladder broke, and the new one was made. There was a step ladder there, but I could not use it for this purpose. It was seven or eight feet long, and was used to clean the windows. The top of the ladder, when I fell from it, rested against the small shed, which was seven inches from the opening. With the ladder placed similarly I went into the loft four or five times. I used the ladder in the same way. If I had had a ladder which I could have placed under the opening, I could have gone in that way. The Court: State what caused the accident this time. A. I lost my hold. I caught hold of the opening with my hands, and my hands slipped. I held myself in the corner, in the bottom of the opening, at the side and bottom. I had to go in with my head first. I wanted to put my hands in the corner of the opening,—slip in my head and body in that way. That was the way I always did. I tried it this time, but my hands slipped, and I fell down."

There was evidence that, immediately after the accident, defendant sent another female servant after the pigeons, and that she went up the same ladder and got them. There was evidence, also, that other servants had used the same ladder in getting pigeons down from the loft; that Erwin Spraul, the deceased husband of defendant, had the new ladder made; that after plaintiff had fallen, as aforesaid, defendant had ordered the top of the ladder to be cut off, which was done; that the ladder was higher than the big shed; that the bottom of the opening into the shed where the pigeons were was 11 feet 1 inch; that plaintiff's father, some six weeks before she fell, had told defendant that the ladder "was dangerous," but did not say in what respect; that the main shed was 16 feet 2½ inches high, and the lower shed was 12 feet 10 inches high, and distant about 11 inches from the taller shed, where the pigeons were. At the close of evidence for plaintiff, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused. Thereupon, on part of defendant, evidence of one witness was introduced that plaintiff said to her a short time after the accident: "I fell, unluckily. I have gone up the ladder so often to get pigeons, and nothing happened, and on this day I had to be unfortunate. But I cannot blame anybody." Another witness testified that he asked plaintiff

about the matter: "What did you do?" And she said: "I and Susan had made humbug in the yard. I made a false step and fell down." She further said, "I can't blame anybody." Two other witnesses testified to similar statements made by plaintiff as that testified to by the first witness for the defense. Part of this testimony plaintiff denied, to wit, that she admitted she had said it was her own fault, and she did not blame anybody; but as to the testimony of two witnesses that she had "made humbug in the yard," etc., she merely said, "I do not remember talking about this accident," etc. Defendant testified that plaintiff was making fun with Susan (the other hired girl) by putting her foot out, and while making fun made a false step and fell. This testimony of defendant was not denied by plaintiff. Defendant also testified that on one occasion she "used the ladder, in fun, to look into the loft."

Erwin Spraul died before this suit was instituted. It did not appear that defendant had any means or estate of her own at the time of the accident, nor at what time the ladder was sawed off. The jury returned a verdict for plaintiff for \$3,000, and defendant appeals.

This cause has been here once before, and is reported in 114 Mo. 551. The facts, however, were not as fully developed heretofore as at the present time.

Messrs. Broadhead & Hesel and H. A. Haussaler for appellant.

Mr. J. Hugo Grimm for respondent.

Sherwood, J., delivered the opinion of the court:

1. Various grounds have been assigned for the reversal of the judgment in this cause, some of which will now be considered. The theory on which this cause was tried in the court below was that defendant was the wife and agent of her then husband, Erwin Spraul, and as such gave the command which, it is claimed, indirectly resulted in the litigated injury. The whole case turns on the point whether, in giving such order, defendant was guilty of a mere omission of duty or negligence, while acting within the scope of her implied authority, derived from her husband, or whether she was guilty of an actionable misfeasance. In a very early case *Chief Justice Holt* clearly drew the distinction between the nonliability of a person to a third party because of negligence or nonfeasance and misfeasance, or positive wrong, saying: "It was objected at the bar that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it. So they might anybody else on whom they could fix that fact. But for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it. But for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a

deputy or servant but as a wrongdoer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by negligence to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer; and it will lie against any other that will rescue in like manner. *Lane v. Cotton*, 12 Mod. 488; *Williams v. St. Louis & S. F. R. Co.* 119 Mo. 816; *Fugler v. Boths*, 117 Mo. 475; *Watson v. Kansas & T. Coal Co.* 52 Mo. App. 866.

In commenting on the first case just cited, the rule is tersely stated: "That an agent is personally liable to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done. In the latter case, the agent is liable only to his employer." *Ewell's Evans, Agency*, 488. On this topic, an eminent commentator observes: "We come, in the next place, to the consideration of the liability of agents to third persons, in regard to torts or wrongs done by them in the course of their agency. . . . And here the distinction ordinarily taken is between acts of misfeasance, or positive wrongs, and nonfeasances, or mere omissions of duty by private agents. . . . The master is always liable to third persons for the misfeasance and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature as that he is entitled to compensation. . . . The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not liable to third persons for his own misfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal. . . . And hence the general maxim, as to all such negligences and omissions of duty, is, in cases of private agency, *respondet superior*. . . . The distinction thus propounded between misfeasance and nonfeasance—between the acts of direct, positive wrong, and mere neglects, by agents, as to their personal liability therefor—may seem nice and artificial, and partakes, perhaps, not a little of the subtlety and overrefinement of the old doctrines of the common law. It seems, however, to be founded upon this ground: that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses; for no man can authorize another to do a positive wrong. But, in respect to nonfeasances, or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other; and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become directly bound or amenable for his conduct." *Story, Agency*, 9th ed. §§ 308, 309.

It will be pertinent, in this connection, to briefly note the facts and rulings in some early cases which serve to illustrate what has been quoted from the text-writers. Thus, in *Bell v. Catesby*, 1 Rolle, 78, Rolle, Abr. 94, pl. 5, it was resolved that if an underbailiff of a liberty levy a debt by virtue of a warrant of *feri facias*, and then conceal the writ, and make no certificate, an action on the case lies against him, for this reason, that he has done a personal tort. *Vide* 1 Vin. Abr. 578. In *Marsh and Astrey's Case*, 1 Leon, 146, an undersheriff was held liable for returning a tenant summoned when he was not, upon the ground that this was a positive act, and not a mere negligence. In *Cameron v. Reynolds*, Cowp. 408, it was held that an action did not lie against an undersheriff for refusing to execute a bill of sale to plaintiff under a *feri facias*. And Lord Mansfield said: "It is an action for a breach of duty in the office of sheriff. Whenever that is the case, the action must be against the high sheriff; and, if it proceed from the default of the undersheriff or bailiff, that is a matter between them and the high sheriff." These cases all go to point out the essential difference which exists between "acts of direct and positive wrong," which are misfeasances, and render the agent personally liable, and "mere neglects," or nonfeasances, in which the liability is cast alone on the principal or master. This distinction finds illustration in *Harriman v. Stove*, 57 Mo. 93, where the defendant, acting as the agent of his wife, and being a carpenter, built a trap door, and did the work so negligently that a third person fell through the hatchway which the door covered, and was injured; and it was held that the party injured was entitled to recover of the agent on the ground that the act which caused the injury, viz., defectively constructing the trap door, was a misfeasance, as contradistinguished from a mere nonfeasance or omission of duty. And this was thus ruled after extensive and approving citations and quotations from Story and other authorities heretofore cited.

In *Horner v. Lawrence*, 37 N. J. L. 46, this case arose: Forsyth, owning a strip of woodland through which a railroad ran, procured the wood to be cut, and employed Horner to haul it. Horner, in order to reach said woodland, obtained permission from Lamb, the owner of an adjoining field, where the hogs of Lawrence were being pastured, to pass through the field, and to open a gap in the fence at a certain place, with directions to close it up after he went in and after he came out, as the hogs and cattle in the field might get through on the railroad and get killed; and Horner passed through with his teams, leaving the gap open while the wagons were being loaded, but closing it when he went out. The hogs escaped through the gap, and one was killed and the other injured on the railroad. Held, that the leaving down the bars by Horner was not a mere neglect, but an intentional and willful violation of his authority, and a misfeasance, for which, as a servant or agent of Forsyth, he cannot claim exemption against the party injured. In Mississippi a very marked illustration of

the point in hand has occurred, where it was ruled that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open; and that the only liability incurred by the agent was to his principal. *Feltus v. Swan*, 62 Miss. 415.

As heretofore seen from the authorities cited, they generally announce the doctrine that, in order to charge the agent with liability, such liability must spring from, and have its origin in, an act of direct and positive wrong done by the agent to the injured party. This idea is happily expressed in *Delaney v. Rochereau*, 34 La. Ann. 1123, where Bermudez, Ch. J., says: "The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrongdoing,—therefore in an act,—directly injures a stranger, then such stranger can recover from the agent damages for the injury. Story, Agency, 308, 309; Story, Bailm. 165; Shearm. & Redf. Neg. ed. 1874, 111, 112; Evans, Agency (notes by Ewell), 437, 438; Whart. Neg. 535, 78, 83, 780." "By Anglo-American law, a servant who, by negligence in the discharge of his duties, injures a third person, is not personally liable to such third person. The maxim *respondet superior* prevails, the principal is liable for the injury, and the agent is then liable to the principal for damages which the latter may have sustained." Whart. Agency, § 535. Now, in this case, nothing can be clearer than that defendant was acting within the orbit of her duty to her husband when giving the order alleged in the petition. This is the theory of the petition, which claims that the command was negligently given, owing to the fact that the ladder furnished for climbing into the loft, by reason of its length, could not be used for that purpose with safety. So that it readily appears that defendant, in giving the order, was not guilty of an act of direct and positive wrong to plaintiff, but simply of giving an order in her husband's business which, solely owing to the length of the ladder furnished by her husband for the purpose, and she having no other, was a negligent order. But it must be remembered that it was no part of defendant's duty to furnish a ladder of proper length, nor does it appear she had the wherewithal to do so. If it was not her duty, then she cannot be charged with even so much as negligence in failing to provide a ladder of requisite length; for negligence is simply duty violated or unperformed. The mere giving of the order, then, to get the pigeons, was not a negligent order. It was her husband's duty to furnish a ladder of proper length, and it is the rule that a servant is never liable for the negligence of his master, nor can an action be maintained against a servant unless he can be considered as a wrongdoer. A servant is never liable to a third person merely for not doing that which it was the duty of the master to do. *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735. Thus, where a master, having an unsafe and

insufficient dam across a stream of water, ordered his servant to shut the gate, and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away, and an injury was done to a third person, it was held that the servant was not liable. See also Bishop, Non-Cont. Law, §§ 695, 628, 446.

With respect to the use of the word "misfeasance" by Lord Holt in the passage already copied, the learned author heretofore quoted says: "For negligences, Lord Holt tells us, the servant is not liable; for misfeasances he is liable. If we are to understand 'negligences,' in Lord Holt's sense, those imperfections in the discharge of duty which are incident to the labor of all men when under the control of others, and if we are to regard as misfeasances those torts which are committed by the servant out of the line of his employment, when acting on his own responsibility, then we can reconcile the famous passage just quoted, not only with the principles here advocated, but with the analogies of the law in other relations." Whart. Agency, § 536. This view accords with the views of Story and others as to the distinction between "mere neglects" and misfeasances or positive wrongs, and conclusively shows that defendant, not having crossed the boundaries of her implied employment, was in nothing derelict, and in nothing liable so far as concerns plaintiff. There are cases, indeed, where an order, when given by an agent, results in direct injury to a third person, and the agent there will be held liable to the person injured. Thus, in *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741, it was ruled that "an agent who negligently directed water to be admitted to the water pipe in a room of his principal's house, over which he had general management, thereby flooding a tenement below, was personally liable." There it was held that it was an act of mere nonfeasance on the part of the defendant to fail to examine the condition of the pipes before causing the water to be let on, but that the turning on of the water without such precedent examination was a misfeasance, and none the less so because preceded by a nonfeasance, and so the action of tort against the defendant was maintained. In that case, however, the agent was acting in an independent sphere of action,—"pursued his own way,"—and consequently occupied a different and higher plane of liability than the defendant wife in the case at bar, owing to her subordinate position in the household, and the matrimonial relations she sustained; because when the agent, by the negligent performance of his ordinary duties, injures a third person, only the principal is liable if the agent's individuality is absorbed in that of the principal; for wherever there is liberty there is liability, and *vice versa*. Whart. Agency, §§ 537, 538. This further difference between the case instanced and the present one consists in the fact that the order in that case was as much a direct and positive wrong as though the fingers of the agent had turned the water on instead of his tongue.

There are cases, too, of omission which may

result in liability, and this illustration is given in the Digest in the discussion of the Aquilian law: "One servant lights a fire and leaves the care of it to another. The latter omits to check the fire, so that it spreads, and burns down a villa. Is there any one liable for the damages? The first servant is chargeable with no negligence, and the second chargeable only with an omission. Of course, if we apply to this case the maxim that a mere omission cannot be the basis of a suit, there can be no redress." In such case the eminent author from whom quotations have already been made says: "It is clear that in the case before us the non-action of the second servant is equivalent to action. He undertakes the charge of the fire, and in the imperfect performance of this charge he acts aggressively and positively. So, also, is it in the well-known case of a physician who undertakes the care of a patient. Whart. Neg. § 80. Of course, no such "aggressive and positive" omission can be laid at the door of defendant, and consequently no such liability as springs from an omission of that sort.

There are cases where a servant is liable to his fellow servant for negligence resulting in injuries to the latter; but it is believed it will be found upon examination that no such liability attaches except where some physical act is done by the servant, and results to the damage of his fellow, or where the servant occupies an independent plane, and his orders to his fellow servants are equivalent in force, effect, and resultant injury to a physical act, as in *Bell v. Josselyn*, *supra*. Where the servant acts as the master's representative, "without liberty," he is not responsible for injuries to his fellow servant resulting from his negligence, unless those injuries are either directly or in effect positive physical wrongs, for which he would be legally liable were he acting without instead of with orders. Whart. Neg. 2d ed. §§ 245, 246; Whart. Agency, § 535. The case of *Osborne v. Morgan*, 187 Mass. 1, affords apt illustration of the principle which renders liable an agent who, acting in an unfettered way, has the general conduct and control of affairs, and gives an order which necessarily and immediately results in injury to an inferior fellow servant. There, the order given by the general superintendent should not have been given, because, as said by Devens, J., "A single careful glance would have shown the hazardous condition in which the machinery was to be left. . . . and which the execution of the order made dangerous." There, the order was the equivalent of a direct and physical wrong, as much so as though the hands of the general superintendent had removed the closet, instead of the hands of his subordinates. In that case, too, an instruction was approved that "the plaintiff must show, in regard to the defendant he would hold, that that defendant had a duty in regard to the use of the apparatus, in keeping it in repair, and in condition to use, put upon him by the corporation." *Rogers v. Overton*, 87 Ind. 410, is another instance where an inferior fellow servant suffered in-

jury as the direct result of an order of his superior fellow servant, for which the latter was held liable.

There are cases, also, where husband and wife, either one or both, as the circumstance happened, have been held liable for their joint or several torts. Many of these cases have been exhaustively cited and reviewed by Burgess, J., in *Flesh v. Lindsay*, 115 Mo. 1. But in none of those cases, and in none which a careful research has been able to discover, has a single instance been found where a wife, in giving her orders in and about her household affairs to one of her domestics, has been held liable for injuries resulting to such servant. And the fact that no such precedent can be found is cogent evidence that such a rule of law does not exist. *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68, and cases cited. And certainly the nonliability of the defendant wife ought to be the dominant principle in surroundings such as this record presents. Here defendant was environed by the confines of a narrow and limited authority. She was "subdued to the very quality of her lord." She was the mouthpiece of her husband, as much so as if she had said, "Anna, my husband says go up and get down the pigeons," in which case it would hardly be contended that defendant could have been held liable to an action. The premises considered, it seems to me that the circumstances in evidence, as disclosed by the record, show no liability on the part of defendant, when considered as acting as the implied agent of her husband.

2. There are other reasons tending toward the same conclusion of defendant's nonliability. It is well-settled law that an employer is not bound to furnish his employes the safest known appliances, tools, or machinery, the latest approved patterns of tools and improvements therein, etc., nor does he render himself liable by failing to discard tools or appliances which are not such, and to supply their places with those which are more safe. 2 Thomp. Neg. 983; *Blanton v. Dold*, 100 Mo. 64. In cases like the present, it seems that, the risk of injury being but small, the use of very primitive and inefficient implements is allowable, and such use will fill the measure of ordinary care. The master is not the warrantor of the tools furnished his servants; having exercised ordinary care in the selection of the implements, his liability, so far as mere selection is concerned, ceases. Beach, Contrib. Neg. 2d ed. §§ 351, 352, and cases cited.

8. Again, no principle is more frequently enunciated or more often applied in the adjudicated cases than that which holds that an employé, in engaging in the service of another, assumes the risks incident to such employment; and this is especially true of seen dangers and patent defects. Where ordinary inspection and carefulness will enable the employé to avoid the danger, there he will be required to use such inspection and carefulness. "But it is held that, wherever the employé's means of information are equal to or greater than those of his employer, the employer . . . will not be liable in case of injury from a defect of that sort. But this 37 L. R. A.

is, perhaps, but little more than to say that the servant, as well as the master, is bound to use ordinary care. For patent dangers or defects the master, as a rule, is not liable, and in many cases it has been held that they need not be pointed out, even to minor employes, if the latter be capable of discerning them." Beach, Contrib. Neg. § 359. The learned author gives some instances where employers have been held exempt from liability. Thus: "One who works on a raised platform without railing takes the risk of falling off; and a laborer employed to wheel earth along the edge of a bank, when the posts are coming out of the ground, is presumed to know the danger, and to assume the risk of the bank caving in. Where a servant who was killed by falling through a hatchway knew when he entered the employment that there were no guards around it, he took all risks incident to the employment. So, also, a workman employed by a railroad company to stand in a dangerous place to signal trains assumes the obvious risks of the position, and a railroad-track walker, who knew that coal was customarily overloaded on tenders, could not recover for injuries from the fall of a piece of it; and a section hand cannot complain of the increased risk in being ordered out to work on a foggy day, nor, while pushing a hand-car, of falling into a properly constructed water-way, nor the risk from special trains not running on schedule time. One, however, whose employment in a railroad yard requires him to move damaged cars, takes the risk of mistaking damaged cars for sound ones." Id. § 360. This doctrine is firmly rooted in this court, and has received its frequent sanction. *Thomas v. Missouri Pac. R. Co.* 109 Mo. 187, and cases cited; *Bishop, Non-Cont. L.* § 675; and the quite recent case of *Wilson v. Tremont & S. Mills*, 159 Mass. 154. The rule is generally applied in actions brought by employé against employer, but no reason is perceived why the rule should not be equally applicable to the circumstances of the present case. As already seen, the plaintiff was fully conversant with the alleged defect in the ladder—its length; for otherwise it was sound. She had ascended it four or five times before, and gotten the pigeons out of the loft without trouble, and this thing occurred four or five times a year, as plaintiff says she had been using the new ladder a year or more when the accident happened. She had also used the old ladder before it had been discarded. So that it is simply indisputable that, if ever the doctrine of the assumption of obvious risks is to be applied, it ought to be applied in the present instance. Being thus applied, the result seems to be inevitable that plaintiff, on this ground alone, has no cause of action, and no standing in court.

For the reason aforesaid, the judgment should be reversed, and the petition dismissed.

All concur, except in the last paragraph.

A rehearing was subsequently held before the court *in banc* after which on March 19, 1895, the following opinion was handed down:

Per Curiam:

The judgment herein is reversed, and the petition dismissed, as directed in the foregoing opinion of Sherwood, J., in division No. 2.

Robinson, J., concurring with **Judge Sherwood** in the opinion. **McFarlane, J.**, in the third paragraph. **Barclay, J.**, specially. **Brace, Ch. J.**, and **Gantt** and **Burgess, JJ.**, dissenting.

Barclay, J., concurring:

Plaintiff, according to her testimony, was employed as a servant to do general housework. In her petition she states that she was employed as a cook, and that, "while performing the duties as cook, . . . under defendant's directions, defendant carelessly and negligently ordered plaintiff to climb up a ladder, and into the pigeon loft," etc. Plaintiff was hurt by falling to the ground while attempting to execute the order of defendant to get the pigeons. The order, by plaintiff's account, was accompanied with a remark about having the pigeons cleaned before the dishes were washed; so that it is evident that the pigeons were wanted for cooking, and that the plaintiff was directed to get them for that purpose. The allegation of the petition is that plaintiff was the servant of Mr. Spraul, the defendant's husband; but that is evidently only a statement of the effect of the employment, for in her testimony plaintiff states that the defendant actually engaged her for service in the family. Defendant had general direction of the household affairs. Plaintiff had been working as a domestic in the Spraul family, as above described, two years and five months, when her mishap occurred. During that time she had "got the pigeons out of the loft four or five times a year," as she said. She also admitted that she had previously used the same ladder to reach the loft (from which she fell) "four or five times." Prior to using that ladder, she had used, for the same purpose, an older one, since discarded. The pigeon loft was in the upper part of a shed in the yard of the Spraul premises, as has been described. The ladder plaintiff had to use was not defective. It was made for the purpose, and was new. The only supposed defect charged against it is that it was too long to reach the loft unless placed at a great angle, so plaintiff had to set it sidewise against an-

other shed. Plaintiff admitted that defendant had cautioned her as to the use of the ladder. Her words were thus given by plaintiff as witness: "Mrs. Spraul had sent me up the ladder before. She asked me why I did not stand the ladder over further, and said I would fall down there some time. I told her I could not stand it any other way, because the ladder did not fit." Defendant, at the time of the accident, did not direct plaintiff how to use the ladder. Plaintiff was then using the ladder according to her own methods. The ladder did not give way. Plaintiff was not even standing on it when she fell. She says: "When I was off the ladder, and wanted to enter the opening [of the loft], I lost my hold of the loft at the opening. I stood on the ladder, and put my hands on the opening. I wanted to step into the hole, and in so doing I lost my hold on the loft, and fell. I had to get off the ladder. I had gotten off the ladder, and had got on the pigeon loft." Later on she said: "If I had had a ladder that fitted, I would not have fallen. I did the best I could. Nobody told me how to enter." Without referring to other features of the case (particulars of which are given in the principal opinion filed), it appears to me that on the state of facts above disclosed the plaintiff cannot maintain this action against this defendant. The appliance in question was a simple one. It required no more than ordinary knowledge for its use. It was sound. The only danger to plaintiff arose from the mode and manner of its use; and the mode and manner of using it, on the occasion in question, were within plaintiff's own control. She had used it with safety before, and undoubtedly knew as much about its use for such purposes as did the defendant. In my opinion, plaintiff cannot recover for an injury arising from the manner in which she saw fit to place the ladder in executing the order of defendant to get the pigeons. The latter was a duty which, it seems to me, obviously came within the fair range of plaintiff's employment as a domestic servant. That, indeed, is the very claim made in her petition. Hence (without considering other questions) my concurrence is given to a reversal of the judgment on the general ground that defendant is chargeable with no breach of duty, as indicated in the closing lines of the opinion delivered by my learned colleague, **Judge Sherwood**.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

Catherine J KETCHUM.

(.....Mich.....)

A purpose to exhibit, loan, and circulate an obscene picture is not shown by proving the mere sitting for a negative of it.

(January 4, 1895.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Ingham County made during the trial of an information charging defendant with procuring an obscene picture of herself for the purpose of exhibition, loan, and circulation, which resulted in conviction. *Reversed.*

The facts are stated in the opinion.

Messrs. A. A. Ellis, Atty. Gen., and L. B. Gardner, Pros. Atty., for the People.

Messrs. William A. Fraser and Jason E. Nichols for defendant.

Hooker, J., delivered the opinion of the court:

Defendant was convicted under an information which charged her with having procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation. Counsel for the people claim that the evidence shows that the defendant employed two itinerant photographers to make negatives of her residence; that subsequently these negatives were found among the effects of said photographers, and that Exhibit A was also found at the same time and place. Exhibit A was a negative of a woman in a practically nude condition, and it is claimed to be a negative of the person of the defendant. Exhibit B was a photograph made from this negative by direction of the prosecuting attorney or sheriff. A witness named Cole testified that he saw a picture identically like Exhibit B in Mohr's cigar store. There was no evidence that any photograph was made from the negative except that made by the officer's direction, unless the picture described by Cole was such.

NOTE.—On the question what constitutes an obscene publication, see *Re Worthington Co's Petition* (N. Y.) 24 L. R. A. 110.

27 L. R. A.

There was testimony tending to show that the photographers did some work upon nude fancy pictures for Mohr's saloon. The court instructed the jury, in substance, that the negative is a picture, within the meaning of the law; that, if the defendant voluntarily sat in a nude condition, to enable it to be taken, she assisted in obtaining it, and therefore procured it; and that an intention to circulate photographic prints from the negative would be an intention to circulate the picture, within the statute. He left the question of the intent with which it was procured to the jury. We have no doubt that a negative is a picture. We think also that the court was right in holding that sitting for the negative was procuring the negative. The purpose for which the picture was obtained is an essential element of the offense, and must be proved like any other element. There can be no presumption of a particular purpose; it must be a legitimate inference from the evidence. The facts that Wigle & Webb had the negative, and that Cole saw a picture printed from it, do not sufficiently prove it. The natural inference from these facts would be that she sat for a negative to obtain a picture or pictures of herself. While it may be admitted that the usual purpose of procuring photographs is exhibition to friends, it does not necessarily follow that such is the purpose. Nor is there any reason for thinking that she designed that Wigle & Webb should dispose of any to other persons. The purpose does not appear, unless from the fact that one was seen, or from the assumption that she expected or designed to give prints to her friends. There is nothing to show either. If there were testimony tending to show that she did exhibit or circulate the picture, we might legitimately infer that she intended, when she procured it, to make such use of it. But in this case she is not shown to have done more than sit for a negative, and that only appears from the fact that the negative was found in the possession of the photographers, with whom she had done business in relation to other pictures. Upon this record the court should have directed a verdict of not guilty.

Conviction set aside, and a new trial ordered.
The other Justices concurred.

ILLINOIS SUPREME COURT.

ROBINSON BANK, *Appt.*,

v.

Frank O. MILLER *et al.*Thomas V. LAMPORT, *Appt.*,

v.

Frank O. MILLER *et al.*

(.....III.....)

1. The purchase by each of two persons of an undivided interest in real property used for mill purposes, and their subse-

quent formation of the partnership to operate the mill with a third person who individually buys the other undivided interest in the real property, does not make the real estate partnership property, where no partnership funds were paid for the purchase money, and the repairs subsequently made were paid, at least in part, by their individual contribution in equal shares.

2. A bona fide purchaser of land from one who holds the record title without notice that it is partnership property, obtains a good title.

3. Notice of a partnership interest in land is not created by knowledge of the fact

NOTE.—When real estate will be considered partnership property.

- I. General doctrine.
- II. The question of intention.
 - a. In general.
 - b. Pennsylvania doctrine.
- III. In whom the legal title vests.
 - a. The common-law doctrine.
 - b. Pennsylvania doctrine.
 - c. How vested at law.
- IV. Immaterial to whom legal title is conveyed.
- V. Parol evidence.
 - a. When held admissible.
 - b. When not admissible.
- VI. Implied and resulting trusts.
 - a. When created in partnership lands.
 - b. When no such trust created.
- VII. Equitable conversion.
- VIII. Out and out conversion.
- IX. Reconversion.
- X. Statute of frauds.
 - a. In general.
 - b. Within the statute.
 - c. Not within the statute.
- XI. Form of conveyance.
- XII. When not considered personally.
- XIII. The question of notice.
- XIV. When partnership formed for the purchase and sale of real estate.
- XV. Real estate acquired in payment of debts.
- XVI. Real estate held under lease.
 - a. In general.
 - b. The question of renewal.
- XVII. The effect of improvements.
- XVIII. Lands owned by partner prior to partnership.
- XIX. Position of incoming partner.
- XX. Facts and circumstances held sufficient to constitute real estate partnership property.
- XXI. Facts and circumstances held not sufficient to create a partnership in real estate.
- XXII. Louisiana doctrine.

Upon the question of dower and the rights of heirs and personal representatives in partnership real estate, see note to Woodward-Holmes Co. v. Nudd (Minn.) ante, 340.

As to the rights of partners *inter se*, surviving partner, and the position and creditors of third parties with respect to such lands, see the respective notes to York v. Tozer, (Minn.), Dyer v. Morse, (Wash.), Galbraith v. Tracy (1894) (Ill.) and Goldthwaite v. Janney (Ala.) post.

I. General doctrine.

A partnership in real estate can be created by parol, and particularly is this so after the partners have acted as such to the final determination of the adventure and divided the profits between them, as in such a case they are in no position to deny the

existence of a valid copartnership. Getty v. Devlin (1873) 54 N. Y. 403. Chester v. Dickerson (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 340, followed.

Section 1887 of the Georgia Code provides, a partnership may be created, either by written or parol contract, or it may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal.

The above section of the code has been held to contemplate that lands may be partnership property, but need not in a stricter sense than they were held to be such property prior to the adoption of the code. Sutlive v. Jones (1878) 61 Ga. 673.

A partnership may exist as to a single transaction or enterprise. Kayser v. Maugham (1885) 8 Colo. 232.

And that as well as in a series. *Re Warren* (1847) 2 Ware (2 Daves) 323.

An express agreement providing for a partnership as such is not necessary to create the relation. Kayser v. Maugham, *supra*.

It may be implied from the acts and interests of the parties, although the words "partnership" or "partner" may never have been used by the parties in connection with the business. *Ibid*.

Yet a partnership in profits and losses does not necessarily imply a partnership in the property out of which the profits arise. Howe v. Howe (1868) 99 Mass. 71, following French v. Styring (1857) 2 C. B. N. S. 357, 25 L. J. Q. P. 181, 3 Jur. N. S. 670.

Ordinary partners may purchase real estate and hold it for partnership purposes. Warner v. Beers (1840) 23 Wend. 103, 150, following Coles v. Coles (1818) 15 Johns. 159, 8 Am. Dec. 231.

So real estate may be purchased and sold as merchandise, and as such become the *sub stratum* of a partnership. Fall River Whaling Co. v. Borden (1852) 10 Cush. 458; Ludlow v. Cooper (1854) 4 Ohio St. 1; Baldwin v. Richardson (1870) 33 Tex. 16.

The word "res" being used without qualification, and designating as well things real as personal. Sage v. Sherman (1849) 2 N. Y. 438.

An unincorporated company or firm may hold land and inculmber or convey as it pleases. Oliver's Estate (1890) 9 L. R. A. 451, 136 Pa. 43.

The only difference growing out of the rules of law in reference to the conveyance and transmission of real estate. Chester v. Dickerson (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349.

At law it is deemed the property of the person in whose name it stands, and so in equity in the absence of an agreement or proof of purchase with partnership funds for partnership purposes. Hogle v. Lowe (1877) 12 Nev. 236.

The principle that a joint undertaking among two or more persons, who are to participate in the profit and loss resulting from it constitutes a

that the holder of the legal title is a member of a firm which is using the property for partnership purposes.

4. The grantee of land "subject to incumbrances" is not bound to pay a mortgage thereon which did not constitute a part of the consideration of his purchase, and which was not made in good faith for a real indebtedness.

(November 23, 1894.)

A PPEAL by plaintiff from a judgment of the Appellate Court, Fourth District, affirming a decree of the Circuit Court for

Crawford County, refusing to set aside a mortgage which had been given upon property of John S. Emmons and granting the prayer of a cross-bill filed to foreclose such mortgage. *Affirmed.*

A PPEAL by defendant Lampport from a judgment of the Appellate Court for Crawford County setting aside a mortgage which had been given to appellant upon land of defendant Miller and refusing the prayer of a cross-bill which had been filed for the foreclosure of such mortgage. *Affirmed.*

partnership, is generally averred without reference to the property to which their dealing relates. *Sage v. Sherman* (1849) *supra*.

A copartnership which is entered into and commenced immediately is not invalid, although one of its declared objects is the purchase of real estate for the purposes of the firm and is a site for the transaction of its business. *Smith v. Tarlton* (1847) 2 Barb. Ch. 393, 5 L. ed. 665.

Yet conceding that a community of interest is in some sense a partnership, it does not follow that all the incidents and liabilities of a commercial partnership attach. *Williams v. Gillies* (1878) 75 N. Y. 197.

Premises used by partners for the purposes of their trade are prima facie a part of the partnership property, but such presumption may be rebutted. *Osborn v. McBride* (1876) 16 Nat. Bankr. Rep. 23, 3 Hawy. 590; *Featherstonbaugh v. Fenwick* (1810) 17 Ves. Jr. 298.

An agreement to build a house and divide the profits will not of itself establish a partnership. *Demarest v. Koch* (1891) 129 N. Y. 218.

The rules of law applicable to commercial partnerships apply to partnerships in real estate. *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 849. To the same effect, *Sumner v. Hampson* (1838) 8 Ohio, 328, 365, 83 Am. Dec. 722.

And so far as the partners and their creditors are concerned it is in equity subject to the same general rules as personal property. *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627.

The law-merchant by which one is answerable as a dormant partner, on a contract made by the partnership of which he is a member, is confined to trade and commerce and does not extend to speculations in the purchase and sale of lands. *Pitte v. Waugh* (1808) 4 Mass. 424.

Yet as between the partners themselves there may be a dormant partnership in the purchase and sale of real estate, but as between the partners and third persons, the law in regard to dormant partnerships will not apply. *Gray v. Palmer* (1858) 9 Cal. 616.

The nature of real estate as partnership property is not altered by the mere fact that the respective interests of the partners therein differ in some degree from their interest in the business and will not be sufficient of itself to show that they hold as tenants in common and not as partners. *Rank v. Grote* (1864) 18 Jones & S. 273.

There may be special covenants and agreements entered into between partners, relative to the use and enjoyment of real estate held by them jointly, to which the land will be considered as held subject. *Coles v. Coles* (1818) 15 Johns. 168, 8 Am. Dec. 231.

When real estate is purchased by a firm, the title is held subject to all the incidents of partnership property. *Trowbridge v. Cross* (1886) 117 Ill. 109.

And a partner is to be regarded in such cases as holding only an interest in the stock or capital

of the partnership, which is personal property. *Lindley v. Davis* (1887) 7 Mont. 206.

While as between the partners in equity, land may be considered as partnership property, yet the debt secured by it is not a partnership debt. *Baxter v. Bell* (1879) 19 Hun, 368.

It matters little whether the purchase is made with partnership funds, that is with a joint fund previously formed by contribution from each of the parties of the proportional part, or whether each one separately pays his proportional part of the purchase money, the essential thing being whether it is paid as partnership money for a partnership. *Bopp v. Fox* (1872) 63 Ill. 540.

To make land partnership property it must be purchased with partnership funds for partnership purposes; or at least one of these elements must be present. *Alkire v. Kahle* (1888) 123 Ill. 496; *Hoxie v. Carr* (1882) 1 Sumn. 188; *Wheatley v. Calhoun* (1841) 12 Leigh, 264, 37 Am. Dec. 654; *Alexander v. Kimbro* (1878) 49 Miss. 529.

If the land is necessary for the partnership purposes, and bought with the partnership assets, it makes no difference whether the real estate is leasehold or in fee; once established that such property is partnership property it comes under the operation of the general principles which arise out of partnership contracts, there being no reason why the operation of such principles should be restricted to any particular class or species of partnership property. *Darby v. Darby* (1856) 8 Drew. 495, 2 Jur. N. S. 271, 26 L. J. Ch. 371, 4 Week. Rep. 418.

In all such cases the whole character of the property dealt with must be looked to, and it must be seen what the property is ancillary to, whether the land is ancillary to the trade or whether the trade is ancillary to the land. *Steward v. Blakeway* (1868) L. R. 6 Eq. 479, 16 Week. Rep. 1104.

Land used in the trade is part of the partnership property and therefore personal estate, while land not used for partnership purposes but let out to tenants, will remain real estate. *Waterer v. Waterer* (1878) L. R. 15 Eq. 402.

The general doctrine with regard to real estate owned by a copartnership, deducible from the decisions upon the subject, is that real estate purchased by partners with partnership funds for partnership purposes, and appropriated to such purposes is, as between the partners themselves and the creditors, partnership property, and although held by them at law as tenants in common, is considered in equity as personal estate so far as it is required for the purposes of the firm, that is, the payment of the debts and liabilities of the partnership, and the settlement of the claims of the partners as between themselves.

The following cases arranged in order of states illustrate this doctrine: *Pugh v. Currie* (1843) 5 Ala. 446; *Owens v. Collins* (1853) 23 Ala. 337; *Murphy v. Abrams* (1874) 60 Ala. 236; *Brewer v. Browne* (1880) 68 Ala. 210; *Little v. Suedecor* (1875) 52 Ala. 167; *Ro-*

Statement by Magruder, J.:

The original bill in these consolidated causes was filed by certain persons doing a banking business, as partners, under the name of the Robinson Bank, for the purpose of removing the three mortgages, hereinafter named, as clouds upon the title of Abner P. Woodworth, trustee for said bank, to four acres of land in Robinson, in the county of Crawford. Upon the first trial in the circuit court, all the mortgages were set aside. Upon appeal to the appellate court, the decree of the circuit court was reversed, and

the cause was remanded. The cause was heard a second time in the circuit court; and at the second hearing the mortgage to Lamport was set aside as fraudulent, and his cross-bill to foreclose the same was dismissed, but the two Emmons mortgages were sustained as valid, and the prayers of the cross-bills and supplemental cross-bills to foreclose the same were granted by the entry of the decree of foreclosure. The second decree of the circuit court has been affirmed by the appellate court, and the present appeal is prosecuted from such judgment of affirmance.

velsky v. Brown (1891) 32 Ala. 522; Powers v. Robinson (1890) 90 Ala. 225; Offutt v. Scott (1872) 47 Ala. 104; Davis v. Smith (1867) 32 Ala. 196; Brunson v. Morgan (1884) 76 Ala. 508; Eppy v. Comer (1884) 76 Ala. 501; Caldwell v. Farmer (1876) 56 Ala. 406; Lang v. Waring (1854) 25 Ala. 625, 60 Am. Dec. 538; Boulston v. Washington (1895) 79 Ala. 539; Hatchett v. Blanton (1868) 73 Ala. 423; Ware v. Owens (1868) 43 Ala. 213, 94 Am. Dec. 642; Lang v. Waring (1860) 17 Ala. 158; Causler v. Wharton (1876) 62 Ala. 368; Hany v. Farmer (1877) cited in Causler v. Wharton, *supra*; Southern Cotton Oil Co. v. Henshaw (1890) 89 Ala. 446; Andrews v. Brown (1863) 21 Ala. 437, 56 Am. Dec. 252; Houston v. Stanton (1846) 11 Ala. 412; Lenow v. Fones (1886) 48 Ark. 557; Percifull v. Platt (1890) 36 Ark. 558; Drewry v. Montgomery (1861) 28 Ark. 256; Ferguson v. Hanauer (1862) 56 Ark. 179; Dupuy v. Leavenworth (1861) 17 Cal. 262; Gray v. Palmer (1858) 9 Cal. 616; Duryea v. Burt (1865) 28 Cal. 566; Jones v. Parsons (1854) 25 Cal. 100; Roberts v. Eldred (1867) 73 Cal. 394; Breen v. Richardson (1883) 6 Colo. 606; Sigourney v. Munn (1828) 7 Conn. 11; Tillotson v. Tillotson (1867) 84 Conn. 336; Frink v. Branch (1844) 16 Conn. 260; Beecher v. Stevens (1876) 43 Conn. 597; Loubat v. Nourse (1858) 5 Fla. 360; Black v. Black (1854) 15 Ga. 445; Dalton City Co. v. Dalton Mfg. Co. (1868) 33 Ga. 243; First Nat. Bank of Gainesville v. Cody (Ga.) Jan. 27, 1894; Faulds v. Yates (1870) 57 Ill. 416, 11 Am. Rep. 24; Hyman v. Peters (1889) 80 Ill. App. 134; Trowbridge v. Cross (1886) 117 Ill. 109; Galbraith v. Tracy (1894) *post*, —, 153 Ill. 54; Taylor v. Farmer (11.) (1896) 6 West. Rep. 710; Pepper v. Pepper (1887) 24 Ill. App. 316; Bopp v. Fox (1872) 63 Ill. 540; Altkire v. Kahle (1886) 123 Ill. 498; Nicoll v. Ogden (1862) 29 Ill. 323, 61 Am. Dec. 311; Rainey v. Nance (1870) 64 Ill. 29; Mauck v. Mauck (1870) 54 Ill. 231; Grissom v. Moore (1886) 106 Ind. 236, 55 Am. Rep. 748; Huston v. Neil (1873) 41 Ind. 504; Hale v. Plummer (1896) 6 Ind. 121; Matlock v. Matlock (1864) 5 Ind. 408; Roberts v. McCarty (1867) 9 Ind. 16, 68 Am. Dec. 604; Indiana Pottery Co. v. Bates (1856) 14 Ind. 8; Morgan v. Olvey (1876) 58 Ind. 6; Dickey v. Shirk (1891) 128 Ind. 278; Evans v. Hawley (1872) 36 Iowa, 89; Paton v. Baker (1888) 62 Iowa, 704; Richards v. Grinnell (1884) 68 Iowa, 44, 50 Am. Rep. 737; Hewitt v. Rankin (1875) 41 Iowa, 85; Paige v. Paige (1887) 71 Iowa, 318, 80 Am. Rep. 799; Van Aken v. Clark (1891) 82 Iowa, 256; Van Staden v. Kline (1894) 64 Iowa, 180; Scruggs v. Russell (1858) McCahon, 30; Johnson v. Clark (1877) 18 Kan. 157; Chicago Lumber Co. v. Ashworth Co. (1861) 26 Kan. 218; Marsh v. Davis (1865) 33 Kan. 328; Caskey v. Caskey, 5 Ky. L. Rep. 775; Spalding v. Wilson (1863) 80 Ky. 699; Burnam v. Burnam (1869) 6 Bush, 389; Wilhite v. Boulware (1889) 36 Ky. 109; Galbraith v. Gedge (1855) 16 B. Mon. 691; Lowe v. Lowe (1878) 13 Bush, 688; Cornwall v. Cornwall (1869) 6 Bush, 369; Pepper v. Thomas (1887) 86 Ky. 539; Hewitt v. Sturdevant (1844) 4 B. Mon. 453; Bryant v. Hunter (1869) 6 Bush, 75; Divine v. Mitchell (1844) 4 B. Mon. 468, 41 Am. Dec. 241; Holmes v. Self (1881) 79 Ky. 297; Bank of Louisville v. Hall (1871) 8 Bush, 672; Sellar v. Brenner (Ky.) March 23, 27 L. R. A.

1887; Flanagan v. Shuck (1865) 82 Ky. 617; Lucas v. Cooper (1866) 15 Ky. L. Rep. 642; Allen v. Whetstone (1869) 35 La. Ann. 849; May v. New Orleans & C. R. Co. (1892) 44 La. Ann. 444; Thomas v. Scott (1842) 3 Rob. (La.) 256; Dudley v. Littlefield (1842) 21 Me. 418; Lane v. Tyler (1861) 49 Me. 262; Bufum v. Bufum (1861) 49 Me. 108; Goodburn v. Stevens (1847) 5 Gill, 1; National Union Bank of Maryland v. National Mechanics Bank of Baltimore (Md.) Dec. 19, 1894; Riley v. Carter (1893) 19 L. R. A. 489, 76 Md. 181; Richards v. Manson (1890) 101 Mass. 484; Wilcox v. Wilcox (1866) 13 Allen, 232; Shearer v. Shearer (1867) 98 Mass. 107; Montague v. Hayes (1866) 10 Gray, 606; Converse v. Citizens Mut. Ins. Co. (1862) 10 Cush. 37; Burnside v. Merrick (1842) 4 Met. 537; Dyer v. Clark (1848) 5 Met. 562, 39 Am. Dec. 697; Fall River Whaling Co. v. Borden (1852) 10 Cush. 458; Howard v. Priest (1848) 5 Met. 582; Moran v. Palmer (1890) 13 Mich. 377; Merritt v. Dickey (1878) 38 Mich. 41; Way v. Stebbins (1882) 47 Mich. 296; Lindsey v. Race (Mich.) Dec. 18, 1894; Williams v. Sheldon (1866) 61 Mich. 311; Thayer v. Laue (1848) Walk. Ch. (Mich.) 200; Arnold v. Wainwright (1861) 6 Minn. 368, 80 Am. Dec. 448; Churchill v. Proctor (1863) 81 Minn. 129; Hanson v. Metcalf (1891) 46 Minn. 25; Markham v. Merritt (1849) 7 How. (Miss.) 444; McGrath v. Sinclair (1877) 55 Miss. 89; Scruggs v. Blair (1870) 44 Miss. 409; Sykes v. Sykes (1873) 49 Miss. 190; Whitney v. Cotten (1876) 58 Miss. 680; Hanway v. Robertshaw (1874) 49 Miss. 756; Alexander v. Kimbro (1878) 49 Miss. 539; Holmes v. McGee (1850) 27 Mo. 597; Carlisle v. Mulhern (1863) 19 Mo. 56; Duhring v. Duhring (1854) 20 Mo. 174; Matthews v. Hunter (1878) 67 Mo. 398; Willet v. Brown (1877) 65 Mo. 126, 37 Am. Rep. 296; Hartnett v. Fegan (1876) 8 Mo. App. 1; Easton v. Courtwright (1884) 64 Mo. 37; Thompson v. Holden (1896) 117 Mo. 118; Lindley v. Davis (1887) 7 Mont. 206; Batty v. Adams County Comrs. (1884) 16 Neb. 44; Bowen v. Billings (1862) 13 Neb. 429; Whitmore v. Shiverick (1897) 3 Nev. 238; Hogle v. Lowe (1877) 13 Nev. 236; Messer v. Messer (1879) 59 N. H. 375; Jarvis v. Brooks (1868) 27 N. H. 37, 69 Am. Dec. 369; Cilley v. Huse (1860) 40 N. H. 363; Parker v. Bowles (1876) 57 N. H. 491; Farrington v. Barr (1858) 36 N. H. 36; Moore v. Moore (1869) 38 N. H. 362; Ballantine v. Frelinghuysen (1884) 38 N. J. Eq. 398; Harney v. First Nat. Bank of Jersey City (N. J.) May 15, 1894; Matlack v. James (1860) 13 N. J. Eq. 126; Deveney v. Mahoney (1873) 23 N. J. Eq. 249; Uhler v. Semple (1890) 20 N. J. Eq. 238; National Bank of the Metropolis v. Sprague (1899) 20 N. J. Eq. 13; Partridge v. Wells (1878) 30 N. J. Eq. 176; Baldwin v. Johnson (1881) 1 N. J. Eq. 441; Holdrege v. Gwynne (1896) 18 N. J. Eq. 26; Averill v. Loucks (1849) 6 Barb. 19; King v. Wilcomb (1849) 7 Barb. 263; Parker v. Parker (1878) 65 Barb. 205; Coles v. Coles (1818) 15 Johns. 160, 8 Am. Dec. 231; Buckley v. Buckley (1850) 11 Barb. 74; Buchan v. Sumner (1847) 2 Barb. Ch. 197, 5 L. ed. 612, 47 Am. Dec. 306; Fairchild v. Fairchild (1879) 64 N. Y. 471, affirming (1876) 5 Hun, 407; Chester v. Dickerson (1873) 64 N. Y. 1, 13 Am. Rep. 560; Van Brunt v. Applegate (1871) 44 N. Y. 544; Lawrence v. Taylor (1843) 5 Hill.

The two causes, here consolidated by agreement, involve two appeals: One is the appeal of the Robinson Bank, which brings up for review the action of the lower courts in sustaining the Emmons mortgages, and refusing to remove the same as clouds. The other is the appeal of Thomas V. Lampport, which questions the action of the lower courts in refusing to sustain his mortgage, and in dismissing his cross-bill. Other questions were involved and other parties were interested in the hearings heretofore had in the circuit and appellate courts, but, as the rec-

ord now stands, the only question presented is whether or not the trustee of the bank holds the title to the land subject to the lien of said mortgages, or either or any of them.

The material facts which it is necessary to state are as follows:

Prior to April, 1883, said four acres upon which there was a flour mill were owned, two thirds thereof by John Newton, and one third thereof by Henry O. Wilkin. Wilkin sold his one-third interest to one Dyer, who executed a mortgage thereon to secure the purchase money. Dyer died, and the mort-

107; Delmonico v. Guillaume (1845) 2 Sandf. Ch. 366, 7 L. ed. 627; MacFarlane v. MacFarlane (1894) 82 Hun, 238; Barter v. Bell (1879) 19 Hun, 368; Teeschmacher v. Lenz (1894) 82 Hun, 594; Columb v. Read (1893) 24 N. Y. 506; Hiscock v. Phelps (1873) 49 N. Y. 97; Greenwood v. Marvin (1888) 111 N. Y. 423; Struthers v. Pearce (1873) 51 N. Y. 387; Sage v. Sherman (1849) 2 N. Y. 417; Haynes v. Brooks (1871) 8 N. Y. Civ. Proc. Rep. 106; Rank v. Grote (1884) 18 Jones & S. 273; Tarbel v. Bradley (1878) 7 Abb. N. C. 379; Cox v. McBurney (1849) 2 Sandf. 561; Leary v. Boggs (1886) 1 N. Y. S. R. 571; Chamberlin v. Chamberlin (1873) 12 Jones & S. 118; Smith v. Jackson (1883) 2 Edw. Ch. 28, 6 L. ed. 236; Martin v. Wagener (1873) 1 Thomp. & C. 518; Smith v. Tarlton (1847) 3 Barb. Ch. 388, 5 L. ed. 606; Bissell v. Harrington (1879) 18 Hun, 81; Deming v. Colt (1850) 3 Sandf. 284; Maloy v. Associated Lace Makers Co. (1890) 28 N. Y. S. R. 736; Williams v. Gillies (1877) 53 How. Pr. 429; Dawson v. Parsons (1894) 10 Misc. 428; Smith v. Danvers (1882) 5 Sandf. 609; King v. Weeks (1874) 70 N. C. 372; Ross v. Henderson (1877) 77 N. C. 170; Marvin v. Trumbull (1888) Wright (Ohio) 386; Rammelsberg v. Mitchell (1875) 29 Ohio St. 22, 53; Norwalk National Bank v. Sawyer (1889) 38 Ohio St. 330; Greene v. Greene (1894) 1 Ohio, 535, 13 Am. Dec. 643; Page v. Thomas (1885) 48 Ohio St. 38, 64 Am. Rep. 799; Ludlow v. Cooper (1854) 4 Ohio St. 9; Knott v. Knott (1876) 6 Or. 142; Miller's Estate (1898) 14 Pa. Co. Ct. Rep. 147; Clark's App. (1872) 73 Pa. 142; Foster's App. (1873) 74 Pa. 391, 15 Am. Rep. 558; Hale v. Henrie (1894) 2 Watts, 143, 27 Am. Dec. 239; Meason v. Kaine (1899) 68 Pa. 335; Foster v. Barnes (1876) 81 Pa. 377; Abbott's App. (1865) 50 Pa. 234; Shafer's App. (1894) 106 Pa. 49; Ridgway's App. (1890) 15 Pa. 177, 58 Am. Dec. 598; Warriner v. Mitchell (1899) 126 Pa. 161; Modervell v. Mullison (1868) 21 Pa. 237; Collner v. Greig (1890) 137 Pa. 606; West Hickory Min. Asso. v. Reed (1875) 80 Pa. 38; Patterson v. Silliman (1867) 23 Pa. 304; Lancaster Bank v. Myley (1850) 13 Pa. 544; Wood v. Witherow (1871) 8 Phila. 517; Kramer v. Arthurs (1847) 7 Pa. 165; McDermot v. Laurence (1821) 7 Serg. & R. 440, 10 Am. Dec. 468; Du Bree v. Albert (1882) 100 Pa. 433; Black v. Seipt (1877) 12 Phila. 360; Erwin's App. (1861) 39 Pa. 585, 80 Am. Dec. 542; Tillinghast v. Champlin (1856) 4 R. I. 173, 37 Am. Dec. 510; Providence v. Bullock (1894) 14 R. I. 363; Lime Rock Bank v. Phetepiace (1864) 8 R. I. 56; Boyce v. Coster (1850) 4 Strobb. Eq. 25; Winslow v. Chiffelle (1894) Harp. Eq. 25; Betts v. Letcher (1890) 1 S. Dak. 132; Williamson v. Fontain (1874) 7 Bart. 213; Piper v. Smith (1858) 1 Head, 93; Hunt v. Benson (1841) 3 Humph. 459; Boyers v. Elliott (1846) 7 Humph. 204; Moreau v. Saffarans (1859) 3 Sneed, 535, 67 Am. Dec. 562; Murrell v. Mandelbaum (1892) 85 Tex. 22; Knauss v. Cahoon (1891) 7 Utah, 132; Dewey v. Dewey (1893) 35 Vt. 555; Hughes v. Allen (1894) 66 Vt. 96; Willis v. Freeman (1861) 35 Vt. 44, 52 Am. Dec. 619; Brooke v. Washington (1851) 8 Gratt. 243, 56 Am. Dec. 142; Davis v. Christian (1859) 15 Gratt. 11; Hardy v. Norfolk Mfg. Co. (1885) 80 Va. 404; Wheatley v. Calhoun (1841) 12 Leigh, 264, 37 Am. Dec. 27 L. R. A.

654; Jones v. Neale (1856) 2 Patton & H. (Va.) 330; McCully v. McCully (1888) 78 Va. 159; Digg v. Brown (1884) 78 Va. 222; Pierce v. Trigg (1839) 10 Leigh. 403; Christian v. Ellis (1845) 1 Gratt. 402; Edgar v. Donnally (1811) 2 Munf. 337; Forde v. Herron (1814) 4 Munf. 316; Fowler v. Bailey (1861) 14 Wis. 129; Weld v. Johnson Mfg. Co. (1893) 36 Wis. 552; Bergeron v. Richardott (1882) 55 Wis. 130; Bird v. Morrison (1840) 12 Wis. 133; Riedeburg v. Schmitt (1883) 71 Wis. 644; Kruschke v. Stefan (1892) 38 Wis. 373; Re Ransom (1883) 17 Fed. Rep. 331; Sprague Mfg. Co. v. Hoyt (1886) 20 Fed. Rep. 421; McKinnon v. McKinnon (1898) 56 Fed. Rep. 409; Logan v. Greenlaw (1896) 25 Fed. Rep. 399; Re Coddling & Russell (1881) 9 Fed. Rep. 349; Perin v. Megibben (1892) 6 U. S. App. 343, 53 Fed. Rep. 36; Megibben v. Perin (1892) 49 Fed. Rep. 138; Ames v. Ames (1888) 37 Fed. Rep. 30; Holaday v. Land & River Imp. Co. (1893) 57 Fed. Rep. 774; Brown v. Slee (1881) 103 U. S. 323, 26 L. ed. 618; Allen v. Withrow (1884) 110 U. S. 119, 23 L. ed. 90; Marrett v. Murphy (1875) 11 Nat. Bank. Reg. 121; Hiscock v. Jaycox (1876) 12 Nat. Bank. Reg. 507; Clay v. Freeman (1899) 118 U. S. 97, 30 L. ed. 104; Platt v. Oliver (1842) 3 McLean, 27; Riddle v. Whitehill (1890) 135 U. S. 631, 34 L. ed. 232; Claggett v. Kilbourne (1862) 66 U. S. 1 Black, 246, 17 L. ed. 213; Lyman v. Lyman (1829) 2 Paine, C. C. 11; Shanks v. Klein (1881) 104 U. S. 18, 26 L. ed. 685; Klein v. Shanks, 15 Alb. L. J. 16; Hoxie v. Carr (1882) 1 Sumn. 174; Phillips v. Phillips (1882) 1 Myl. & K. 649, 7 Cond. Ch. Rep. 303, 1 L. J. Ch. N. S. 214; Fereday v. Wightwick (1829) 1 Russ. & M. 45, Tambl. 250; Bell v. Phyn (1893) 7 Ves. Jr. 453; Fereday v. Wightwick (1827) 4 Cond. Ch. Rep. 114, 4 Russ. 114, 6 L. J. Ch. 60; Broom v. Broom (1834) 9 Cond. Ch. Rep. 163, 3 Myl. & K. 442; Randall v. Randall (1835) 10 Cond. Ch. Rep. 59, 7 Sim. 271, 4 L. J. Ch. N. S. 187; Thornton v. Dixon (1791) 3 Bro. Ch. 190; Darby v. Darby (1856) 3 Drew. 495, 3 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Week. Rep. 413; Smith v. Smith (1800) 5 Ves. Jr. 139; Ripley v. Waterworth (1802) 7 Ves. Jr. 424; Featherstonhaugh v. Fenwick (1810) 17 Ves. Jr. 296; Crawshaw v. Maule (1813) 1 Swanst. 495; Ex parte Neale, Re Laurence, Case of the Bank of England (1861) 3 DeG. F. & J. 645; Re Streathfield (1861) 7 Jur. N. S. 715, 30 L. J. Bankr. 25, 9 Week. Rep. 892, 4 L. T. N. S. 601; Morris v. Kearley (1837) 2 Younge & C. Exch. 139; Kirkpatrick v. Sime 5 Pat. So. App. Cas. 326; Waterer v. Waterer (1878) L. R. 15 Eq. 402; Bligh v. Brent (1836) 3 Younge & C. Exch. 223, 6 L. J. Exch. N. S. 53; Wylie v. Wylie, 4 Grant, Ch. (U. C.) 273; Atty.-Gen. v. Hubbard (1883) L. R. 10 Q. B. Div. 493, 52 L. J. Q. B. 464, 48 L. T. N. S. 608; Houghton v. Houghton (1841) 11 Sim. 491, 10 L. J. Ch. N. S. 210, 5 Jur. 523; Selkirk v. Davies (1814) 2 Dow, P. C. 230; Re Wilson, Wilson v. Holloway (1893) 2 Ch. 240.

Although the company is a corporation and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. Bligh v. Brent, *supra*.

The rule is founded upon the ground of a trust imposed upon all who hold the legal title on behalf of

gage so given by him was foreclosed. This one-third interest was sold under the decree of foreclosure on April 20, 1883, to John S. Emmons, for \$3500, and a certificate of sale was issued to Emmons by the master. By arrangement between Wilkin and John S. Emmons, the latter gave to the former, in payment of the purchase money, two notes, — one for \$2000, secured upon a farm, and the other for \$1500, — dated April 24, 1883, due on or before April 24, 1884, with Willis Emmons, a brother of John S., as surety thereon. Subsequently, suit was brought

upon this note for \$1500, and judgment obtained against Willis Emmons, who paid the whole of the judgment, no part thereof being paid by John S. Emmons. A few days after the purchase of the one-third interest by John S. Emmons at the master's sale, John Newton sold an undivided one-third interest in the four acres, except three fourths of an acre in the northeast corner thereof, to the appellant, Frank O. Miller, for \$3000, and executed a deed therefor to Miller. It would appear from the evidence that Newton resided upon the three quarters of an acre,

all partnership objects, and such trust once discharged the residue resumes its former character. *Huston v. Neil* (1873) 41 Ind. 504.

The doctrine establishing, by equitable fiction, partnership real estate as personality, is in favor of trade and for the benefit of surviving partners and firm creditors, and the Minnesota statutes have not changed the doctrine. *Marrett v. Murphy* (1875) 11 Nat. Bankr. Reg. 151.

The theory being that every person who shares in the profits deprives creditors of parties of the means of payment. *Williams v. Gillies* (1876) 58 How. Pr. 429.

Real property held in the joint names of the firm as partnership stock is regarded at law as held and owned by the partners as tenants in common, where there is no agreement or understanding to the contrary, and will be so treated; in equity, however, it is regarded as held in trust as partnership property, subject to the rules applicable to personal estate and liable to the claims of the partner *inter se*, and to the partnership debts and liabilities. *Galbraith v. Gedge* (1855) 16 B. Mon. 681.

Lands bought by a commercial concern for the purpose of the partnership concern are considered in equity as forming a part of the partnership fund and stock in trade, particularly during the lives of the partners. *Lyman v. Lyman* (1829) 2 Paine, C. C. 11.

The ground of the equitable doctrine appears to be a specific interference of equity in favor of commerce, whereby the trust is separated from the legal estate, the latter being left to pass according to the nature of the property; the trust estate is made subject to the rules of partnership personal property, so far as concerns the interests of the partners in relation to one another, and those who are in privity with them. *Arnold v. Wainwright* (1861) 6 Minn. 358, 80 Am. Dec. 448.

Such doctrine is a necessary sequence of the principle, which imposes upon the real estate its character of assets, as well for the settlement and liquidation of the accounts between the partners as to answer the demand of creditors. *Whitney v. Cotten* (1876) 53 Miss. 639.

Land thus acquired or obtained as a means of collection and taken in payment of a firm debt, acquires many of the incidents of personal property, so far as an adjustment and settlement of the partnership accounts are concerned. *Espy v. Comer* (1884) 76 Ala. 501.

It is considered personality to the extent that it is under the control of the chancellor in making a final adjustment of the affairs of the partnership, or in marshaling assets among the creditors. *Mauck v. Mauck* (1870) 54 Ill. 231.

The doctrine is, however, purely equitable, and the legal title with all the characteristics of realty attaches to it, until it is so applied to partnership wants. *Espy v. Comer*, *supra*.

Equity interfering for equitable purposes only. *Wilcox v. Wilcox* (1866) 13 Allen, 252.

And will not act upon doubtful proof, particularly when the rights of strangers or third parties

are affected. *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore* (Md.), Dec. 14, 1894, where the required evidence pointed out the property being that of the individual members.

Three things are necessary to constitute real estate partnership property; first, it must be purchased for that purpose; secondly, it must be appropriated thereto, and thirdly, it must be paid for with partnership funds. *Pepper v. Pepper* (1887) 24 Ill. App. 316; *Messer v. Messer* (1879) 59 N. H. 375.

It must have been purchased for partnership purposes and on partnership account, or must in some form have been voluntarily subjected by the legal owner to the equitable rights and liens of all the partners and of the partnership creditors. *Chamberlain v. Chamberlain* (1878) 12 Jones & S. 116.

Facts must concur in order to constitute real estate partnership property, namely, acquisition with partnership funds or on partnership credit, and it must be for the use of the partnership. *Hatchett v. Blanton* (1863) 72 Ala. 423, following *Ware v. Owens* (1868) 42 Ala. 212, 94 Am. Dec. 642; *Owens v. Collins* (1868) 28 Ala. 387; *Hoxie v. Carr* (1832) 1 Sumn. 198.

It should not only have been purchased with partnership funds but it should have been used for partnership purposes. *Cox v. McBurney* (1849) 2 Sandf. 562; *Crawshaw v. Maule* (1818) 1 Swanst. 506; *Phillips v. Phillips* (1833) 1 Myl. & K. 649, 7 Cond. Ch. Rep. 208, 1 L. J. Ch. N. S. 214; *Fereday v. Wightwick* (1829) 1 Russ. & M. 45, Taml. 250.

A decree in equity making real estate partnership property is conclusive upon the partners who are parties to the bill, and a sale made thereunder will pass their interests. *Foster v. Barnes* (1876) 81 Pa. 377.

Where real estate becomes partnership property, fixtures attached by the partners may become part of it. *Robertson v. Corsett* (1878) 39 Mich. 777; *Christian v. Dripps* (1857) 28 Pa. 271.

It depends mainly upon the question, whether or not the property has been brought into the firm as part of the joint stock. *Brown v. Morrill* (1891) 45 Minn. 438; *Riedeburg v. Schmitt* (1888) 71 Wis. 644.

And the transaction must be construed with reference to the character of the property, and the legal rules applicable to it. *Williams v. Gillies* (1878) 78 N. Y. 197.

When land is conveyed to the several partners, it is indispensable that it should be actually used for partnership purposes, or that a positive agreement should be proved making it partnership property. *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun. 407.

Yet a special agreement that real estate purchased with partnership funds and used for partnership purposes is not necessary for the purpose of constituting it partnership property. *Jarvis v. Brooks* (1868) 27 N. H. 37, 59 Am. Dec. 359.

Where tenants in common are *prima facie* also copartners in business, and partnership funds have been expended in the purchase of real property for

excepted from Miller's deed. Thereupon, Newton, being the owner of an undivided one third of the four acres, and Emmons, being the holder of a master's certificate of sale of an undivided one third of the four acres, and Miller, being the owner of an undivided one third of three and one-quarter acres of said four acres, formed a partnership, under the firm name of Newton, Emmons & Miller, to engage in the business of milling and buying and selling grain. There were no written articles of partnership. The partnership arrangement was oral merely. The business

of the firm was done in the mill upon the land. In August, 1888, the firm was indebted to the Robinson Bank in the sum of \$5400 for advances made to it by the bank for use in the grain business, and to pay for improvements in the mill machinery; and, when the bank called for payment of this amount, Newton and Miller each paid one third of it,—\$1800,—but John S. Emmons gave the bank his note for \$1800, dated August 28, 1888, due four months after date, with Wiley S. Emmons and William W. Walter as sureties thereon; the former being his father,

the use of the copartnership, and the same has been used for partnership purposes by agreement to that end, it is to be treated in equity as partnership assets and is liable for the debts due to the creditors of the copartnership. *Hiscook v. Phelps* (1872) 49 N. Y. 108.

And it is of no consequence whether the partnership is for a definite or an indefinite period. *Mitchell v. Read* (1872) 61 Barb. 810.

There must, however, be satisfactory evidence of an appropriation of the property to the use of the company, for the purpose of making it a part of the stock in trade. *Richards v. Manson* (1899) 101 Mass. 484.

The manner in which and the purposes for which it is used, the conduct of the parties in applying the partnership funds in payment and maintenance of the property are facts which authorize a referee to hold it partnership property. *Everett v. Schepmoes* (1876) 6 Hun. 480.

Usually it is not so unless partnership assets have been used to purchase it, or unless it was put in originally as a part of the joint estate. *Reynolds v. Ruckman* (1876) 35 Mich. 80.

A stipulation in partnership articles, that at the termination of the partnership the property shall be sold for the payment of debts, shows the original understanding of the parties that real estate was to be treated as partnership effects, and not as an estate in lands held in common. *Greene v. Greene* (1824) 1 Ohio, 536, 18 Am. Dec. 642.

It by no means follows, however, from the operation of such real estate by the firm, the transactions of each operation being entered in the same books, kept entirely distinct and separate from those of the other, that real estate used for partnership purposes is partnership property, a contrary presumption prevailing when the title is not in the firm, to rebut which it must be shown either that it was paid for with firm money, or that an agreement existed to treat it as common stock. *Shafer's App.* (1884) 106 Pa. 49.

There must be something more than a mere community of interest to make parties partners in land; there must be a joint adventure with an agreement to share in the profits and losses thereof. *Bird v. Morrison* (1800) 12 Wis. 158.

So when the title is in the name of one member of the firm, the presumption is that it is his individual property until shown to belong to the firm. *Jones v. Smith* (1889) 81 S. C. 527.

Yet property which has been used and treated as partnership property cannot be presumed to belong to one partner simply because he has paid for it, for the presumption in such case is rather that the property in question was his contribution to the common stock. *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207.

Thus land credited to a partner holding the legal title thereto, charged in the firm books and used for the firm purposes, is partnership property. *Bergeron v. Richardott* (1882) 55 Wis. 129.

And if the funds be advanced to such partner, or if he gets credit in the firm books for the amount

invested in such purchase for firm purposes, it is partnership property though he retain the legal title. *Boyers v. Elliott* (1846) 7 Humph. 204.

The simple fact that land has been paid for out of partnership funds is not of itself sufficient to stamp it with the character of personality, and subject it to the lien of partnership; it must have been necessary for the conducting of the business of the partnership, and there must be some contract or agreement, either express or implied, that it should be converted into personality. *Robertson v. Baker* (1866-7) 11 Fla. 192.

But where purchased with funds put in by two partners as their share of capital for partnership purposes and improved, it is partnership property though conveyed to them in common. *National Bank of the Metropolis v. Sprague* (1899) 20 N. J. Eq. 13.

And so it is where contributed to capital stock by one partner, at an estimated valuation inventoried and carried to the stock account, although he has the legal title. *Clark's App.* (1872) 73 Pa. 142.

Also where the purchase is made by the financial partner for the promotion of the business and improved with firm money. *Lacy v. Hall* (1861) 37 Pa. 360.

The mere fact that land is bought with partnership funds is ordinarily not sufficient, where the conveyance is made to one alone and the property is never used for partnership purposes. *Richards v. Manson* (1899) 101 Mass. 484.

And this is so even though the rents and profits thereof may have gone into the partnership business. *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22.

The fact that land was acquired during the existence of the partnership, and in the firm name alone, has been held not sufficient evidence to establish it as partnership stock. *Alkire v. Kahle* (1888) 128 Ill. 496; *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

So the mere use of the property by the firm does not impress upon it the character of partnership property, it not being an uncommon thing for a partnership to use the property of its several members, or of a preceding partnership. *Hatchett v. Blanton* (1882) 73 Ala. 428.

And such use by the sufferance of the legal owner does not operate to divest his title. *Chamberlin v. Chamberlin* (1878) 12 Jones & S. 115.

The fact that lands were purchased during the existence of a firm with partnership moneys, the title being taken in the name of one partner, is but a single persuasive circumstance tending to show that there are partnership assets. *McKinnon v. McKinnon* (1896) 56 Fed. Rep. 409.

And the mere fact that tenants in common are also partners does not of itself invest real estate with any of the characteristics of personality, nor is the fact that it was paid for out of partnership money decisive of the question. *Lindley v. Davis* (1897) 7 Mont. 206.

Taking a deed in the joint name of two persons who are partners will not of itself render the real

and the latter his father-in-law. Subsequently, the bank sued and obtained judgment upon this note, and the judgment was paid, one half by Wiley S. Emmons, and one half by Walter, but no part thereof by John S. Emmons. The firm continued to do business until September 2, 1884, at which time it had become indebted to the bank in the sum of \$21,585.32, and to various other creditors in various amounts. It is conceded that the firm was then insolvent.

Miller had executed a note, dated May 1, 1883, payable on or before September 1, 1884,

to the order of said Lamport, his brother-in-law, for the sum of \$5500. On July 22, 1884, he executed a mortgage to secure this note to Lamport, upon his undivided one-third interest in said mill property, which mortgage was recorded on September 2, 1884. On September 1, 1884, John S. Emmons executed two mortgages on his undivided one-third interest in said property (he having obtained a master's deed),—one to Willis Emmons, to secure him as surety upon said note for \$1500, and the other to Wiley S. Emmons and William W. Walter, to secure

estate partnership property and liable for partnership debts; there must be some express act or understanding. *Smith v. Jackson* (1853) 2 Edw. Ch. 23, 6 L. ed. 205.

Again, the mere fact that real estate is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of co-partnership between them with respect to it. *Thompson v. Bowman* (1897) 78 U. S. 6 Wall. 316, 18 L. ed. 733.

Unless the contract under which the partnership is claimed fairly excludes every construction under which the property can retain its usual characteristics of real estate, it should be held not to have created a partnership in the land. *Thompson v. Holden* (1898) 117 Mo. 118.

But the fact that it is paid for with partnership funds after the death of a partner, the conveyance being taken to the survivor and the heirs of the deceased partner, does not change its character as partnership property. *Matthews v. Hunter* (1878) 97 Mo. 293.

The mere assertion in an agreement relating to the sale and participation in the profits of real estate, and reference to the land "as said partnership land" is not sufficient to constitute a partnership therein, but the rights, duties, and interests of the parties must be read and construed in order to determine their true relationship, and the manner in which the land was held, in order to determine its character. *Thompson v. Holden*, *supra*.

Yet an admission that the real estate was principally, if not wholly, purchased with partnership funds, is strong evidence that it is partnership property in equity, and is ordinarily decisive to the extent of the partnership investment. *Hoxie v. Carr* (1892) 1 Sumn. 173.

So the circumstances that payment was made out of partnership funds, especially if the property purchased was necessary to the operations of the partnership business, and was actually so employed, affords a very cogent presumption that it was intended to be held as partnership property, and in the absence of all countervailing circumstances will be absolutely decisive. *Hoxie v. Carr* (1892) 1 Sumn. 181; *Tillinghast v. Champlin* (1856) 4 R. I. 173, 67 Am. Dec. 510.

But it is not enough to convert the partners into tenants in common that the lot was not necessary for partnership purposes; if it was acquired for such purposes with the joint funds, it becomes a part of the joint property though the business could have been carried on without it. *Erwin's App.* (1861) 39 Pa. 535, 40 Am. Dec. 542.

Where the purchase is made and the property used for partnership accommodation, it cannot at common law, in contravention of the Maine statute, become a joint estate. *Blake v. Nutter* (1841) 12 Me. 14.

In *Cape Sable Co's Case* (1823-32) 3 Bland. Ch. 606, it was held that even though there be a declaration that the property of the corporation should be held as real estate and descend as such, its personality must be treated as regards the stockholders as 37 L. R. A.

such, yet it did not follow that it must be so considered for all purposes.

Yet where the land is purchased for the partnership use, or it has been agreed that it shall be considered partnership property, it is enough that the purchase has been made with partnership funds. *Buchan v. Sumner* (1847) 3 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305.

Facts showing that premises leased for oil and mining purposes were treated as partnership property, having gone into the partnership stock, are evidence of a partnership, and such property may be converted into partnership assets for the payment of the partnership debts. *Brown v. Beecher* (1898) 120 Pa. 520. *Shafer's App.* (1894) 106 Pa. 49, distinguished.

II. The question of intention.

a. In general.

As to the intention of the partners to work a conversion out and out, see head VIII., *infra*.

There is no rule that where lands are bought by partners in trade and are paid for out of the partnership assets they of necessity become part of the joint estate, nor, on the other hand, that if they are bought for the purposes of the partnership business they are not joint estate; nor does the form of the conveyance settle the question which must be determined with reference to all the circumstances of the case. *Ex parte Neale, Re Lawrence*, Case of the Bank of England (1861) 3 De G. F. & J. 645.

It would be difficult to state any one part or stipulation which would be decisive of the question, except a stipulation expressed that they were partners *inter se*, and even this might be controlled by other stipulations and the conduct of the parties in relation to the business. *Thompson v. Holden* (1893) 117 Mo. 112; *McDonald v. Matney* (1894) 89 Mo. 353.

Land not being ordinarily a subject of partnership operation, it requires strong evidence to show an intention to convert it into partnership stock. *Brooke v. Washington* (1851) 8 Gratt. 242, 56 Am. Dec. 142.

The question is, however, to be determined from the intention of the parties, the above general doctrine being applied in all cases where there is not an express agreement or circumstances showing a contrary intention. *Lenow v. Fones* (1890) 48 Ark. 537; *Hyman v. Peters* (1899) 30 Ill. App. 124; *Nicoll v. Ogden* (1892) 29 Ill. 323, 31 Am. Dec. 311; *Loubat v. Nourse* (1893) 5 Fla. 360; *Robertson v. Baker* (1897) 11 Fla. 123; *Galbraith v. Gedge* (1895) 16 B. Mon. 631; *Hogle v. Lowe* (1877) 12 Nev. 236; *Duryea v. Burt* (1895) 28 Cal. 593; *Tillinghast v. Champlin* (1856) 4 R. I. 173, 67 Am. Dec. 510; *Hoxie v. Carr* (1892) 1 Sumn. 173; *Ex parte Emly*, 1 Rose, Bankr. Cas. 64; *Page v. Thomas* (1895) 43 Ohio St. 33, 54 Am. Rep. 793; *Ludlow v. Cooper* (1894) 4 Ohio St. 1; *Rank v. Grote* (1894) 18 Jones & S. 273; *Ware v. Owens* (1893) 42 Ala. 212, 94 Am. Dec. 642; *Buckley v. Buckley* (1850) 11 Barb. 74; *Fairchild v. Fairchild* (1878) 64 N. Y. 471; *Providence v. Bullock* (1894) 14 R. I. 353; *Shafer's*

them as sureties upon said note for \$1800. One of these mortgages was recorded on September 1, 1884, and the other on September 2, 1884. The three mortgages thus described are those which the original bill asks to remove as clouds. Newton has died since this suit was begun, but the proof tends to show that said mortgages were not made with his knowledge. His one-third interest was free of mortgage. The bank learned of the making of these mortgages on September 2, 1884. Its officers on that day had an interview with the members of the firm, and sought to obtain

a deed from them of the mill property, offering \$16,000 therefor. Sixteen thousand dollars was agreed upon as the value of the property, and was the consideration agreed upon for the transfer, and was finally paid therefor in credits on the firm indebtedness to the bank. On September 2, 1884, Newton and his wife and Miller and his wife executed to Woodworth, as trustee for the bank, a deed conveying "all of the interest of the grantors" in the four acres, except the three quarters of an acre above mentioned. The consideration expressed in the deed is \$5333. The

App. (1884) 106 Pa. 49; *Holmes v. Self* (1881) 79 Ky. 297; *Collumb v. Read* (1882) 24 N. Y. 505.

A universal partnership may be created where the intention is clearly expressed. *Gray v. Palmer* (1858) 9 Cal. 616.

Wherever partners manifest their intention to hold land as partnership stock, either by express convention or by their course of dealing, it will be treated as such in all respects by courts of equity. *Sumner v. Hampson* (1838) 8 Ohio, 523, 365, 32 Am. Dec. 722.

If the property has been paid for with partnership funds, it is then a question of intention whether the conveyance is to have its legal effect and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407.

The question as to whether or not real property is partnership stock, being one of intention. *Pepper v. Pepper* (1897) 24 Ill. App. 316; *Hoxie v. Carr* (1832) 1 Sumn. 188; *Fall River Whaling Co. v. Borden* (1852) 10 Cush. 462.

To be ascertained from the partners' own acts and agreements. *Arnold v. Wainwright* (1861) 6 Minn. 353, 80 Am. Dec. 448.

And gathered from the manner in which the members of the firm have dealt with it. *Lindsay v. Rhee* (Mich.) Dec. 13, 1894.

The contracts, promises, or mutual understandings of the partners governing. *Tenney v. Simpson* (1887) 37 Kan. 353; *Marsh v. Davis* (1835) 33 Kan. 329; *Morrill v. Colehour* (1876) 82 Ill. 619; *Knott v. Knott* (1876) 6 Or. 142; *Collins v. Decker* (1879) 70 Me. 23; *York v. Clemens* (1875) 41 Iowa, 95; *Clark's App.* (1872) 72 Pa. 142.

The controlling element being the intention with which the purchase is made. *Holmes v. Self* (1881) 79 Ky. 297; *Providence v. Bullock* (1884) 14 R. I. 353.

To be gathered from all the attending circumstances. *Flanagan v. Shuck* (1885) 23 Ky. 617; *Ex parte Neale, Re Laurence, Case of the Bank of England* (1861) 3 De G. F. & J. 645.

As where the land was purchased as an article of commerce and for speculation; the intention of the partners stamping its character. *Morrill v. Colehour, supra*; *Boone v. Clark* (1880) 5 L. R. A. 279, 129 Ill. 466.

Such agreement or intention may be expressed in the articles, or in writing evidencing its purchase, or verbally. *Wilbitt v. Boulware* (1889) 88 Ky. 169.

It may be implied from the circumstances of the purchase and the conduct of the parties. *Ibid.*; *Richards v. Manson* (1889) 101 Mass. 484.

All depends upon the express or implied agreement of the partners. *Arnold v. Wainwright* (1861) 6 Minn. 353, 80 Am. Dec. 448; *Brown v. Morrill* (1891) 45 Minn. 438; *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

And is to be determined by the evidence. *Rank v. Grote* (1884) 18 Jones & S. 275.

It is a matter of inference where not expressly declared in the partnership deed. *Riedeburg v. Schmitt* (1888) 71 Wis. 644.

The circumstances of each case, or the actual agreement of the parties, controlling. *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207.

So the intention may be manifested in the acts and declarations of the partners. *Shaffer's App.* (1884) 106 Pa. 49; *Erwin's App.* (1891) 39 Pa. 535, 80 Am. Dec. 543; *Abbott's App.* (1885) 60 Pa. 234; *West Hickory Min. Assn. v. Reed* (1875) 80 Pa. 33; *Collner v. Greig* (1890) 137 Pa. 606; *Warriner v. Mitchell* (1889) 128 Pa. 153; *Miller's Estate* (1888) 14 Pa. Co. Ct. Rep. 147.

It may be made a part of the partnership stock by parol agreement of the partners. *Murrell v. Mandelbaum* (1892) 85 Tex. 22; *Arnold v. Wainwright* (1861) 6 Minn. 353, 80 Am. Dec. 450.

No express agreement in writing or otherwise being essential, even in cases where the legal title to the firm property is not vested in all of its members, but is in one or more. *Brown v. Morrill* (1891) 45 Minn. 433; *Ames v. Ames* (1889) 37 Fed. Rep. 30.

It being a question of intention in one case as well as the other. *Lindsay v. Rhee* (Mich.) Dec. 13, 1894.

It is enough if from all the acts and conduct of the partners the court can be satisfied that it was the thought and intention of the partners to treat it as partnership property. *Ames v. Ames, supra*.

The manner in which the accounts are kept, whether the purchase money is severally charged to the members of the firm, or whether the accounts treat it the same as other firm property as to purchase money, income, expenses, etc., are controlling circumstances in determining such contention, and from these circumstances an intention may be inferred. *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407; *Collumb v. Read*, (1882) 24 N. Y. 511.

The manner in which and the purposes for which it is used and the partner's conduct in applying partnership funds in its payment and maintenance, are also matters for consideration. *Everett v. Schoepmoes* (1876) 6 Hun, 479; *Garrett v. Schoeffer* (1872) 47 N. Y. 656; *Buchan v. Sumner* (1847) 2 Barb. Ch. 135, 5 L. ed. 599, 47 Am. Dec. 305.

The intent to consider real estate partnership assets may be implied from the fact that the losses in the transaction are to be sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm. *Hiscock v. Jaycox* (1875) 12 Nat. Bankr. Reg. 516.

The fact that real estate is purchased and paid for with partnership funds, in the absence of evidence to the contrary, is proof of an intention of its being partnership property. *Hunt v. Benson* (1841) 2 Humph. 459.

The mere fact that the purchase of real property with partnership funds, or to pay a debt owing to the firm, is sufficient presumptive evidence of such intention, and in the absence of anything to the contrary, is sufficient to justify the conclusion that the real estate is in equity personal property. *Page v. Thomas* (1885) 43 Ohio St. 33, 54 Am. Rep. 793; *Hoxie*

deed contains the words, "The grantee takes subject to incumbrances on the interest conveyed." At that time, John S. Emmons refused to join in the deed, saying that \$16,000 was an inadequate consideration. But afterwards, on September 4, 1884, John S. Emmons and his wife executed a quitclaim deed to Woodworth, as such trustee, conveying "one third undivided interest" in the four acres above mentioned. The consideration named in this deed is \$3,333.33. On September 8, 1884, Newton and Miller confessed judgment in favor of the bank for \$16,252.32,

and on the next day John S. Emmons confessed judgment in the bank's favor for the same amount. \$16,252.32 was the amount of indebtedness remaining due to the bank after crediting \$5333 (which was the agreed value of Newton's one-third interest, and the consideration named in his and Miller's deed to the bank) upon the total indebtedness of \$21,585.32. Execution was at once issued upon these judgments, and levied upon certain grain and other personal property belonging to the firm, which was sold by the sheriff on or about November 10, 1884, for

v. Carr (1833) 1 Sumn. 173; Uhler v. Semple (1897) 20 N. J. Eq. 238; Ross v. Henderson (1877) 77 N. C. 170; Bryant v. Hunter (1899) 6 Bush. 75; Price v. Hicks (1874) 14 Fla. 565; Cornwall v. Cornwall (1899) 6 Bush. 309; King v. Weeks (1874) 70 N. C. 372; Holmes v. Moon (1872) 7 Heisk. 506; Clark's App. (1878) 73 Pa. 142; Shafer's App. (1884) 106 Pa. 49.

Yet the payment of the purchase money from the partnership fund is, however, only *prima facie* evidence of such intention. *Providence v. Bullock* (1884) 14 R. I. 368.

But it requires less evidence to overcome the presumption arising from the payment of the purchase money from the partnership fund, where the land is neither intended nor used for partnership purposes. *Ibid.*

So the rights of the parties must be deduced from their intention as shown by the agreement, read in the light of surrounding circumstances. *Thompson v. Holden* (1893) 117 Mo. 118.

Each case must be determinable on its own peculiar facts. *Ibid.*; *McDonald v. Matney* (1884) 3 Mo. 368.

Which are necessarily a matter of inference and evidence. *Brown v. Morrell* (1891) 45 Minn. 433; *Arnold v. Wainwright* (1891) 6 Minn. 353, 80 Am. Dec. 443; *Sherwood v. St. Paul & C. R. Co.* (1875) 21 Minn. 127.

Their application or use for the purposes of the concern, so as to evidence an original understanding of the parties that they are to be treated as such and not as an estate in common, shows an intention. *Woodlidge v. Wilkins* (1899) 3 How. (Miss.) 360.

The rule being that in order to convert it into personality, or purposes beyond these or for all, there must be an agreement either express or implied to do so. *Flanagan v. Shuck* (1885) 82 Ky. 617.

The intention may be shown by parol. *Warner v. Mitchell* (1899) 123 Pa. 161; *Shafer's App.* (1884) 106 Pa. 49; *Erwin's App.* (1891) 89 Pa. 535, 80 Am. Dec. 542; *Abbott's App.* (1895) 50 Pa. 234; *West Hickory Min. Asso. v. Reed* (1875) 80 Pa. 33.

The facts which will govern the quality of personal estate to partnership land cannot be presumed, but must be alleged and proved, where one who is either a purchaser or creditor is sought to be affected. *Kepler v. Erie Dime Sav. & Loan Co.* (1892) 101 Pa. 603.

In an action against several defendants as partners, the plaintiff is entitled to lay all the facts of the case before the jury in order to determine the question whether or not the transaction is that of the partnership and as such binding upon the partnership firm. *Habig v. Layne* (1894) 38 Neb. 743.

Real estate purchased with partnership funds for the use of the firm, without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, is in equity to be considered and treated as the property of the members of the firm collectively. *Sage v. Sherman* (1849) 2 N. Y. 423.

Partners, being the owners of the money which pays for the title, have the power of direct-

ing its application to suit their own purposes, and to secure the identity of its character in the kind of title they take for it, and therefore if they take the title to themselves as tenants in common, instead of as partners, they by their own election stamp the character of the title taken as to those who afterwards deal with them. *Ebbert's App.* (1871) 70 Pa. 79.

When, however, during the existence of a partnership, real estate is purchased with partnership funds and the title thereto is taken in the name of one member of the firm the real estate so acquired does not become a part of the firm assets, unless such was the intention of the partners. *McKinnon v. McKinnon* (1893) 56 Fed. Rep. 409; *Tillinghast v. Champin* (1856) 4 R. I. 173, 87 Am. Dec. 510; *Ludlow v. Cooper* (1854) 4 Ohio St. 1; *Collumb v. Read* (1832) 24 N. Y. 503; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 306; *Page v. Thomas* (1835) 43 Ohio St. 33, 54 Am. Rep. 738.

Therefore, where there is no positive evidence that real estate purchased by one partner is partnership property, the whole matter resting upon circumstances, such circumstances must be strong and carry with them the full conviction, in order to justify a specific recovery of such property after a great lapse of time by the heirs of a deceased partner. *Hart v. Hawkins* (1814) 3 Bibb, 502, 6 Am. Dec. 693.

Although land is not purchased with partnership funds, but with the separate funds of the parties in equal proportion, upon an understanding that it is to be considered and treated as partnership property, it will be considered as such. *Ludlow v. Cooper, supra.*

Property purchased with partnership funds does not of necessity become partnership property, if that is not the intention of the parties; especially in all cases steering wide of fraud and breach of trust. *Hoxie v. Carr* (1832) 1 Sumn. 173; *Ex parte Emly*, 1 Rose, Bankr. Cas. 64.

The use to which the property is applied does not necessarily determine the question as to whether it is to be treated as personal or real estate, but it is the intention with which the purchase is made that is the controlling element. *Holmes v. Self* (1891) 79 Ky. 297.

So the mere fact that property held by the firm as tenants in common is used in and for the partnership business is not of itself sufficient to convert it into partnership stock, there must be some evidence or further agreement to make it partnership property. *Alexander v. Kimbro* (1873) 49 Miss. 523; *Frink v. Branch* (1884), 16 Conn. 251.

The use thereof being only an evidence of the intention of the partners to make it personality or realty, and if such intention to make it personality is clearly manifest by the partners in the purchase, the fact that there is a nonuser for partnership purposes will not recommit it to real estate. *Holmes v. Self, supra.*

The mere fact that partners carrying on a partnership business upon a lot belonging to the members of the firm does not necessarily impress it

\$5880.06, and the latter amount was credited upon the execution. The bank took possession of the mill on or about September 3, 1884, and operated it until it was transferred, during the pendency of this litigation, to Singleton B. Allen, originally a member of the banking firm, and appointed receiver in this cause. The books of Newton, Emmons & Miller remained in the mill after the bank took possession, and collections were made on the accounts under the direction of Newton, who had become an employé of the bank. The books showed accounts due to the firm

to the amount of \$3348.78. The bank paid the wife of John S. Emmons \$200 for signing the deed to Woodworth. On January 14, 1885, it gave credit on its books for \$16,000, as the consideration of the conveyance to it of the mill property, and on the same day entered upon the margin of the record of the judgments for \$16,252.32 each against Newton and Miller and Emmons a receipt dated back to September 4, 1884, for \$10,666.66, credited "on this judgment by balance conveyance of the Eclipse Mills and appurtenances thereunto belonging, and the tract

with the character of partnership property. *Ware v. Owens* (1868) 42 Ala. 212, 94 Am. Dec. 642.

And although the property may be in the occupation of the firm, that fact alone will not as between the partners themselves, or between the partners and creditors, convert the individual real property of one partner into joint property of the partnership, there must be something which amounts to a representation that it is joint property, or conduct justifying the creditor to treat it as such. *Goepper v. Kinsinger* (1883) 39 Ohio St. 429.

It would be unreasonable to suppose that partners in farming, a business in which real estate occupied and used is the most important and extensive part, intended, by purchasing lands with partnership funds, or by using the land as partnership property, to blend the land and the stock, produce and implements of husbandry into one common and entire thing, and to treat it as personal property. *Lowe v. Lowe* (1878) 13 Bush, 688.

Unless an intention exists between the joint owners to throw their real estate in the firm as partnership stock, and such intention is distinctly manifest, or unless the property is bought out of the social funds for partnership purposes, it will still retain its character of real estate. *Wheatley v. Calhoun* (1841) 12 Leigh, 264, 37 Am. Dec. 654; *Brook v. Washington* (1851) 8 Gratt. 248, 56 Am. Dec. 142.

If it is not the intention of the partners to purchase and hold real estate for partnership purposes, there can be no objection to such purchase made in good faith and for their individual account. *Marrett v. Murphy* (1875) 11 Nat. Bankr. Reg. 131.

Where land is purchased for partnership use, or it is agreed that it shall be considered partnership property, it is enough that the purchase has been made with partnership funds. *Buchan v. Sumner* (1847) 2 Barb. Ch. 168, 5 L. ed. 601, 47 Am. Dec. 306, distinguished in *Collum v. Read* (1862) 24 N. Y. 512, a case where the land was purchased with partnership funds.

The circumstance that the payment has been made out of partnership funds, especially if the property purchased is necessary for the ordinary operations of the partnership business, and is actually so employed, affords a very cogent presumption that it is intended to be held as partnership property, and in the absence of all countervailing circumstances will be absolutely decisive. *Hoxie v. Carr* (1882) 1 Sumn. 173; *Thornton v. Dixon* (1791) 3 Bro. Ch. 199; *Crawshaw v. Maule* (1818) 1 Swanst. 508; *Smith v. Smith* (1800) 5 Ves. Jr. 189; *Forster v. Hale* (1798) 3 Ves. Jr. 606 (1800) 5 Ves. Jr. 808; *Featherstonhaugh v. Fenwick* (1810) 17 Ves. Jr. 298; *M'Dermot v. Laurence* (1831) 7 Serg. & R. 438, 10 Am. Dec. 468.

Yet it is not conclusive, although when accompanied by the entry of the transactions of the firm books as a partnership transaction under circumstances importing a daily declaration that it was so regarded, it is convincing evidence. *Lindsay v. Raco* (Mich.) Dec. 13, 1894, following *Merritt* 97 L. R. A.

v. Dickey (1878) 88 Mich. 41; *Way v. Stebbins* (1885) 47 Mich. 296; *Williams v. Shelden* (1896) 61 Mich. 311; *Hoxie v. Carr* (1882) 1 Sumn. 173; *Balmain v. Shore* (1804) 9 Ves. Jr. 500; *Forde v. Herron* (1814) 4 Munf. 316; *N'Dermot v. Laurence*, *supra*.

The circumstance that the conveyance is in the names of the parties as tenants in common may afford some presumption, in the absence of countervailing presumptions, that the conveyance is not designed to be on a partnership account, but *per se* is very slight and never decisive. *Hoxie v. Carr*, *supra*.

It is necessary to show, when the intention of the partners is not manifest, whether the real estate so acquired is used for partnership purposes, or whether the income derived therefrom and the expenses incident thereto are carried into the partnership accounts and treated as partnership matters. The facts that real estate so acquired is used for partnership purposes; that the income derived therefrom and the expenses incident thereto are carried into the partnership accounts and treated as partnership matters,—are controlling circumstances in determining whether lands purchased with the money of a firm and held in the name of one partner, are in fact partnership assets. *McKinnon v. McKinnon* (1893) 56 Fed. Rep. 409; *Fairchild v. Fairchild* (1876) 64 N. Y. 471; *Fall River Whaling Co. v. Borden* (1852) 10 Cush. 458; *Collins v. Decker* (1879) 70 Me. 28; *Collumb v. Read* (1862) 24 N. Y. 508; *York v. Clemens* (1875) 41 Iowa, 95; *Sherwood v. St. Paul & C. R. Co.* (1875) 21 Minn. 128.

In such cases it will be considered as partnership property, yet there must be distinct evidence of the intention of the members to hold it as real estate, in which case each will have his interest in common with the others. *Wilhite v. Boulware* (1889) 88 Ky. 169.

Partners being the owners of the money which pays for the title have the power of directing its application to suit their own purposes, and can if they choose always secure the identity of its character in the kind of title they take for it, and if they take title to themselves as tenants in common instead of as partners, they, by their own election, stamp the character of the title as to those who afterwards deal with them. Second Nat. Bank of Titusville's App. (1877) 88 Pa. 208; *Eubert's App.* (1871) 70 Pa. 79.

Where real estate is acquired by the partners for their joint use, and for the purposes intended is taken into the firm and used in its operation, the partners occupying the same relation with respect to it as if it had been purchased with their joint moneys, it will be impressed with the character of partnership property. *Roberts v. McCarty* (1867) 9 Ind. 18, 68 Am. Dec. 604.

So machinery not made expressly for use in the building, and capable of beneficial use upon being removed and set up in some other building, may become a part of the real estate if such is the intention, or it may remain personal estate if the understanding is clearly indicated or deducible from the circumstances. *Robertson v. Corsett* (1878) 39

of land on which said mill is situated." The proof shows that the firm of Newton, Emmons & Miller put new machinery in the mill, after the formation of their partnership, to the amount of about \$11,200.

Messrs. Callahan, Jones & Lowe for appellants.

Messrs. Parker, Crowley & Bogard for appellees.

Magruder, J., delivered the opinion of the court:

The Robinson Bank, one of the appellants

Mich. 777; Rogers v. Brokaw (1875) 25 N. J. Eq. 496; Blanche v. Rogers (1875) 28 N. J. Eq. 566; Voorhees v. McGinnis (1872) 48 N. Y. 273.

If partners buy land with the joint funds and cause them to be conveyed to themselves in the same proportions in which they are interested in the capital, the presumption is quite as strong that they intended a division of capital, as that they had merely changed the investment. *Re Farmer, Ex parte Griffin (1878) 18 Nat. Bankr. Reg. 207.*

Written articles which show a certain proportion of the capital invested in the purchase and improvements of real estate, and machinery for the use of the firm, the balance being used in the general business; a portion of the real estate being purchased on the day of the signing of the articles and the remainder at different times; the grantees in one conveyance being described as partners,—are apparent evidence that the partners understood and intended that the real estate should be regarded as part of the capital or assets of the firm being purchased expressly for and used exclusively in the business. *Messer v. Messer (1879) 80 N. H. 376.*

An entry made by one of the partners in the books of a firm charging the firm with the value of real estate made upon the understanding that it was to be partnership property, will constitute it partnership property. *Boyers v. Elliott (1846) 7 Hun, 204.*

But a subsequent entry in the firm books not proved is not sufficient evidence of an intention to treat as partnership property conveyed to partners and others as joint tenants and tenants in specific portions, under an agreement stating the terms of purchase and position of the partners. *Lindsay v. Race (Mich.) Dec. 18, 1894.*

Where the assumption is that during the continuance of the firm's operation the property in question had been regarded as partnership property, it cannot be doubted that as soon as it is sold and ceases to be used for partnership purposes the proceeds are withdrawn from the partnership stock, even though there is no express agreement to that effect, the acts of the partners fairly showing such an intention, their subsequent conduct being inconsistent with any other supposition than that the purchase money should be the individual estate of the partners. *Snafers App. (1884) 106 Pa. 40.*

The Maine Statute of 1821, chap. 36, § 1, provides that lands conveyed to two or more persons shall be held by them as tenants in common and not as joint tenants, unless it is set forth in the conveyance that they hold jointly, or unless it contains other words clearly and manifestly showing that intention. *Blake v. Nutter (1841) 19 Me. 16.*

One partner may withdraw a part of the partnership funds for a separate purchase on his own behalf; and all may join in a purchase of real estate for purposes wholly independent of the partnership, intending to sell their shares severally on their individual account, and in such a case the mere fact that the payment is made from the partnership funds will not change the nature
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herein, claims that the mill property, including the four acres of land upon which the mill was located, was partnership property belonging to the firm of Newton, Emmons & Miller; that as such it was first liable to be subjected to the payment of the partnership creditors, including the bank; that the mortgagees, Lamport, Walter, and Willis and Wiley S. Emmons, were individual creditors of Miller and John S. Emmons, and only entitled to such surplus as might arise out of the mill property after the payment therefrom of the firm debts.

of the operation of the purchase, and it will take effect as the parties intended. *Hoxie v. Carr (1832) 1 Sumn. 173; Smith v. Smith (1800) 5 Ves. Jr. 189.*

The mere fact of a bequest by a testator to his two sons, of real estate and of the business carried on by him thereon, together with the machinery and appliances, will not constitute them partners, but such facts coupled with their election to continue the business and the contribution thereto, by each of his share of such property, will render the relation between them that of partners and the property that of the firm. *MacFarlane v. MacFarlane (1894) 82 Hun, 238.*

b. Pennsylvania doctrine.

In Pennsylvania, however, so far as creditors and other third persons are concerned, such property would seem not to be held as partnership stock unless the intention is manifested in writing or by deed, the same being recorded, the question being looked upon as coming within the provisions of the statute of frauds.

In order to render real estate partnership stock as to strangers, purchasers, mortgagees, and creditors, the fact that the property is held as partnership property must be expressed on the face of the deed, or else some agreement in writing to that effect must have been executed by the members of the firm and duly recorded, and in the absence thereof notice of the character of the real estate as partnership property must be brought home to a purchaser or creditor before he can be affected by it. *Kepler v. Erie Dime Sav. & Loan Co. (1882) 100 Pa. 608; McDermot v. Laurence (1831) 7 Serg. & R. 453, 10 Am. Dec. 468; Hale v. Henrie (1884) 2 Watts, 143, 37 Am. Dec. 239; McCormick's App. (1888) 57 Pa. 59, 98 Am. Dec. 191; Lefevre's App. (1871) 60 Pa. 125, 8 Am. Rep. 229; Lancaster Bank v. Myley (1850) 18 Pa. 54; Second Nat. Bank of Titusville's App. (1877) 83 Pa. 203; Ridgeway's App. (1850) 15 Pa. 177, 53 Am. Dec. 586; Kramer v. Arthurs (1847) 7 Pa. 170.*

Otherwise it will be liable as property held by them as tenants in common, to their separate debts. *Hale v. Henrie, McCormick's App., Kramer v. Arthurs, and Lefevre's App., Ridgeway's App. and Lancaster Bank v. Myley, supra.*

As under the statute of frauds all contracts respecting real estate must be in writing. *Lancaster Bank v. Myley, supra.*

Where a lot adjoining the firm premises was purchased by one partner and intended for partnership purposes, payment being made out of the firm money, the conveyance taken in the name of the partnership; but owing to circumstances not so used, the court held that the beneficial use vested in the firm, the subsequent use differing from that originally contemplated, was not devoted; that therefore the lot was partnership property and not held by the partners as tenants in common, the property being worked in its altered uses at the expense of the firm, the profit going into the firm being treated in all respects as partnership prop-

Whether real estate upon which a partnership transacts its business is firm property or the property of the individual members of the firm is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform. The mere fact of the use of land by a firm does not make it partnership property. *Goepper v. Kimsinger*, 39 Ohio St. 429; *Hatchett v. Blanton*, 72 Ala. 428. Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member, or by the several members in in-

dividual interests. 1 Bates, Partn. § 280. Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed the circumstances usually relied upon to determine the question are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. 1 Bates, Partn. § 280; 2 Lindley, Partn. *649; 17 Am. &

erty. *Erwin's App.* (1861) 39 Pa. 535, 80 Am. Dec. 642.

Where it is the manifest intention of the partners to regard the property as held by them under a tenancy in common, the record not showing to the contrary, it is to be treated as separate estate and as such liable to the separate creditors. *Ridgeway's App.* (1850) 15 Pa. 177, 58 Am. Dec. 586.

Under articles of partnership containing a provision for the continuation of the partnership after the death of a member and that the real estate of the firm shall be held as personal property, such real estate being acquired with partnership funds and used for partnership purposes, during the continuance of the partnership agreement, all the property of the firm is to be regarded as personal estate. *Leaf's App.* (1884) 105 Pa. 505.

Where one of two partners acquired title to certain unimproved real estate, the actual consideration for the conveyance being the transfer of four other properties, the title to two of which was in the names of the partners, and those of the other properties in the name of each of the partners separately, the property being subsequently improved and the rent carried to the firm's account, it was held that such property belonged to the partners as tenants in common, as real estate conveyed to individuals who may be partners will not be treated as partnership assets, where partnership purchasers and creditors are concerned, unless the intention so to treat it appears in the deed, or otherwise of record. *Black v. Seipt* (1877) 12 Phila. 360.

III. In whom the legal title vests.

a. The common-law doctrine.

At law partners, like any other persons, may take a conveyance of real estate to themselves either as joint tenants or tenants in common. *Whitmore v. Shiverick* (1867) 3 Nev. 238.

It is impossible for a partnership as such to hold the legal title of real estate; only a person can do so, and a corporation only because it is a person in law which a partnership is not; and therefore a deed made to a partnership vests the legal title in such of the members of the firm individually as are named in the conveyance. *Holmes v. Moon* (1872) 7 Heisk. 506; *Moreau v. Saffarans* (1856) 3 Sneed, 599, 57 Am. Dec. 532; *Percifull v. Platt* (1890) 36 Ark. 456; *Tidd v. Rines* (1879) 26 Minn. 201; *Gille v. Hunt* (1886) 36 Minn. 337.

The legal title is in the individual partner to whom by name the conveyance is made, the several members composing the firm not being regarded in the view of a court of law as holding real estate as tenants in common, unless it be conveyed to them as such by name, and on the other hand each partner is required to join in the conveyance of real estate in order to pass the entirety thereof to a purchaser. *Moreau v. Saffarans* (1856) 3 Sneed, 599, 57 Am. Dec. 532; *Hogle v. Lowe* (1877) 12 Nev. 236; *May v. New Orleans & C. R. Co.* (1892) 44 La. Ann. 444.

Although at law an unsealed instrument would not convey the legal title to a firm, yet it would

convey to them the equitable title, unless it be the law that a conveyance made to a partnership in the firm name is a nullity. *Frost v. Wolf* (1890) 77 Tex. 455; *Miller v. Alexander* (1852) 8 Tex. 37; *Holman v. Criswell* (1854) 18 Tex. 38; *Martin v. Weyman* (1859) 26 Tex. 468; *Tom v. Sayers* (1855) 64 Tex. 342; *Wadsworth v. Wendell* (1821) 5 Johns. Ch. 224, 1 L. ed. 1064; *McCaleb v. Pradat* (1852) 23 Miss. 258; *Dreutzer v. Baker* (1884) 60 Wis. 180.

In Alabama the rule has been uniformly declared to be that where there is a conveyance of land to a partnership in its common or firm name no legal title vests in the partnership as such; the legal title vests in the several persons composing the partnership as tenants in common, with all the attributes and incidents of a tenancy in common, so far as mere legal remedies can be enforced, and such title is chargeable with an equity whenever the land is wanted to meet partnership debts or to secure equalization in division among the partners, and that until equitable interposition is invoked the status of the title is not there, it remains a legal title in all the partners as tenants in common, the characteristics of joint tenancy being abolished by section 1837 of the Code of 1886. *Powers v. Robinson* (1890) 90 Ala. 225; *Slaughter v. Doe* (1890) 97 Ala. 494; *Brunson v. Morgan* (1884) 76 Ala. 593; *Blanchard v. Floyd* (1890) 96 Ala. 53.

The legal title must be vested in some person, and a partnership is not a corporation. *Percifull v. Platt* (1890) 36 Ark. 456.

And will be controlled by the terms of the conveyance. *Arnold v. Wainwright* (1861) 6 Minn. 363, 80 Am. Dec. 448.

But a deed taken by a firm in its partnership name is not void. *Kelley v. Bourne* (1857) 15 Or. 478.

A sale to a partnership is a legally recognized method of sale to all persons interested whether named or not. *Turner v. Ontonagon River Imp. Co.* (1889) 77 Mich. 603.

The legal title of lands belonging to a firm may be held by one partner. *York v. Clemens* (1875) 41 Iowa, 96.

A deed conveying real estate to a copartnership in the copartnership name vests the legal title in the partner whose name appears in such partnership, and not in the firm. *Arthur v. Weston* (1856) 22 Mo. 373.

And the same is the case where the title is to a partnership name, which expresses the name of one party only with the addition of "& Co." *Percifull v. Platt*, *supra*.

Such a deed containing no certain designation or description of any other person for the reason that the words "& Co." may describe one person as well as another. *Winter v. Stock* (1866) 29 Cal. 407, 89 Am. Dec. 57.

A purchase of real estate in the name or style of the partnership not being sufficient to pass the legal title to the members of the firm. *Ibid*.

And if the whole legal estate is in the deceased partner, it all descends to his heirs, and nothing goes to the survivor except his equities. *Percifull v. Platt* (1890) 36 Ark. 456.

Eng. Encyclop. Law, p. 945, and cases in note. Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and in such case it makes no difference, in a court of equity, whether the title is vested in all the partners, as tenants in common, or in one of them, or in a stranger. *T. Parsons*, Partn. 4th ed. § 265; 1 *Bates*, Partn. § 281; *Johnson v. Clark*, 18 Kan. 157; 17 Am. & Eng. Encyclop. Law, p. 948, and cases

cited. If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application. *Parker v. Bowles*, 57 N. H. 491; 1 *Bates*, Partn. § 281.

In the case at bar the land was not purchased with partnership funds. The undivided one-third interest bought by John S. Emmons was paid for by him with his own individual money. Miller also paid for the

The interest in a partnership leasehold estate, however, is in the copartners as such, and not as tenants in common. *Rust v. Chisolm* (1868) 67 Md. 376.

Yet the possessor of the legal title holds the estate in trust for the purposes of the partnership. *Dupuy v. Leavenworth* (1861) 17 Cal. 232.

Such a deed to a partnership firm does not take effect as a legal conveyance of the land to the persons composing the partnership property, upon proof of that fact. *Arthur v. Weston* (1856) 23 Mo. 378.

A conveyance mentioning the partners by name, and describing them as composing the firm the property being paid for with partnership funds and used for partnership purposes, is not void within the statute of frauds, the legal title passing to an undivided fourth part to each of the partners subject to the equitable lien in favor of the copartners. *McCauley v. Fulton* (1873) 44 Cal. 363.

Although under the Massachusetts General Statutes, chapter 80, section 24, Public Statutes, chapter 80, section 8, a corporation cannot hold land, yet a conveyance made to a voluntarily unincorporated association, a well-known body all the members of which could be ascertained, may be construed as a grant to those who are properly described by the title as tenants in common. *Byam v. Bickford* (1885) 140 Mass. 81.

A deed tendered to a partnership in its partnership name, under a contract that the conveyance shall be executed to the parties in their partnership name, is sufficient. *McMurry v. Fletcher* (1863) 28 Kan. 397.

A court of equity leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners. *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 633; *Buchan v. Sumner* (1847) 2 Barb. Ch. 200, 5 L. ed. 618, 47 Am. Dec. 305.

Under a deed of real estate in common form of a warranty deed, given to a trustee for the partnership reciting the payment of the purchase money by such trustee for the firm, the question whether the legal title to the lands vests in the trustee for the firm, or in all the partners as tenants in common, turns upon the meaning of the word "trustee" as used in the grant and *habendum*, and if the word is merely descriptive of the person of the grantee, the legal title vests in him alone subject to a resulting trust in favor of the firm, whose property has been expended in the purchase, and the effect of the deed is to vest the legal title in him and to create such a trust, and not to raise a use executed by the statute of uses in the partners as tenants in common. *Mowry v. Bradley* (1876) 11 R. I. 370.

Under an agreement for the purchase of an adverse outstanding title held by a partnership, one partner purchasing and taking the title to himself, such title must be taken as belonging to the partnership, and one partner having made advances equal to his share, he will not be deprived of the benefit of his purchase by refusal to pay his

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share, and such refusal will not work a dissolution. *Bakin v. Shumaker* (1854) 12 Tex. 51.

In *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305, it was stated that where real estate is conveyed to firm partners in their individual names for the sole benefit of the firm, or is so conveyed to them in payment of debts due to the partnership, the legal title vests in the grantees thereof as in an ordinary conveyance of real estate; and by the common law where land is purchased with partnership funds for partnership purposes and conveyed to all the partners generally in fee, it will create at law a joint tenancy; so that neither could convey any more than his share of the land during the lease of his copartner, and upon the death of either partner without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other partners.

In *Donaldson v. State Bank of Cape Fear* (1827) 18 N. C. 103, 18 Am. Dec. 577, the parties had acquired real estate, either by purchase upon speculation with partnership funds, or by taking the same as security for debts due to them, the title either by accident or mistake, or because the matter was not considered of importance, not always being made to the partnership by its name, the conveyances sometimes being made to the partnership, at other times to the partners as tenants in common in their individual names, and in other instances to one or the other of the partners in severalty, the copartnership being insolvent at the date of its dissolution. The court held that the conveyances to the partnership vested the property in the concern and not in the members, each taking an entirety and by his own deed conveying only his right to the residue, after a settlement of the partnership accounts.

Where the bill charged a partnership upon the parties in real estate and in the business connected therewith, the amount being shown in the name of one partner and so recorded under the act relating to possessory claims, such partner afterwards selling his interest to the other, taking back a mortgage, the continuing party undertaking to pay the firm debts, such arrangement being subsequently canceled, one half of the property being reconveyed, the partner retaining the other half, the court held that the first sale of the property divested it of its character of partnership or common property, and that the reconveyance of one half left the parties as ordinary tenants in common in the same manner as if it had been partnership property and been divided. *Brush v. Maydwell* (1850) 14 Cal. 208.

b. Pennsylvania doctrine.

In Pennsylvania the deed or instrument granting the title is to be considered as the guide so far as creditors or third persons are concerned, the record title in that state being conclusive.

Where creditors are concerned, the deed, or other paper of record, is the true index of owner-

one undivided one-third interest, purchased by him with his individual funds. None of the money of the firm of Newton, Emmons & Miller was contributed towards the purchase of the one-third interest held by Newton. Indeed, the proof shows that the firm of Newton, Emmons & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one-third part of the property. No entries were made upon the books of the firm showing that the real estate was treated as firm assets. The evi-

dence, however, does show that the property was bought for the purpose of being used in the milling business, and that after its purchase it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners, holding as tenants in common? It cannot be said that the land is firm property, upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such

ship, not only where all the partners take title in their own names, but even where one with the assent of others buys real estate in his own name with partnership funds. *Black v. Seipt* (1877) 12 Phila. 360; *Lafevre's App.* (1871) 69 Pa. 122, 8 Am. Rep. 229.

But the face of the title is not always conclusive as between the partners themselves. *Miller's Estate* (1868) 14 Pa. Co. Ct. Rep. 147.

If it does not appear on the face of the deed, or by some recorded agreement in writing, that the land in question is held as partnership land, it does not have that quality and the fact being vital must be specially alleged, and in case of contest must be proved, especially where the proceeding is simply a *scire facias*, to revive a judgment against an original defendant and one who is his assignee for the benefit of creditors. *Kepler v. Erie Dime Sav. & Loan Co.* (1882) 101 Pa. 602.

The title to real estate put into a partnership by its owner upon a parol understanding that it shall be part of the partnership fund, the other partner paying a portion of the consideration in cash, both entering into possession and improving it with the firm funds, does not pass to the firm, there being no distinct transfer of possession equivalent to a written contract. *McCormick's App.* (1868) 57 Pa. 54, 98 Am. Dec. 191.

c. How vested at law

At law, upon a conveyance to partners in their individual names they become vested with the legal title as tenants in common subject to all the incidents relative thereto. *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Caldwell v. Farmer* (1876) 56 Ala. 405; *Brunson v. Morgan* (1884) 76 Ala. 563; *Percifull v. Platt* (1880) 36 Ark. 456; *Jones v. Parsons* (1884) 25 Cal. 100; *Frink v. Branch* (1844) 16 Conn. 260; *Robertson v. Baker* (1866-7) 11 Fla. 182; *Printup v. Turner* (1880) 65 Ga. 71; *Jackson v. Stanford* (1855) 19 Ga. 14; *Pepper v. Pepper* (1837) 24 Ill. App. 316; *Blake v. Nutter* (1841) 19 Me. 16; *Dyer v. Clark* (1849) 5 Met. 562, 39 Am. Dec. 697; *Howard v. Priest* (1848) 5 Met. 582; *Ensign v. Briggs* (1856) 6 Gray, 329; *Peck v. Fisher* (1852) 7 Cush. 386; *Goodwin v. Richardson* (1814) 11 Mass. 469; *Whitney v. Cotten* (1876) 53 Misc. 639; *McGrath v. Sinclair* (1877) 55 Miss. 89; *Matthews v. Hunter* (1878) 67 Mo. 236; *Carlisle v. Mulhern* (1868) 19 Mo. 57; *Duhring v. Duhring* (1854) 20 Mo. 184; *Hartnett v. Fegan* (1876) 3 Mo. App. 1; *Lindley v. Davis* (1897) 7 Mont. 206; *Leary v. Boggs* (1886) 1 N. Y. S. R. 571; *Hiscook v. Phelps* (1872) 49 N. Y. 97; *Lawrence v. Taylor* (1849) 5 Hill, 107; *Coles v. Coles* (1818) 15 Johns. 159, 8 Am. Dec. 231; *Ross v. Henderson* (1877) 77 N. C. 170; *Hunter v. Martin* (1845) 2 Rich. L. 54; *Jones' App.* (1871) 70 Pa. 169; *Santa Clara Min. Asso. v. Quick-silver Min. Co.* (1882) 17 Fed. Rep. 657; *Anderson v. Tompkins* (1820) 1 Brook. 456; *Marrett v. Murphy* (1875) 11 Nat. Bankr. Reg. 131; *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207; *Thompson v. Bowman* (1867) 73 U. S. 6 Wall. 316, 18 L. ed. 736.

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And there is no such tenancy known in law or equity as copartnership. *Re Farmer, Ex parte Griffin, supra.*

Even though purchased with partnership funds and used for partnership purposes. *Ensign v. Briggs* (1856) 6 Gray, 329. *Peck v. Fisher* (1852) 7 Cush. 386, followed.

And that without survivorship. *Percifull v. Platt* (1880) 36 Ark. 456.

As it is not to be construed a joint tenancy at law, being contrary to the policy of the law which gives a *ius accrescendi* at common law in case of survivorship when no such intent or purpose can be presumed. *Howard v. Priest* (1848) 5 Met. 582.

And for all purposes outside of a court of equity. *Lawrence v. Taylor* (1849) 5 Hill, 107.

The law taking no notice of the equitable relation arising out of the partnership. *Ross v. Henderson* (1877) 77 N. C. 170.

But where the evidence proves that the parties are general mercantile partners, and that the lands are part of the partnership effects, they are joint tenants as copartners. *Baird v. Baird* (1837) 21 N. C. 524, 31 Am. Dec. 399; *Price v. Hunt* (1849) 33 N. C. 42.

Partners in the lumber business purchasing timber tracts with partnership funds and for partnership purposes, the deed conveying the property to them making no mention of the fact of the partnership, hold the legal title as tenants in common. *Jones' App.* (1871) 70 Pa. 169.

So the interests of the associates in a mining partnership in the land are in the nature of a tenancy in common, so far as the title is concerned. *Santa Clara Min. Asso. v. Quick Silver Min. Co.* (1882) 17 Fed. Rep. 657.

And with respect to property taken and acquired by mortgage of real estate taken as collateral security for moneys due to partnership, the equity of redemption in which is extinguished by lapse of time, the partners become tenants in common. *Goodwin v. Richardson* (1814) 11 Mass. 469.

Where a house and lot were purchased by a commercial firm, which was subsequently dissolved, one partner conveying his interest in the property to the others, a portion of the money being paid out of the funds of the new firm; the property being adapted to no other use than a residence and occupied as such by the partners, the one partner depositing that it should be considered, as between himself and his partner, as his own property,—the court held that as between the members of the firm it became subject to a complete legal ownership, and the constituent members held as tenants in common, the parties at the time of purchase taking the deed to themselves individually as tenants in common. *McGrath v. Sinclair* (1877) 55 Miss. 89.

So where the partners owned in their own names a dwelling house, subsequently occupied by one as a home with the consent of the other partner; a declaration claiming the property as a homestead being filed and recorded, it was held upon an attachment issued by a firm creditor, that such prop-

a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here, under the facts stated. *Van Buskirk v. Van Buskirk*, 148 Ill. 9. In view of the fact that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it

should be regarded as firm property, does the conduct of the parties in afterwards forming a partnership, and using the property for partnership purposes, and repairing and improving the mill at the expense of the firm, make the land firm property in a court of equity? A negative answer to this question is found in many of the authorities, as will be seen by reference to the following: *Alexander v. Kimbro*, 49 Miss. 529; *Theriot v. Michel*, 28 La. Ann. 107; *Reynolds v. Ruckman*, 85 Mich. 80; *Parker v. Bowles*, 57 N. H. 491; *Thompson v. Bowman*, 78 U. S. 6

erty no longer constituted firm assets and that the partners were tenants in common of the same, and a tenant in common was entitled to homestead exemptions under the Montana laws. *Lindley v. Davis* (1887) 7 Mont. 203.

So under the English authorities there is no survivorship. *Jeffereys v. Small* (1868) 1 Vern. 217; *Lyster v. Dolland* (1782) 1 Ves. Jr. 436, 8 Bro. Ch. 478; *Lake v. Craddock* (1782) 3 P. Wms. 158; *Usher v. Angleward* (1838) 1 Vern. 360.

In *Reilly v. Walsh* (1848) 11 Ir. Eq. Rep. 22, it was held that the right of survivorship between two persons who carried on the building trade, with a provision for the lease of the ground, would not be interfered with where it was not shown that they were general partners.

IV. Immaterial to whom legal title is conveyed.

In equity it is unimportant in whose name the purchase may have been made, or the conveyance taken; if purchased in fact with partnership funds and for partnership purposes, it will be treated in that jurisdiction as belonging to the firm. *Moreau v. Saffarans* (1856) 8 Sneed, 596, 67 Am. Dec. 583; *Dudley v. Littlefield* (1842) 21 Me. 418; *Taylor v. Farmer* (1890) 6 West. Rep. 710; *Galbraith v. Tracy* (1894) post, 28 L. R. A. 129, 153 Ill. 54; *Alkire v. Kahle* (1898) 128 Ill. 493.

Equity looking upon lands purchased with partnership funds for partnership purposes as partnership property. *Owens v. Collins* (1858) 23 Ala. 337.

It is immaterial to whom the legal title may be conveyed, whether to the partners by name as individuals, or to one of them, or to a third person. *Offutt v. Scott* (1872) 47 Ala. 104.

When purchased with partnership funds and actually appropriated to and used in the business. *MacFarlane v. MacFarlane* (1894) 82 Hun, 238; *Greenwood v. Marvin* (1888) 111 N. Y. 423.

And it is not material in what manner it is bought, or in what name it stands. *Little v. Sneedcor* (1875) 52 Ala. 167.

The fact that the title to real estate bought by a partner acting for the firm is taken in his name, will not deprive it of the character of partnership property. *Bowen v. Billings* (1882) 13 Neb. 439.

And in some cases, as between the partners themselves, real estate may be shown to be firm property, although the title may be in one only or in all as tenants in common, even though the record shows a conveyance to two. *Miller's Estate* (1893) 14 Pa. Co. Ct. Rep. 147.

No matter what the nature of the conveyance may be. *Spalding v. Wilson* (1893) 30 Ky. 690.

The person holding the legal title doing so for copartnership purposes. *Batty v. Adams County Comrs.* (1884) 16 Neb. 44; *Dupuy v. Leavenworth* (1861) 17 Cal. 263; *Buckley v. Buckley* (1860) 11 Barb. 45; *Kendall v. Rider* (1861) 35 Barb. 100.

Even though the conveyance, which was taken to the partners jointly, does not describe them as partners, they must be regarded as such in controversies, as between themselves and the firm and 27 L. R. A.

private creditors. *Willis v. Freeman* (1861) 35 Vt. 44, 32 Am. Dec. 619.

There being no agreement or design that it shall be held for their separate use. *Ferguson v. Hanauer* (1892) 56 Ark. 179.

The decisive presumption in the absence of proof to the contrary is that it is intended to be held as partnership property. *Hoxie v. Carr* (1832) 1 Sumn. 181; *Tillinghast v. Champlin* (1856) 4 R. I. 173, 67 Am. Dec. 510; *Hunt v. Benson* (1841) 2 Humph. 459; *Buchan v. Sumner* (1847) 2 Barb. Ch. 206, 5 L. ed. 615, 47 Am. Dec. 205; *Smith v. Tarlton* (1847) 2 Barb. Ch. 336, 5 L. ed. 635; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627; *Dyer v. Clark* (1843) 5 Met. 578, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 585; *Burnside v. Merrick* (1842) 4 Met. 541.

So a conveyance of property to one member of a firm in payment of a debt due to the firm, will inure to the benefit of the firm. *Gannett v. Cunningham* (1852) 34 Me. 62.

So it has been held with respect to real estate belonging to a mining partnership acquired for mining purposes, whether purchased with partnership funds or contributed by the individual partners as a part of the stock. *Duryea v. Burt* (1865) 28 Cal. 569.

The same conclusions were arrived at in the following cases: *Houston v. Stanton*, 11 Ala. 412; *Andrews v. Brown* (1852) 21 Ala. 437, 55 Am. Dec. 252; *Murphy v. Abrams* (1874) 50 Ala. 236; *Powers v. Robinson* (1890) 90 Ala. 225; *Rovelsky v. Brown* (1891) 92 Ala. 522; *Hatchett v. Blanton* (1882) 72 Ala. 423; *Gray v. Palmer* (1858) 9 Cal. 618; *Dupuy v. Leavenworth* (1861) 17 Cal. 262; *Duryea v. Burt*, supra; *Copp v. Longstreet* (Colo.) Dec. 10, 1894; *Trowbridge v. Cross* (1886) 117 Ill. 109; *Bopp v. Fox* (1872) 63 Ill. 540; *Galbraith v. Tracy* (1894) post, —, 153 Ill. 54; *Alkire v. Kahle* (1898) 128 Ill. 496; *Hyman v. Peters* (1890) 80 Ill. App. 134; *Nicoll v. Ogden* (1892) 29 Ill. 323, 81 Am. Dec. 311; *Taylor v. Farmer* (1896) (Ill.) 6 West. Rep. 710; *Simpson v. Leech* (1877) 86 Ill. 365; *Seller v. Brenner* (Ky.) March 22, 1887; *Dickey v. Shirk* (1891) 128 Ind. 273; *Pepper v. Thomas* (1887) 35 Ky. 539; *Galbraith v. Gedge* (1855) 16 R. Mon. 631; *Burnam v. Burnam* (1869) 6 Bush, 399; *Dudley v. Littlefield* (1842) 21 Me. 418; *Goodburn v. Stevens* (1847) 5 Gill, 1; *National Union Bank of Maryland v. National Mechanics Bank of Baltimore* (Md.) Dec. 19, 1894; *Converse v. Citizens Mut. Ins. Co.* (1853) 10 Cush. 37; *Collins v. Charles-town Mut. F. Ins. Co.* (1867) 10 Gray, 155; *Dyer v. Clark* (1843) 5 Met. 578, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 585; *Burnside v. Merrick* (1842) 4 Met. 537; *Williams v. Shelden* (1890) 61 Mich. 311; *Newell v. Cochran* (1890) 41 Minn. 374; *Churchill v. Proctor* (1883) 61 Minn. 129; *Willet v. Brown* (1877) 35 Mo. 138, 27 Am. Rep. 265; *Bowen v. Billings* (1882) 13 Neb. 439; *Smith v. Jones* (1885) 18 Neb. 431; *Batty v. Adams County Comrs.* (1884) 16 Neb. 41; *Hogle v. Lowe* (1877) 12 Nev. 236; *Messer v. Messer* (1879) 59 N. H. 375; *Jarvis v. Brooks* (1853) 27 N. H. 37, 59 Am. Dec. 359; *Cilley v. Huse* (1860) 40 N. H. 353; *Parker v. Bowles* (1873) 57 N. H. 491; *Matlack v.*

Wall. 816, 18 L. ed. 786; *Frink v. Branch*, 16 Conn. 260; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654; *Sikes v. Work*, 6 Gray, 433; *Gordon v. Gordon*, 49 Mich. 501; *Moody v. Rathburn*, 7 Minn. 89 (Gil. 58); *Paige v. Paige*, 71 Iowa, 818, 60 Am. Rep. 799; T. Parsons, *Partn.* 4th ed. § 266; *Hatchett v. Blanton*, *supra*.

The general doctrine of all these cases is that a purchase of the land with partnership funds is necessary to make it firm property. T. Parsons, in his work on *Partnership* (4th ed.), says: "Although it [real estate] be held in the joint name of two or more per-

sons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or tenants in common. . . . So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." Sections 265, 266. In *Hatchett v. Blanton*, *supra*, the supreme court of Alabama says: "Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real

James (1860) 18 N. J. Eq. 126; *Holdrege v. Gwynne* (1866) 18 N. J. Eq. 26; *Uhler v. Semple* (1869) 20 N. J. Eq. 283; *Baldwin v. Johnson* (1831) 1 N. J. Eq. 441; *Deveney v. Mahoney*, 1742 23 N. J. Eq. 249; *Ballantine v. Frelinghuysen* (1884) 38 N. J. Eq. 266; *Coltumb v. Reed* (1862) 24 N. Y. 506; *Buchan v. Sumner* (1847) 3 Barb. Ch. 197, 5 L. ed. 612, 47 Am. Dec. 806; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407; *Teschmacher v. Lens* (1894) 82 Hun, 594; *Deming v. Colt* (1860) 3 Sandf. 234; *Williams v. Gillies* (1877) 53 How. Pr. 429; *Rank v. Grote* (1884) 18 Jones & S. 275; *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279; *Smith v. Tarlton* (1847) 2 Barb. Ch. 333, 5 L. ed. 668; *Leary v. Boggs* (1886) 1 N. Y. S. R. 571; *Blissell v. Harrington* (1879) 18 Hun, 81; *MacFarlane v. MacFarlane* (1864) 33 Hun, 238; *Greenwood v. Marvin* (1868) 111 N. Y. 423; *King v. Weeks* (1874) 70 N. C. 372; *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22; *Page v. Thomas* (1885) 43 Ohio St. 33, 54 Am. Rep. 738; *Norwalk Nat. Bank v. Sawyer* (1882) 33 Ohio St. 339; *Ludlow v. Cooper* (1864) 4 Ohio St. 9; *Knott v. Knott* (1876) 6 Or. 142; *Abbott's App.* (1885) 50 Pa. 234; *Shafer's App.* (1884) 106 Pa. 49; *Miller's Estate* (1868) 14 Pa. Co. Ct. Rep. 147; *Warriner v. Mitchell* (1889) 123 Pa. 161; *Colliner v. Greig* (1890) 137 Pa. 606; *Tillinghast v. Champlin* (1850) 4 R. I. 173, 67 Am. Dec. 510; *Jones v. Smith* (1889) 81 S. C. 627; *Betta v. Letcher* (1890) 1 S. Dak. 182; *Hunt v. Benson* (1841) 2 Humph. 459; *Boyers v. Elliott* (1846) 7 Humph. 304; *Moreau v. Saffarans* (1856) 3 Sneed, 595, 67 Am. Dec. 563; *Griffey v. Northcutt* (1871) 5 Helsk. 748; *Dewey v. Dewey* (1863) 35 Vt. 555; *Willis v. Freeman* (1861) 35 Vt. 44, 32 Am. Rep. 619; *Hardy v. Norfolk Mfg. Co.* (1885) 30 Va. 404; *Davis v. Christian* (1859) 15 Gratt. 11; *Diggs v. Brown* (1884) 73 Va. 292; *Pierce v. Trigg* (1839) 10 Leigh, 406; *Wheatley v. Calhoun* (1841) 12 Leigh, 264, 37 Am. Dec. 654; *Christian v. Ellis* (1845) 1 Gratt. 403; *Fowler v. Bailley* (1861) 14 Wis. 123; *Bird v. Morrison* (1860) 12 Wis. 153; *Riedeburg v. Schmitt* (1886) 71 Wis. 644; *Holladay v. Land & River Imp. Co.* (1868) 57 Fed. Rep. 774; *Hoxie v. Carr* (1882) 1 Sumn. 173; *Riddle v. Whitehill* (1890) 135 U. S. 621, 34 L. ed. 233; *Allen v. Withrow* (1834) 110 U. S. 119, 23 L. ed. 90; *Brown v. Slee* (1881) 103 U. S. 823, 26 L. ed. 613; *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 635; *Lyman v. Lyman* (1829) 2 Paine, C. C. 11.

Property bought by a partner in a firm, acting for the firm, belongs to the partnership as soon as the sale is complete, because the purchaser is the firm. *Bowen v. Billings* (1882) 13 Neb. 439.

If purchased and held as partnership property, the delivery of a deed to one partner will be a delivery to the partnership. *Henry v. Anderson* (1881) 77 Ind. 361.

A charge that where a partner in a firm purchases real estate with partnership funds and takes a deed to himself, the presumption of law is that the partner so purchasing credits his copartner with his part of the land bought, or paid for the property and charges himself with it, and is entitled to the property in his individual right, will not be sustained. *King v. Weeks* (1874) 70 N. C. 372. 37 L. R. A.

And if from the testimony the jury may properly find that the tenant rented the property of the firm, and so understood and paid the rent to the firm as landlords, and continued to hold under the firm, it is of no consequence who is the real owner if the firm act as such. *Williams v. Sheldon* (1899) 61 Mich. 311.

Where the evidence is clear that real estate is partnership property, purchased virtually with partnership funds and used for partnership purposes, though standing in the name of the individual partner, it is held by the partners as tenants in common in trust for the partnership and as such is liable for the firm debts. *Mattlack v. James* (1880) 13 N. J. Eq. 126.

Real estate contributed to the capital of the company at an estimated valuation by one partner, inventoried and carried into the stock account, becomes in equity partnership property, although the legal title remains in the partner. *Clark's App.* (1872) 72 Pa. 143.

So if the partnership funds be advanced to one partner for lands for business purposes, or if he gets credit on the books of the firm for the land, intending to invest it in the business, it is in equity the property of the partners though he retain the legal title. *Boyers v. Elliott* (1846) 7 Humph. 204.

V. Parol evidence.

a. When held admissible.

Parol evidence is admissible as between the partners themselves, to prove that a partnership existed in real estate. *Lindsay v. Hoke* (1852) 21 Ala. 542; *Hanks v. Hinson* (1837) 4 Port. (Ala.) 509; *Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373; *Allison v. Perry* (1889) 130 Ill. 9; *Wallace v. Carpenter* (1877) 85 Ill. 590; *York v. Clemens* (1875) 41 Iowa, 53; *Paige v. Paige* (1887) 71 Iowa, 318, 60 Am. Rep. 799; *Scruggs v. Russell* (1858) McCabon, 39; *Marsh v. Davis* (1855) 33 Kan. 320; *Baldwin v. Johnson* (1831) 1 N. J. Eq. 441; *Harney v. First Nat. Bank of Jersey City (N. J.)* May 15, 1894; *Teschmacher v. Lens* (1894) 82 Hun, 594; *Leary v. Boggs* (1886) 1 N. Y. S. R. 571; *Traphagen v. Burt* (1876) 67 N. Y. 30; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407; *Rank v. Grote* (1884) 18 Jones & S. 275; *Blissell v. Harrington* (1879) 18 Hun, 81; *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 552, affirming (1868) 52 Barb. 349; *Greenwood v. Marvin* (1868) 111 N. Y. 423; *Getty v. Devlin* (1873) 54 N. Y. 403; *Babcock v. Read* (1885) 99 N. Y. 609; *Smith v. Danvers* (1852) 5 Sandf. 669; *Knott v. Knott* (1876) 6 Or. 142; *Geddes's App.* (1877) 84 Pa. 432; *Shafer's App.* (1884) 106 Pa. 49; *Black v. Seipt* (1877) 12 Phila. 360; *Abbott's App.* (1885) 50 Pa. 234; *Brown v. Beecher* (1888) 120 Pa. 590; *Black's App.* (1879) 89 Pa. 201; *Holt's App.* (1881) 93 Pa. 237; *Miller's Estate* (1863) 14 Pa. Co. Ct. Rep. 147; *Colliner v. Greig* (1890) 137 Pa. 606; *Warriner v. Mitchell* (1889) 123 Pa. 153; *Erwin's App.* (1881) 39 Pa. 535, 30 Am. Dec. 542; *West Hickory Min. Asso. v. Reed* (1875) 80 Pa. 38; *Jones v. Smith* (1889) 31 S. C. 627; *Holmes v. Moon* (1872) 7 Helsk. 506; *McCully v. McCully* (1883) 73 Va. 156; *Brooke v. Washington* (1831) 8 Gratt. 243, 56 Am.

estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership." In *Thompson v. Bowman*, *supra*, the Supreme Court of the United States says: "In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common." *Buchan v. Sumner*, 2 Barb. Ch. 165, 5 L. ed. 599, 47

Am. Dec. 305. The theory of some of the cases is that real estate bought with separate, and not partnership, funds, cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lauds, unless by writing, in view of the statute of frauds, except such as results by implication of law. *Purker v. Bowles*, *supra*. There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as

Dec. 142; *Bird v. Morrison* (1860) 12 Wis. 153; *McKinnon v. McKinnon* (1893) 56 Fed. Rep. 409, reversing (1891) 46 Fed. Rep. 713; *Re Ransom* (1883) 17 Fed. Rep. 331; *Re Farmer*, *Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 307; *Re Warren* (1847) 2 Ware (2 Davels) 323.

So a resulting trust by one partner of lands purchased by him with partnership funds in his own name in favor of the other partner, may be proved by parol evidence. *Baldwin v. Johnson* (1831) 1 N. J. Eq. 441; *Marsh v. Davis* (1885) 33 Kan. 323; *Scruggs v. Russell* (1858) *McCahon*, 39; *Paige v. Paige* (1837) 71 Iowa, 318, 60 Am. Rep. 799; *York v. Clemens* (1875) 41 Iowa, 95; *Cotton v. Wood* (1868) 25 Iowa, 43; *Fairchild v. Fairchild* (1876) 64 N. Y. 471; *Hardy v. Norfolk Mfg. Co.* (1886) 80 Va. 404.

When there is an undoubted partnership, oral evidence may be received to prove that lands are the property of the partnership. *Re Farmer*, *Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 307.

The fact of a part performance of the contract requiring a court of equity to admit such evidence—*ibid.*

Such a partnership so far as the rights of third parties are involved being proved in the same manner as any other partnership. *Re Warren* (1847) 2 Ware (2 Davels) 323.

It may be supported by parol testimony, even in regard to a particular transaction, if such be the intention. *Re Ransom* (1883) 17 Fed. Rep. 331; *Fairchild v. Fairchild*, *supra*; *Traphagen v. Burt* (1876) 67 N. Y. 30; *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 552; *Smith v. Danvers* (1852) 5 Sandf. 609.

The rule that the deed is the badge of ownership where purchasers and creditors are concerned not holding where the contests are simply between the partners; the real ownership may be shown by parol evidence to be in the firm. *Black v. Seipt* (1877) 12 Phila. 300; *Abbott's App.* (1865) 50 Pa. 234.

But parol evidence is admissible under the Pennsylvania doctrine even as against creditors if the objecting creditor cannot call to his aid the principle of estoppel. *Miller's Estate* (1893) 14 Pa. Co. Ct. Rep. 147.

Where the title is held by the partners jointly, and is entirely consistent with the character of partnership property, the fact of a partnership and that the property was held for partnership purposes may be shown by parol. *Bird v. Morrison* (1860) 12 Wis. 153.

So when the existence of a firm is established by an instrument in writing, any one concerned in the firm assets, whether a creditor or a partner, is at liberty to prove, by extrinsic evidence or by parol, that certain lands held by one of the partners are in fact the property of the firm. *McKinnon v. McKinnon* (1893) 56 Fed. Rep. 409.

And direct testimony by the surviving partner, together with declarations made by the deceased partner that real estate was considered the property of the firm, are sufficient to establish its character as firm property. *McKinnon v. McKinnon*, *supra*, reversing (1891) 46 Fed. Rep. 713.

So a partnership involving transactions in real

estate, and resulting substantially in an interest or the fruits of an interest in real estate, can be established by parol not being within the fourth section of the statute of frauds. *Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373.

In New York there may be a copartnership in real estate, and it is not necessary to the existence of such a partnership that it should be evidenced in writing, and signed by the partners; but it may be created by parol, and where such partnership exists the partners may establish their interests in land, the subject of the partnership, without such interest being evidenced by any writing. *Williams v. Gillies* (1877) 53 How. Pr. 423; *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 552; *Teschmacher v. Lenz* (1894) 82 Hun, 594; *Traphagen v. Burt* (1876) 67 N. Y. 30; *Leary v. Boggs* (1886) 1 N. Y. S. R. 571.

The question being one of fact upon all the evidence in the case, determinable by parol evidence independent of the particular form which the transaction took, or the manner in which the title was taken. *Greenwood v. Marvin* (1888) 111 N. Y. 423; *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407.

It is admissible for the purpose of showing that the title to the property, although in one member of the firm, is really in the firm and for its benefit. *Jones v. Smith* (1880) 31 S. C. 527; *Scruggs v. Russell* (1858) *McCahon*, 39.

And also to prove that it was paid for out of partnership funds. *Scruggs v. Russell*, *supra*.

So in the case of a lease, with the right to take oil and minerals, taken in the name of one partner and so appearing on the record, such lease being a mere chattel. *Brown v. Beecher* (1888) 120 Pa. 590.

Where a partnership is constituted under a parol agreement, it may be shown that its property consists of lands, and it may own, possess, and enjoy the same. *Allison v. Perry* (1890) 130 Ill. 9. To the same effect, *Wallace v. Carpenter* (1877) 85 Ill. 590; *York v. Clemens* (1875) 41 Iowa, 95.

The unauthorized execution of a deed in the name either of a partnership or of an individual, may be ratified by parol. *Holbrook v. Chamberlin* (1874) 116 Mass. 155, 17 Am. Rep. 146; *Cady v. Shepherd* (1881) 11 Pick. 400, 22 Am. Dec. 379; *Swan v. Stedman* (1842) 4 Met. 548; *McIntyre v. Park* (1858) 11 Grar. 102; *McDonald v. Eggleston* (1853) 26 Vt. 154, 60 Am. Dec. 303.

And in the case of a deed of lands made in the firm name, parol evidence is admissible to mark the identity of the grantees named as composing the firm. *Lindsay v. Hoke* (1852) 21 Ala. 542.

So, although the original agreement of partnership in real estate is not in writing, some of the partners withdrawing, others substituted being recognized by the continuing members in written transactions, the evidence is sufficient to satisfy the requirements of the statute of frauds. *Rowland v. Booser* (1846) 10 Ala. 690.

It is also competent to prove by parol that the land described in the petition is partnership property. *York v. Clemens* (1875) 41 Iowa, 95.

And in the case of a conveyance to one by deed

tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. 1 Bates, Partn. §§ 281, 282. The use of the property is not conclusive of its character as real estate or personality, but is only evidence of the intention

of the parties. Id. § 285. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. T. Parsons, Partn. § 287. And, where it is sought to show a conversion of the land into personality by agreement of the partners, such agreement must be clear and explicit. 17 Am. & Eng. Encyclop. Law, p. 954, and cases cited. In *Alkire v. Kahle*, 123 Ill. 496, land was conveyed during the existence of the partnership

absolute on its face, an attempt to show by parol evidence that it is in fact a conveyance to him for the use of himself and his copartner as tenants in common may be rebutted by parol evidence showing that it is owned by them as partnership property. Black's App. (1879) 89 Pa. 201.

A partnership may exist between dealers and speculators in real estate for the purpose of buying and selling land, and it is not necessary to the existence of the partnership that it should be evidenced by a written agreement signed by the partners; such a partnership may be created by parol. Bissell v. Harrington (1879) 18 Hun, 81, following *Chester v. Dickerson* (1878) 54 N. Y. L.

The terms of such a contract may be established by parol evidence, when material, in an action to recover money alleged to have been fraudulently obtained thereunder by one partner from the other. *Davenport v. Buchanan* (S. Dak.) Dec. 15, 1894; *Bates v. Babcock* (1892) 95 Cal. 479; *Pennybaker v. Leary* (1884) 85 Iowa, 220; *Flower v. Barnekoff* (1890) 11 L. R. A. 149, 30 Or. 122; *Treat v. Hiles* (1887) 68 Wis. 244, 60 Am. Rep. 858; *Richards v. Grinnell* (1884) 63 Iowa, 44, 50 Am. Rep. 727; *Newell v. Cochran* (1899) 41 Minn. 374; *Holmes v. McCray* (1875) 51 Ind. 355, 19 Am. Rep. 735; *King v. Barnes* (1858) 108 N. Y. 267; *Wallace v. Carpenter* (1877) 85 Ill. 500.

A deed conveying the title to a partnership in the partnership name to two parties the others not being named or proven, vests the legal title in the two parties named as trustees for the partnership, unless the fact that the given names are not proven renders the deed void for uncertainty, but an ambiguity of such a kind is capable of explanation by parol evidence, the parties to be designated as grantees thus being made certain. *Holmes v. Moon* (1872) 7 Heisk. 506.

In Pennsylvania, however, real estate conveyed to the partners as tenants in common will be bound by the individual judgments rendered against the partners, and parol evidence will not be admitted to prove the contrary. *Holt's App.* (1881) 98 Pa. 257.

In a case where the greater portion of the partnership capital to be contributed by each partner is to be derived from the leasing or sale of the donation claims owned by them separately, but is not bought to be derived from the sale or rent of real property, some personal property being owned by each, the labor of the partners going into the community, such partnership may be proven by parol. *Knott v. Knott* (1876) 6 Or. 142.

Where it was sought to establish a copartnership in relation to a house used and occupied by the defendant, the evidence of a witness who testified that the house was sold to one of the plaintiffs but he could not say whether the purchase was for himself or on account of the firm, and that an account which the vendor had contracted with the firm was credited with the sum agreed to be paid, was held admissible, as it tended to establish the existence of a partnership, its weight being for the consideration of the jury. *Hanks v. Hinson* (1837) 4 Port. (Ala.) 502.
37 L. R. A.

A mortgage deed describing the grantees as a firm is admissible in evidence to show that plaintiffs were partners at the time, and that the mortgage was executed to them in the firm name, and entitled the plaintiff to recover in ejectment as against the defendant. *Morse v. Carpenter* (1847) 19 Vt. 618.

It is not enough that the articles of copartnership are in writing, nor that they are expressly for buying and selling real estate; parol evidence must still be resorted to in order to show that the particular land in question is a part of the partnership transaction. *Geddes's App.* (1877) 84 Pa. 482.

Evidence showing that a partnership existed, that the partnership funds were used in the purchase of real estate which was conveyed to one partner, who used the partnership money in the purchase of such lands, was held sufficient to uphold an implied trust in favor of the partnership, the money having come from that source, parol evidence being sufficient to prove that the money belonged to the partnership. *McCully v. McCully* (1888) 78 Va. 159; *Brooke v. Washington* (1851) 8 Gratt. 248, 56 Am. Dec. 142.

Where the partnership articles provided for the purchase of property, and for the erection of business premises thereon, it was held that parol evidence was admissible for the purpose of proving that property afterwards purchased and conveyed to one partner, the business premises being erected thereon and used for the purposes of the business and improved with partnership means, was partnership property. *Bird v. Morrison* (1800) 12 Wis. 153.

In *Essex v. Essex*, 20 Beav. 442, the court admitted evidence of a parol contract as to the continuance of a partnership relating to real estate.

A partnership agreement between two parties to be jointly interested in the speculation of buying, improving for sale, and selling land, may be proved without being evidenced by any writing signed by, or by the authority of the party to be charged therewith, within the statute of frauds, and such an agreement being proved, either partner may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale v. Hamilton* (1846) 5 Hare, 369, 16 L. J. Ch. N. S. 128, 11 Jur. 163.

Where the master's report in an action for a partnership account showed that the property where the business was carried on was partnership property but was claimed by one partner as his separate estate, the patent being issued to him while other patents were issued to the other partners in their respective names, such partner making no separate claim therefor, the property was decreed partnership estate, parol evidence being admitted to prove the same. *Newton v. Doran*, 3 Grant, Ch. (U. C.) 353.

See also as to parol evidence to prove the trust, head VI. a, *infra*, page 471.

b. When not admissible.

When land is purchased with partnership funds and for partnership purposes, there is an implication of law that the land is held for the partnership.

to "Cato Abbott and Henry Robinson, composing the firm of Abbott & Robinson;" and it was held not to be partnership property, because it was not shown to have been either purchased with partnership funds, or used for partnership purposes; but we do not regard that case as holding that the mere use of the land for partnership purposes constitutes it firm property. In *Mauck v. Mauck*, 54 Ill. 281, land which had been bought and held for firm purposes was said to be firm property, and to partake of the character of personality; but in that case a part of the

business of the firm was to buy and sell real estate, and, although the land was said to belong to the firm, it does not appear that it was not purchased with partnership funds. In *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, the land was bought for the use of the partnership, but after the partnership was formed, and with the money of two of the partners. In *Bopp v. Fox*, 63 Ill. 540, land, bought by four partners with their individual funds, and conveyed to them in their individual names, was held to be partnership property, because, two weeks before the pur-

but where it is purchased with the separate funds of the partners it cannot by a verbal agreement between themselves be converted into partnership property, because no trust in lands can be created unless by writing, except such as arises or results by implication of law, parol evidence not being admissible to prove any declarations of trust or agreement of the parties for a trust, although it is received to establish the fact from which the law will raise or imply a trust. *Parker v. Bowles* (1876) 57 N. H. 491; *Farrington v. Barr* (1858) 36 N. H. 86; *Moore v. Moore* (1859) 38 N. H. 332; *Otis v. Sill* (1849) 8 Barb. 102.

A bill alleging that the property was purchased with partnership funds for the purposes of the partnership in the name of one individual partner, will not be sustained by evidence showing the purchase by one partner with his individual funds. *Owens v. Collins* (1853) 23 Ala. 337.

Verbal testimony to establish the existence of a partnership in the lands and negroes, for the purpose of planting, is inadmissible. *Gantt v. Gantt* (1851) 6 La. Ann. 577.

In the above case the contention was that at the time of the formation of the partnership, the land was public property and not the joint property of the owners, and that the slaves were the separate property of the partners, and therefore a partnership in the improvements and crops might be proved by parol, but the court held that as the settlement on the public lands could only be with a view of acquiring title thereto, and that as the partnership as it was contemplated by the parties was one in which part of the stock consisted of real estate, it could not be proved by parol. *Ibid*.

A lease taken by a member of a copartnership, not expressly for the firm, the premises being demised to him individually, does not belong to the partnership, and parol evidence that it was executed for the benefit of the partnership is inadmissible. *Otis v. Sill* (1849) 8 Barb. 122.

In *Otis v. Sill*, *supra*, the evidence did not show that it had been taken for the firm and with express reference to its business, although it did appear that the partnership commenced at the date of the lease and that the business was carried on upon the demised premises.

By such parol evidence a trust in real estate would be sought to be created contrary to the provisions of the statute of frauds. *Otis v. Sill*, *supra*.

An agreement between the parties at the time of the conveyance by members of a copartnership to one partner absolutely, that such property should be considered as partnership property or be held in trust for the firm, cannot be proved by parol evidence even though such property is subsequently improved by the firm but never used for firm purposes, the proof of such an agreement by parol evidence being contrary to the provisions of the statute of frauds. *Bird v. Morrison* (1860) 13 Wis. 153.

In Pennsylvania the courts hold that such a partnership cannot, so far as bona fide purchasers, cred-

itors, and other third parties without notice are concerned, be proved by parol evidence inasmuch as the statutes of that state make provision for the recording of titles to real estate, the record itself being evidence.

Where the recorded title is in one of the partners, parol evidence is inadmissible to show that it was partnership property, as against the purchaser or creditor acting bona fide without notice. *Warriner v. Mitchell* (1890) 128 Pa. 161.

Where they deal on the faith of a recorded title and without notice that it is different from what it appears of record. *Colliner v. Greig* (1890) 137 Pa. 606.

Where lands are owned by two persons, the face of the deed showing them to be tenants in common, it is incompetent, whenever the rights of third persons are involved, to show by parol that they are partnership property. *Geddes' App.* (1877) 84 Pa. 482; *Lefevre's App.* (1871) 69 Pa. 122, 8 Am. Rep. 229; *Ebbert's App.* (1871) 70 Pa. 79; *Hale v. Henrie* (1834) 2 Watts, 142, 27 Am. Dec. 299; *Ridgway's App.* (1850) 15 Pa. 177, 53 Am. Dec. 563.

Such evidence would destroy and contradict the title established by the deed and set up a parol title in its place. *Lancaster Bank v. Myley* (1850) 13 Pa. 544.

Where real estate was purchased in the individual names of two parties before the partnership, cash on account and the first installment being paid before a third partner joined the firm, the appropriation of the firm funds for the payment of the balance being acquiesced in by such partner, improvements being made thereon with a knowledge that the property stood in the names of the first two partners, the money being chargeable against such partners in the final account, the facts showing an express agreement that such third partner must have a proportion of the property upon a final settlement, upon his paying for the same, such parol agreement will give him no title, and even if such were the case it would be as an individual and not as a partner, no resulting trust for a partnership being created. *Lefevre's App.* (1871) 69 Pa. 122, 8 Am. Rep. 229.

Where the face of the title indicates nothing to show that the property belongs to the firm, but on the contrary that the partners are entitled to an undivided fourth part as tenants in common; as to purchasers, mortgagees, and creditors the agreement of partners to make real estate part of the common stock must be in writing, and appear of record, and it cannot be shown by parol that real estate thus conveyed is partnership property. *Harding v. Devitt* (1873) 10 Phila. 95; *Lefevre's App.* *supra*.

As to purchasers of the title and creditors having liens, a deed to persons in fact partners but taking the title to themselves as tenants in common must stand as the foundation of their rights and govern, and cannot be changed by parol evidence. *Ebbert's App.* (1871) 70 Pa. 79; *Hale v. Henrie* (1834) 2 Watts, 142, 27 Am. Dec. 299; *McDermot v. Laurence* (1821) 7 Serg. & R. 438, 10 Am. Dec. 466; *Ridgway's*

chase, the four purchasers made, not a mere executory agreement to form a partnership at a future time, but a "present, verbal agreement of partnership," and then afterwards bought the land, and began the erection of a mill for the purpose of carrying on the milling business as a firm "already formed under the verbal agreement." It was there held that the essential question was whether the purchase money "was paid as partnership money for a partnership purpose," and we said, "We consider this was essentially a purchase with partnership funds for partnership purposes."

The weight of authority seems to us to support the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here

App. (1860) 15 Pa. 177; *Kramer v. Arthurs* (1847) 7 Pa. 170; *Launcester Bank v. Myley* (1850) 13 Pa. 544; *Cumming's App.* (1855) 25 Pa. 268, 64 Am. Dec. 696; *Erwin's App.* (1861) 39 Pa. 535, 80 Am. Dec. 542.

VI. Implied and resulting trusts.

As to the admissibility of parol evidence to establish such a trust, see head *V. supra*.

a. When created in partnership lands.

A partnership in any branch of trade or business may be shown by parol as an existing fact, and whatever real estate is held for the purposes of such business is regarded as an incident thereto, and the law implies a trust in favor of the partnership, however the lands be held in law. *Marsh v. Davis* (1855) 33 Kan. 323; *Bird v. Morrison* (1890) 12 Wis. 153.

Where partners take the deed in their individual right as tenants in common, their act tends to mislead both purchasers and creditors trusting the apparent state of the title, and therefore the trust, if valid, will be protected against all creditors, except when affected by the recording acts, or a want of notice. *Ebbert's App.* (1871) 70 Pa. 79.

In equity it will be treated as joint property held in common, each tenant in common holding his interest in trust for the partnership, for the reason that in equity partners cannot hold in joint tenancy, otherwise the *fus accrescendi* will intervene in case of the death of one of the partners. *Whitmore v. Shiverick* (1867) 3 Neb. 288.

Yet the form of equity is merely to declare the trust and compel the legal title to serve the equitable interests. *Shearer v. Shearer* (1867) 98 Mass. 107.

If the title is taken in the name of one partner, or in the name of the partnership, such conveyance is held in equity as a trust for all the partners, and if the real estate is in fact partnership property, it matters not that the legal title is in one or in all the parties, or in a third person, equity regarding it as held in trust for the partnership, the trust being enforceable by the parties interested, whether partners or creditors. *Chicago Lumber Co. v. Ashworth* (1881) 26 Kan. 212.

An agreement between parties bona fide, to bring real estate into the stock of the firm and thus impress it with the character of personality, impresses the land with a trust which equity will enforce and consider as actually done, whatever a chancellor will decree to be done, yet it is treated as if it had actually changed its character of land into money. *Calhitt v. Thomas* (1853) 1 Phila. 463.

A resulting trust in favor of partnership occurs where real estate is purchased for partnership purposes and paid for with partnership funds in the name of one partner. *McGuire v. Ramsey* (1849) 9 Ark. 518.

The court will imply the partnership character and the trusts resulting therefrom from the fact that the title is held by the partners jointly and consistently with the character of partnership property, being used for such purposes. *Re Far-*

mer, Ex parte Griffin (1873) 18 Nat. Bankr. Reg. 207; *Bird v. Morrison* (1890) 12 Wis. 139; *Smith v. Burnham* (1838) 3 Sumn. 435.

No equities apply in favor of revealing a copartnership with property which is voluntarily conveyed or caused to be conveyed to a third person which does not apply with equal force in the case of a similar transfer of property by an individual. *Winans v. Winans* (1894) 99 Mich. 74.

The doctrine has been thus stated:—

If land is acquired as the *substratum* of a partnership, or is brought into and used by the partnership for partnership purposes, there will be a trust by operation of law for the partners as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them as joint tenants. *Hanff v. Howard* (1857) 56 N. C. 440.

Even though such deed conveys the legal title of the land to them individually as tenants in common, or as joint tenants, yet if upon the face of the deed it appears that they are partners and the land is purchased for partnership purposes, they will hold such land as trustees for the partnership as against all creditors of one of the individual partners, whether claiming by judgment lien against him to secure his individual debts, or in any other manner. *Cunningham v. Ward* (1868) 30 W. Va. 572.

Such trust relation exists with respect to real estate, as well as to personalty. *Gillett v. Gaffney* (1877) 3 Colo. 361.

And applies equally to joint tenants, tenants in common, copartners, and all others having a common title in interest. *Forrer v. Forrer* (1877) 29 Gratt. 134.

These principles are fully enunciated by the opinions of the courts in the following cases, viz.: *Larkins v. Rhodes* (1897) 5 Port. (Ala.) 195; *Houston v. Stanton*, 11 Ala. 412; *Little v. Snedecor* (1875) 53 Ala. 167; *Owens v. Collins* (1853) 23 Ala. 397; *McGuire v. Ramsey* (1849) 9 Ark. 518; *Deputy v. Leavenworth* (1861) 17 Cal. 282; *Gray v. Palmer* (1853) 9 Cal. 616; *Jones v. Parsons* (1864) 25 Cal. 100; *Kayser v. Maugham* (1835) 8 Colo. 232; *Gillett v. Gaffney* (1877) 3 Colo. 361; *Sigourney v. Munn* (1823) 7 Conn. 11; *Robertson v. Baker* (1866) 11 Fla. 122; *Prioe v. Hicks* (1874) 14 Fla. 555; *Louhat v. Nourse* (1853) 5 Fla. 360; *Cottle v. Harrold* (1894) 72 Ga. 530; *Hyman v. Peters* (1889) 30 Ill. App. 134; *Nicoll v. Orden* (1862) 29 Ill. 323, 81 Am. Dec. 311; *King v. Hamilton* (1864) 16 Ill. 190; *Faulds v. Yates* (1870) 57 Ill. 416, 11 Am. Rep. 24; *Indiana Pottery Co. v. Bates* (1850) 14 Ind. 8; *Pennybacker v. Leary* (1884) 65 Iowa, 220; *Paige v. Paige* (1877) 71 Iowa, 318, 60 Am. Rep. 739; *Paton v. Baker* (1883) 62 Iowa, 704; *Scruggs v. Russell* (1853) *McCahon*, 39; *Marsh v. Davis* (1855) 33 Kan. 323; *Chicago Lumber Co. v. Ashworth* (1881) 26 Kan. 212; *Tenney v. Simpson* (1887) 87 Kan. 353; *Simpson v. Tenney* (1889) 41 Kan. 561; *Bryant v. Hunter* (1869) 6 Bush, 75; *Galbraith v. Gedge* (1857) 16 B. Mon. 631; *Pepper v. Thomas* (1897) 96 Ky. 539; *White v.*

in controversy to be firm property. The testimony proves affirmatively that there was no agreement, written or verbal, to put the land into the firm as a firm asset, and that it was treated by the parties as individual property. John S. Emmons insured his interest separately. When he gave his note for \$1500, signed by his brother as surety, in part payment of the purchase money for the land, he promised his brother that he would give him a mortgage on his one-third interest when the master's certificate, issued to him at the sale, should ripen into a deed and the mortgage afterwards made was given as soon as the

master's deed was obtained. Four months after the purchase, when he borrowed \$1800 of the bank upon his note, signed by his father and father-in-law as sureties, he stated to the bank that he intended to mortgage his interest to his sureties to secure them. About this time, Newton, Emmons & Miller paid \$5400 in cash for improving the mill; but this amount was contributed by the partners, not out of partnership funds, but by the contribution of their individual moneys, each paying one third. The one third so paid by John S. Emmons was the \$1800 borrowed on his note. The bank itself, in procuring deeds

Boulware (1889) 88 Ky. 169; Burnam v. Burnam (1869) 6 Bush, 899; Collins v. Decker (1879) 70 Me. 23; Goodburn v. Stevens (1847) 5 Gill, 1; National Union Bank of Maryland v. National Mechanic's Bank of Baltimore (Md.) Dec. 19, 1894; Shearer v. Shearer (1897) 96 Mass. 107; Richards v. Manson (1869) 101 Mass. 484; Collins v. Charlestown Mut. F. Ins. Co. (1887) 10 Gray, 155; Howard v. Priest (1849) 5 Met. 552; Fall River Whaling Co. v. Borden (1868) 10 Cush. 455; Dyer v. Clark (1848) 5 Met. 552, 89 Am. Dec. 697; Homer v. Homer (1871) 107 Mass. 53; Peck v. Fisher (1868) 7 Cush. 386; Goodwin v. Richardson (1814) 11 Mass. 469; Burnside v. Merrick (1848) 4 Met. 537; Montague v. Hayes (1868) 10 Gray, 609; Converse v. Citizens Mut. Ins. Co. (1862) 10 Cush. 37; Thayer v. Lane (1843) Walk. Ch. (Mich.) 200; Way v. Stebbins (1882) 47 Mich. 296; Arnold v. Wainwright (1861) 6 Minn. 368, 89 Am. Dec. 448; Harding v. Jamison (Minn.) Feb. 25, 1896; Sherwood v. St. Paul & C. R. Co. (1878) 21 Minn. 127; Alexander v. Kimbro (1878) 49 Miss. 539; Davis v. Davis (1882) 60 Miss. 615; Whitney v. Cotten (1876) 58 Miss. 689; Thompson v. Holden (1893) 117 Mo. 118; Willet v. Brown (1877) 65 Mo. 128, 27 Am. Rep. 296; Matthews v. Hunter (1878) 67 Mo. 298; Carlisle v. Mulhern (1868) 19 Mo. 58; Duhring v. Duhring (1864) 30 Mo. 174; Evans v. Gibson (1869) 29 Mo. 233, 77 Am. Dec. 585; Hartnett v. Fegan (1876) 3 Mo. App. 1; Hirdour v. Reeding (1877) 3 Mont. 18; Whitmore v. Shiverick (1897) 3 Nev. 238; Messer v. Messer (1879) 60 N. H. 375; Jarvis v. Brooks (1863) 37 N. H. 37, 69 Am. Dec. 329; Cilley v. Huse (1860) 40 N. H. 358; Parker v. Bowles (1876) 57 N. H. 491; Baldwin v. Johnson (1861) 1 N. J. Eq. 441; Pillsbury v. Kingdon (1879) 81 N. J. Eq. 619; Arnold v. Hagerman (1888) 45 N. J. Eq. 186; Harney v. First Nat. Bank of Jersey City (N. J.) May 15, 1894; Greenwood v. Marvin (1888) 111 N. Y. 423; Fairchild v. Fairchild (1876) 64 N. Y. 471, affirming (1875) 5 Hun. 407; Marvin v. Marvin, Court of Appeals 1888, opinion by Allen, J., cited in Greenwood v. Marvin, *supra*; Robbins v. Robbins (1882) 89 N. Y. 251; Traphagen v. Burt (1876) 67 N. Y. 30; Chamberlin v. Chamberlin (1878) 12 Jones & S. 116; Delmonico v. Guillaume (1848) 3 Sandf. Ch. 366, 7 L. ed. 627; Martin v. Wagener (1878) 1 Thomp. & C. 518; Smith v. Jackson (1838) 2 Edw. Ch. 23, 6 L. ed. 295; Tarbell v. Bradley (1878) 7 Abb. N. C. 279, affirmed, Tarbell v. West (1881) 68 N. Y. 260; Collumb v. Read (1862) 24 N. Y. 505; Rank v. Grote (1894) 18 Jones & S. 275; Buchanan v. Sumner (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; Mitchell v. Read (1878) 61 Barb. 310; King v. Weeks (1874) 70 N. C. 372; Hanff v. Howard (1867) 56 N. C. 440; Ross v. Henderson (1877) 77 N. C. 170; Page v. Thomas (1865) 43 Ohio St. 33, 54 Am. Rep. 793; Greene v. Greene (1824) 1 Ohio, 535, 18 Am. Dec. 642; Lacy v. Hall (1861) 37 Pa. 360; McCormick's App. (1868) 57 Pa. 54, 98 Am. Dec. 191; Erwin's App. (1861) 39 Pa. 535, 80 Am. Dec. 542; Ebbert's App. (1871) 70 Pa. 79; Calkitt v. Thomas (1853) 1 Phila. 453; Lime Rock Bank v. Phetteplace (1894) 8 R. I. 56; Tillinghast v. Champlin (1866) 4 R. I. 173, 67 Am. Dec. 510; Jones v. Smith (1869) 31 S. C. 537; Boyce v. Coster (1850) 4 Strobb. Eq. 25; Betts v. Letcher (1890) 1 S. Dak. 153; 37 L. R. A.

Holmes v. Moon (1872) 7 Helak. 508; Moreau v. Safarans (1856) 8 Sneed, 595, 67 Am. Dec. 582; Eakin v. Shumaker (1854) 12 Tex. 51; Dewey v. Dewey (1863) 25 Vt. 555; Wheatley v. Calhoun (1841) 12 Leigh, 264, 37 Am. Dec. 654; Hardy v. Norfolk Mfg. Co. (1865) 80 Va. 404; Deloney v. Hutcheson (1823) 2 Rand. (Va.) 138; Pierce v. Trigg (1899) 10 Leigh, 406; Forrer v. Forrer (1877) 29 Gratt. 134; Digns v. Brown (1884) 78 Va. 222; McCully v. McCully (1888) 78 Va. 150; Christian v. Ellis (1845) 1 Gratt. 402; Brooke v. Washington (1851) 8 Gratt. 243, 54 Am. Dec. 143; Cunningham v. Ward (1888) 30 W. Va. 572; Bird v. Morrison (1860) 13 Wis. 153; Fowler v. Bailey (1861) 14 Wis. 125; Kruachke v. Stefan (1892) 63 Wis. 373; *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207; Lyman v. Lyman (1829) 2 Paine, C. C. 11; Thrall v. Crampton (1877) 16 Nat. Bankr. Reg. 261, 9 Ben. 218; Hoxie v. Carr (1853) 1 Sumn. 193; Smith v. Burnham (1868) 8 Sumn. 435; Phillips v. Crammond (1810) 3 Wash. C. C. 441; Megibben v. Perin (1892) 49 Fed. Rep. 133; Kelley v. Greenleaf (1843) 3 Story, C. C. 92; Wiegand v. Copeland (1882) 14 Fed. Rep. 412; Kirkpatrick v. Sims, 5 Pat. So. App. Cas. 325.

The basis of the equitable trust or lien upon partnership real estate is the agreement and intention of the partners, which may be either express or implied; it may be expressed in the articles of partnership, or in the writing evidencing its purchase, or verbally; it may be implied from the circumstances of the purchase and the conduct of the parties. *Wilhite v. Boulware* (1889) 89 Ky. 169.

It is not necessary that the trust be expressed, provided it exists and is capable of proof, and the land is in fact and substance partnership property. *Jones v. Smith* (1889) 31 S. C. 527.

It arises in favor of the purposes for which the land is purchased, and for payment of the partnership debts; such rule being applied in all cases, where there is not an express agreement or circumstances showing a contrary intention. *Loubat v. Nourie* (1853) 5 Fla. 260.

And it is considered as a trust attaching to the estate at the time of its acquisition, one which a court of equity is bound to execute as against the partners and those claiming under them with notice. *Greene v. Greene* (1824) 1 Ohio, 535, 18 Am. Dec. 642; *Bell v. Phyn* (1802) 7 Ves. Jr. 454; *Balmain v. Shore* (1804) 9 Ves. Jr. 500.

It derives its existence from the actual or implied agreement of the parties, and from the mutual relation in which they stand to each other. *Howard v. Priest* (1843) 5 Met. 552; *Carlisle v. Mulhern* (1853) 19 Mo. 56; *Willet v. Brown* (1877) 65 Mo. 128, 27 Am. Rep. 295.

It results from the relation which the partners bear to each other, and from the fact that the estate is brought into the firm or purchased with its funds for the convenience and accommodation of the trade. *Goodburn v. Stevens* (1847) 5 Gill, 1; *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207.

From the investment of the funds of the partner-

from the partners in September, 1884, dealt with them as owners of separate interests. Each member of a partnership has a superior lien on the partnership property for the payment of the firm debts. This equitable lien of the partners is worked out for the benefit of the firm creditors. *Huggood v. Cornwell*, 48 Ill. 65, 95 Am. Dec. 516. Hence, partnership property must be first applied to the payment of partnership debts; and the true interest of each partner in such property is the balance found to be due to him after the payment of the firm debts, and the settlement

of accounts between the partners. *Bopp v. Fox, supra*. In equity, real estate stands on the same footing in this respect as personal property. *Alkire v. Kahle, supra*. It results that there can be no dower interest in real estate owned by a partnership until all the partnership debts are paid and the partnership accounts are adjusted. *Trowbridge v. Cross*, 117 Ill. 109. If the land in controversy was firm property in September, 1884, there were no dower interests at that time in the wives of Newton, Emmons, and Miller; and yet their wives were required by the bank

ship in real estate for the use of the partnership. *Shearer v. Shearer* (1897) 98 Mass. 107; *Harney v. First Nat. Bank of Jersey City* (N. J.) May 15, 1894.

And from the original transaction and at the time it takes place, and at no other time, and is founded upon the actual payment of the money and on no other ground, and cannot be mingled or confounded with any subsequent dealings whatever. *Richards v. Manson* (1899) 101 Mass. 484.

So it is declared by the fact that they are partners. *Re Farmer, Ex parte Griffin, supra*.

It is founded in the equity of the surviving partner, who being charged with the debts of the firm has control of the partnership property as assets for the payment of the firm's debts, and for the restoration to himself upon settlement of the partnership account, of such part of the capital as has been contributed by him to the common stock. *Howard v. Priest* (1849) 5 Met. 582; *Carlisle v. Mulhern* (1858) 19 Mo. 56.

And equity will not undertake to disregard the assurances of title under which real estate is held for partnership purposes, but will treat the holder of the title as a trustee for the purposes of the partnership, for the payment of the creditors and the adjustment of the accounts between the partners, according to their interests. *Whitney v. Cotten* (1876) 53 Miss. 689.

In order to defeat the apparent individual right of the partner holding such title it must affirmatively appear that he acquired and held title under circumstances upon which equity would fix its grasp, for the purposes of declaring and enforcing a trust in favor of those beneficially entitled. *Chamberlin v. Chamberlin* (1878) 12 Jones & S. 116.

To create such a trust there must, however, be an original agreement creating the trust at the time of the purchase, or at least at the time when the contract for the purchase takes effect and is executed by an appropriation of the property as that of the partnership. *Hoxie v. Carr* (1832) 1 Sumn. 173.

The resulting trust can only arise upon the original payment being made with the partnership funds and not from a subsequent agreement to hold the property as partnership stock, such an agreement being void under the statute of frauds. *Deloney v. Hutcheson* (1823) 2 Rand. (Va.) 183.

A statement that the partners purchased the land upon which their business was carried on for partnership purposes, and hold it as stock, is not equivalent to an allegation that the property in question is purchased with partnership funds inasmuch as such a circumstance is consistent with the fact of each partner paying his proportion of the purchase money out of his individual funds. *Ibid*.

The purchase must be made at the time with partnership funds, or on partnership responsibility. *Alexander v. Kimbro* (1873) 49 Miss. 529; *Wheatley v. Calhoun* (1841) 12 Leigh, 272, 37 Am. Dec. 654.

It must be clearly shown that they so regard the title themselves and have paid for it out of the partnership funds. *Ebbert's App.* (1871) 70 Pa. 72, 27 L. R. A.

The fact must be established that it belongs to the partnership. *Messer v. Messer* (1879) 59 N. H. 375; *Fairchild v. Fairchild* (1876) 64 N. Y. 471; *Dyer v. Clark* (1849) 5 Met. 562, 39 Am. Dec. 697; *Jarvis v. Brooks* (1863) 27 N. H. 37, 59 Am. Dec. 356; *Cilley v. Huse* (1860) 40 N. H. 358; *Parker v. Bowles* (1876) 37 N. H. 491.

And to sustain the proposition that equity will recognize a resulting or constructive trust, in such cases it must be found that in procuring title to the property the defendant perpetrated a fraud, actual or constructive, upon the plaintiff, or improperly reaped the personal advantage of ownership, through a bargain entered into for the benefit of the partnership; that in some particular he violated the principle requiring the utmost good faith between the parties to that relation. *Kayser v. Maugham* (1885) 8 Colo. 232.

The implied trust is confirmed by the fact that the property is bought for the use of the firm and actually used in its business, in the absence of an agreement or conduct implying such an agreement, prior or subsequent to or at the time of the purchase, proved, to indicate an intention on the part of the partners to hold the real estate so purchased by them in undivided shares as their separate property. *Tillinghast v. Champlin* (1856) 4 R. I. 173, 67 Am. Dec. 510.

A mere allegation, however, of an express agreement that lands purchased by one partner in his own name were purchased with the firm's money under an express agreement that they were to become the firm's property is not sufficient; it must be shown that there was an agreement to purchase for the joint benefit of the partners, before the court will entertain the question of a resulting trust in favor of the partners. *Russell v. Miller* (1872) 26 Mich. 1.

Yet it has been held that a resulting trust cannot be raised where there is no written conveyance, nor where the property is of a perishable nature. *Lyon v. Lyon* (1878) 1 Tenn. Ch. 225.

Such a trust may be predicated where a partnership exists prior to the time of the acquiring of the real estate, the partnership contract not resting entirely in parol. *Kayser v. Maugham* (1885) 8 Colo. 232.

Whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another, a trust will be implied under section 2316 of the Georgia Code. *Cottle v. Harrold* (1884) 73 Ga. 630.

Such trustee must account to the partners according to their several rights and interests. *Faulds v. Yates* (1870) 57 Ill. 416, 11 Am. Rep. 24.

Treated in the nature of a trust the rights of all parties are preserved, the legal estate going to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which it was purchased and subject to this all will take. *Dyer v. Clark* (1842) 5 Met. 562, 39 Am. Dec. 697.

to sign the deeds to its trustee, Woodworth, and one of them was paid \$200 for her signature. There is no question about the bona fide character of the mortgages to Willis Emmons and Wiley S. Emmons and W. W. Walter. They paid the judgments upon the notes of John S. Emmons, upon which they were sureties, and those notes were given for borrowed money expended in the purchase and improvement of the mill property. We think the mortgages have been properly sustained as resting upon an undivided one-third interest in the land, which must be regarded,

under all the circumstances of this case, as the separate property of John S. Emmons.

But, even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgages thereon had notice, or reasonable ground for believing, that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and

To constitute an implied or resulting trust, however, in favor of the co-partner on the ground of payments made, it must appear that they were made for the purpose of making the purchase by the firm and for its use. *Richards v. Manson* (1889) 201 Mass. 484; *Homer v. Homer* (1871) 107 Mass. 82.

And if it be made to appear that real estate, including chattels real, does in fact belong to a partnership and constitute part of its assets, in whose name it may stand, equity will treat it as such and will decree the person in whom the legal estate vests to be a trustee for those beneficially interested. *Chamberlin v. Chamberlin* (1878) 12 Jones & S. 116.

So the payments or advances must have been made before or after the time of the purchase, as the trust arises out of the circumstances that the money of the real and not of the nominal purchaser formed at the time the consideration of the purchase and became converted into land. *Richard v. Manson*, *supra*.

In such a case the land vests in each partner, and the heirs of each clothed with a trust for the co-partnership capable of being protected and enforced by the court, through as well the general as the special equity powers created by the Massachusetts statutes. *Fall River Whaling Co. v. Borden* (1882) 10 Cush. 458.

So real estate purchased with partnership funds, in the name of the wife of one of the partners, charges such estate in her hands with a resulting trust in favor of the partners and their creditors. *Price v. Hicks* (1874) 14 Fla. 555.

The trust, however, need not be expressed, as equity will treat the ownership as a distinct trust, if only the trust exist and is capable of proof, and the land is in fact and substance partnership property. *Little v. Snedecor* (1875) 52 Ala. 167.

A partner bringing in real estate at a valuation is a trustee thereof for the firm. *Wiegand v. Cope-land* (1882) 14 Fed. Rep. 418, 7 Sawy. 442.

Every partner who holds the legal title of partnership real estate holds the same in trust for the benefit of the firm, and the trust created by such deed is not enlarged or limited by the use of the word "trustee" in the deed. *Paton v. Baker* (1883) 68 Iowa, 704.

Such a trust will make the land the property of the partnership in equity and may be established by parol evidence. *Sherwood v. St. Paul & C. R. Co.* (1875) 21 Minn. 127; *Hoxie v. Carr* (1832) 1 Sumn. 173, 182; *Jarvis v. Brooks* (1868) 27 N. H. 87, 67, 59 Am. Dec. 859; *McGuire v. Ramsey* (1849) 9 Ark. 518; *Philips v. Crammond* (1810) 2 Wash. C. C. 441; *Paige v. Paige* (1837) 71 Iowa, 818, 60 Am. Rep. 799.

Where it is sought to enforce the same as a resulting trust, the relief must depend upon the nature of the evidence, and though parol evidence may be given to establish such a trust, it must be clear and certain. *Larkins v. Rhodes* (1837) 5 Port. (Ala.) 125.

Where real estate is purchased by a partner for the use of the firm with partnership moneys, and is actually occupied by the firm, there is sufficient

evidence to prove a resulting trust in the partner in whose name it was purchased for the firm. *Scruggs v. Russell* (1858) McCahon, 32.

And such is the case when the legal title is held by one partner in excess of his beneficial interest. *Collins v. Decker* (1879) 70 Me. 23; *Shearer v. Shearer* (1897) 98 Mass. 107.

The trust being for the purposes of the partnership, is chargeable in equity with all obligations growing out of that relation. *Shearer v. Shearer*, *supra*.

Yet all such trusts arising from equitable presumption may be rebutted by parol evidence that it was the intention of the parties that the person with whom the conveyance was made should take for his own benefit. *Richards v. Manson* (1889) 101 Mass. 484.

Such holding is not contrary to the statute of frauds, nor to the statute of Vermont regulating conveyances of real estate which saves expressly such trusts as may arise or result by implication of law but with the provision that trusts in land generally shall be declared in writing. *Thrall v. Crampton* (1877) 16 Nat. Bankr. Reg. 251, 9 Ben. 218.

Section 4190 of the Michigan Compiled Laws relating to resulting trusts has no application to a purchase of real estate by one partner in his own name for the firm's use, even though he purchased with the money of another partner and the property was actually used as firm assets; and in such a case the property is to be treated as belonging to the partnership. *Way v. Stebbins* (1882) 47 Mich. 236.

Section 5569 of Howell's Michigan Statutes provides that when a grant for a valuable consideration is made to one person and the consideration is paid to another, no use or trust results in favor of the person by whom such payment is made, but the title vests in the person named as the alienee in such conveyance, subject only to the provisions of the next section, and therefore where the legal title was taken in the name of the wife of one of the partners of a firm, and of the co-partner, it was held there was no resulting trust in favor of the husband of the wife. *Winans v. Winans* (1894) 99 Mich. 74.

The Minnesota Statute of Uses and Trusts, Compiled Statutes, 382-384, which does away with some trusts that would otherwise result, was not intended to cut off trusts of land conveyed to the individual members of the firm as tenants in common, or otherwise than as partners. *Arnold v. Wainwright* (1861) 6 Minn. 365, 30 Am. Dec. 448.

The creation of trusts as to interests in partnership real estate is not prohibited by the New York statute of uses and trusts. *Greenwood v. Marvin* (1888) 111 N. Y. 423; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407; *Marvin v. Marvin*, Court of Appeals, MSS. opinion by Allen, J., cited in *Greenwood v. Marvin*, *supra*; *Robbins v. Robbins* (1882) 89 N. Y. 251.

But the firm can acquire no interest in the real estate itself, which is conveyed to the partners in equal proportions prior to the articles of partner-

grain business were not necessarily notice of a partnership in the land. Now, it is well settled that a bona fide purchaser or mortgagee of firm property, from one of the partners holding the legal title, without notice of its partnership character, will hold it free from partnership claims. *T. Parsons, Partn.* 4th ed. §§ 277, 278; 1 *Bates, Partn.* § 291; *Dyer v. Clark*, 5 Met. 563, 39 Am. Dec. 697; *Collyer, Partn. Perkins' ed.* § 135. When a firm and its members are insolvent, and the firm has been dissolved, an equity exists in favor of the creditors of the firm in respect of the lands purchased with partnership

funds, which is superior to that of the creditors of the individual partners; but there may be cases where an equal or superior equity may be created in favor of a creditor of an individual member of the firm, as where one has furnished to one of the members the capital upon which the business was commenced. *Reeves v. Ayers*, 33 Ill. 418. By signing the note for \$1500 as surety, Willis Emmons enabled John S. Emmons to purchase an interest in the mill property, and if that interest was a partnership asset, he thereby aided in procuring a part of the firm capital. In addition to what has been said,

ship, unless there be an express agreement in writing, or unless purchased with partnership funds and an implied trust raised in its favor. *Alexander v. Kimbro* (1873) 49 Miss. 529.

So the appropriation of the joint funds of a co-partnership by one of the members of the firm, to purchase real estate, conveyed to such partner in his own name, will not create a resulting trust in favor of his co-partner, unless the fund is so appropriated in pursuance of an agreement between the parties at the time of the purchase. *Forsyth v. Clark* (1820) 3 Wend. 637.

Real estate purchased for the use of the partnership, and so used being necessary for the purposes of the business, and mentioned in the deeds to the several partners as forming part of the partnership effects, is held in trust for the partners as tenants in common, even though such a trust was not declared in writing. *Hanft v. Howard* (1857) 58 N. C. 440.

A conveyance to J. L. S. & Co., invests J. L. S. with the legal title, but in equity he holds such title in trust for the benefit of the firm. *Moreau v. Saffarans* (1856) 3 Sneed, 535, 67 Am. Dec. 582.

Where pursuant to a parol agreement between partners for the investment of the profits for their joint benefit the profits are invested by the partner receiving the same, who takes the conveyance in his own name, a trust is raised in favor of the remaining partners. *McCully v. McCully* (1833) 78 Va. 159.

So where it is discovered by the surviving partner that a title to a portion of real estate conveyed for partnership purposes is defective, and he thereupon purchases such outstanding title in his own name, he purchases for the joint benefit of himself and the heirs of the deceased partner, who are entitled to claim the deceased's share upon paying their proportion of the purchase money. *Forrer v. Forrer* (1877) 29 Gratt. 124.

A financial partner purchasing real estate for the purpose of promoting the firm business, the same being improved with firm funds, is a trustee thereof for the firm. *Lacy v. Hall* (1861) 37 Pa. 360.

So a trust will be raised where one advances part of the purchase money out of his own estate and the other pays his share out of the partnership funds and takes the conveyance in his own name. *Owens v. Collins* (1853) 23 Ala. 337.

And land purchased by a partnership, under an agreement that it shall be paid for by the firm, although the conveyance being taken in the name of one partner only, without the knowledge or consent of the other, the note of such partner given for the price being subsequently paid out of the firm's funds, the land being all the time in possession of the firm, and used as its property for a number of years, is held in trust for the firm. *Dewey v. Dewey* (1863) 35 Vt. 555.

Again if part of the partnership funds of real estate partnership is taken by one partner and invested in lands in a foreign state with the intention of appropriating the same to his own use and

that of his family, the other partner has a right to follow such moneys into the lands, and such partner will be a trustee for the partnership. *King v. Hamilton* (1854) 16 Ill. 190.

Real estate purchased for the purpose of resale for profit, without any intention or understanding that it shall be purchased for the permanent use of any one or all; one partner furnishing the purchase money to and for the partnership as a loan, the deed being taken in such partner's name by way of security,—the deed is an absolute conveyance for the purpose of transferring the property to the partnership, and so far as intended as a security for the money loaned by such partner only a mortgage, and such partner therefore holds the property in trust for the partnership, and after its determination in trust for the individual members of the partnership, in the shares mentioned in the agreement entered into between them. *Tenny v. Simpson* (1897) 37 Kan. 363. To the same effect is the case of *Simpson v. Tenny* (1899) 41 Kan. 561.

A bill in equity will lie against the representatives of a deceased partner, to recover partnership funds fraudulently and without the consent of the copartners taken by one partner and invested in real estate in his own name and for his own use, when such real estate can be traced, a trust, being thereby created for the benefit of the firm; and the same must be accounted for by any person into whose possession it may have come other than a bona fide purchaser for valuable consideration without notice. *Kelley v. Greenleaf* (1843) 3 Story, C. C. 36.

The court distinguished the case of *Kruschke v. Stefan* (1893) 33 Wis. 373, from *Traphagen v. Burt* (1876) 67 N. Y. 30, and *Davis v. Davis* (1832) 60 Mass. 615, upon the ground that in those cases the real estate was acquired with partnership funds and for partnership purposes by the co-partner without the knowledge or consent of the other partner who procured the title to be conveyed to him when it should have been conveyed to both, in those cases an implied and resulting trust arising out of such breach of faith was enforceable without bringing a suit for dissolution and accounting, while in that case there was no violation of confidence or breach of faith, and therefore an action to compel a conveyance without bringing suit for dissolution and account would not lie.

Where, pursuant to an arrangement between the parties in the purchase of real estate, to be disposed of by them and the profits and losses divided, of which act a letter written by one of the parties to an attorney was evidence, the property being alienated pursuant to the arrangements, and the title vested in the purchasers, the trust is discharged. *Montague v. Hayes* (1858) 10 Gray, 609.

b. *When no such trust created.*

A bald parol agreement for a partnership in real estate, as such, cannot be shown to create a trust in land held by one of the partners under a deed absolute on its face. *Bird v. Morrison* (1860) 12 Wis. 152.

we think the evidence shows that the officers of the bank, if they did not actually make an agreement to that effect, gave John S. Emmons to understand that the bank would protect the mortgages on his interest if he and his wife would sign the deed to the bank. The consideration of that deed was just the amount of the two mortgages, and four witnesses swear that one of the officers of the bank promised to take care of the mortgages. When a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as to change his previous position,

the former will be estopped to aver against the latter a different state of things. *Casler v. Byers*, 129 Ill. 657.

As to the mortgage made by the appellant Miller to Larnport, the lower courts have found that that mortgage was not made in good faith, and was not given to secure a bona fide indebtedness. It is claimed that the note for \$5500, secured thereby, was given for money loaned to Miller by his wife and by his brother-in-law, Larnport. It is true that the fact of the relationship between the parties is no proof of fraud, although it may be a circumstance to excite suspicion. *Wightman v. Hart*, 87 Ill. 123. But we are

Such a trust cannot arise in contradiction of the terms of the deed. *Hoxie v. Carr* (1833) 1 Sumn. 173.

It will not be created unless it appears that the purchase of the land was made for the firm and for its use. *Homer v. Homer* (1871) 107 Mass. 82, where the proof was plenary, that it was the understanding that the partner should take a conveyance of the land for his own benefit, and account with the others for the proceeds or reasonable value of it. *Richards v. Manson* (1869) 101 Mass. 484, followed.

A trust in land cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling, or improving such lands, the partnership relation not having existed prior to the acquisition of title, no partnership funds being invested in the property, the recognition of such a trust abrogating the statute of frauds. *Kayser v. Maugham* (1886) 8 Colo. 232.

The mere incidental payment out of such funds of an installment due upon an antecedent contract on individual responsibility cannot raise a trust or give title to anything but reimbursements. *Wheatley v. Calhoun* (1841) 13 Leigh, 264, 37 Am. Dec. 654.

A memorandum made upon the ledger of a firm relating to a purchase of real estate by one partner in his own name, is insufficient as a declaration of trust, the memorandum importing that the defendant is to hold the land as his own. *Homer v. Homer*, *supra*.

If one of two partners buys in his own name and gives his own bond and mortgage, and afterwards pays out of the partnership fund, a resulting trust will not be thereby created, unless it unequivocally appears that there is an agreement at the time of the purchase that the funds shall be so appropriated. *Richards v. Manson*, *supra*; *Forayth v. Clark* (1829) 3 Wend. 603.

Where a mere possessory title is acquired by the use of partnership moneys, and the fee is not acquired by the partners but is subsequently taken by the surviving partner purchasing the possessory title of his deceased partner, such survivor does not acquire an outstanding title as trustee for his cotenants. *Blachley v. Coles* (1839) 6 Colo. 349, wherein they were treated as mere tenants at will, the interests of the estate being merely personalty.

And where real estate is purchased by a partner at sheriff's sale, a part of the purchase money being paid with an arrangement for the balance, with securities therefor taken in such partner's own name, the deed also being made in his name, the mere fact that a portion of such estate is afterwards used by the firm in its business will not create a trust, even though the amount paid by such partner, with interest accruing on the securities, is paid from the firm's funds, such sums being 37 L. R. A.

charged against such member in the books. *Rice v. Pennypacker* (1875) 5 Del. Ch. 33.

VII. Equitable conversion.

Real estate may be converted if there is no partnership between those interested in the land, and it may be unconverted though there be a partnership, as where land was held for partnership purposes and there was a definite agreement that at the end of the partnership it should be conveyed as land, the interest of a partnership in such a case being real estate. *Re Wilson, Wilson v. Holloway* (1863) 2 L. Ch. 340.

The equitable principle, that lands agreed to be turned into money or money into land, shall be considered in equity as that species of property into which they are directed to be converted, is universal. *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 642; *Craig v. Leale* (1818) 16 U. S. 3 Wheat. 533, 4 L. ed. 480.

If a firm holds lands by deed impressed on its face to be partnership property of the firm, it is stamped, so far as the partners are concerned, with all the attributes of personality and continues to be such until the partnership is dissolved, the business of the firm settled, and its debts paid. *Du Bree v. Albert* (1832) 100 Pa. 433; *Lucas v. Laws* (1856) 37 Pa. 211; *Erwin's App.* (1861) 39 Pa. 535, 30 Am. Dec. 542; *Melly v. Wood* (1872) 71 Pa. 433, 10 Am. Rep. 719; *Foster's App.* (1876) 74 Pa. 391, 15 Am. Rep. 553; *West Hickory Min. Assn. v. Reed* (1850) 80 Pa. 38; *Foster v. Baroes* (1876) 81 Pa. 377; *Davis v. Christian* (1869) 15 Gratt. 11. To the same effect, *Holladay v. Land & River Imp. Co.* (1898) 57 Fed. Rep. 774; *Riddle v. Whitehill* (1890) 135 U. S. 621, 34 L. ed. 233; *Allen v. Withrow* (1884) 110 U. S. 119, 23 L. ed. 90; *Brown v. Slee* (1881) 103 U. S. 323, 26 L. ed. 613.

By agreement, it may be brought into common stock and be considered as personality as among the partners themselves. *Wood v. Witherow* (1871) 8 Phila. 517; *McDermot v. Laurence* (1827) 7 Serg. & R. 440, 10 Am. Dec. 468; *Hale v. Henrie* (1834) 3 Watts, 145, 27 Am. Dec. 339; *Kramer v. Arthurs* (1847) 7 Pa. 172.

But in Pennsylvania, in order to work a conversion as against creditors and others, the deed or instrument must be duly recorded. *Ibid*.

When the partners in their copartnership articles, or at the time of the purchase, agree that real estate advanced as stock or acquired with partnership funds shall form part of the company's property it must in equity be considered as personal property. *Sigourney v. Munn* (1823) 7 Conn. 11.

The intention of the partners, to be ascertained from their own acts and agreements, is to govern in the question of conversion of lands into partnership stock, and no express agreement in writing is necessary. *Arnold v. Waluwright* (1861) 6 Minn. 353, 30 Am. Dec. 443.

not satisfied from the evidence that the money alleged to have belonged to Mrs. Miller was not the money of Miller himself. If any funds were loaned to him by Lamport, it is not possible to fix their exact amount separately from those alleged to have been borrowed of Mrs. Miller. The witnesses contradict each other as to amounts, and as to the times and places of payment. There is refusal to answer questions, and failure to explain matters needing explanation. We have examined all the testimony, as contained in the original record, and we cannot

say that the circuit court erred in the conclusion reached by it in regard to this mortgage, or that the appellate court has erred in agreeing with the circuit court. It is true that the deed from Miller and Newton to the bank contains the words, "subject to incumbrances," but we think the reference here is to incumbrances which are made in good faith. The facts about the mortgage were not known when the deed was executed. There is some conflict in the evidence as to whether the parties intended to refer to the Lamport mortgage, or to certain liens claimed

A parol agreement will work a conversion. *Ibid.*; *Davis v. Christian* (1859) 15 Gratt. 11.

Or it may be so converted by such facts and circumstances attending its acquisition or use as will raise an implication that the partners so intended. *Arnold v. Wainwright, supra.*

Real estate is capable of being converted into personality for partnership purposes, and an intention to make such conversion being shown, it becomes as completely a matter of the social effects as if it were personal estate. *Brooke v. Washington* (1861) 8 Gratt. 248, 56 Am. Dec. 142.

Such conversion is sufficiently shown where real estate is purchased for partnership purposes and paid for with partnership funds, and used solely for the conducting of the partnership business. *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22.

And such is the case although it is conveyed to them in their individual names as joint tenants. *Davis v. Christian, supra.*

Or where it is originally put into the company as stock by agreement. *Frink v. Branch* (1844) 16 Conn. 200, following *Sigourney v. Munn* (1828) 7 Conn. 11; *Fereday v. Wightwick* (1827) 4 Cond. Ch. Rep. 114, 4 Russ. 114; *Phillips v. Phillips* (1832) 7 Cond. Ch. Rep. 208, 1 Myl. & K. 649, 1 L. J. Ch. N. S. 214; *Broom v. Broom* (1884) 9 Cond. Ch. Rep. 168, 3 Myl. & K. 448; *Randall v. Randall* (1835) 10 Cond. Ch. Rep. 53, 7 Sim. 271, 4 L. J. Ch. N. S. 187; *Crawshaw v. Maule* (1818) 1 Swanst. 496; *Edgar v. Donnelly* (1811) 2 Munf. 387; *McDermot v. Laurence* (1821) 7 Serg. & R. 438, 10 Am. Dec. 406; *Greene v. Greene* (1824) 1 Ohio, 685, 13 Am. Dec. 648; *Forde v. Herron* (1814) 4 Munf. 316.

Real estate bought with partnership funds or acquired in satisfaction of debts constitutes assets of the firm so far as the partners and creditors are concerned, quite as effectually as choses in action or merchandise, the fact of the acquisition working an equitable conversion of them into personal estate. *Whitney v. Cotten* (1876) 53 Miss. 639.

The conversion of real estate into personality is a device of equity in order to effectuate the settlement of partnerships, and to devote all their property to the payment of the firm debts, a result highly equitable which the court will never fail to attain. *Hewitt v. Rankin* (1875) 41 Iowa, 35. To the same effect, *Shearer v. Shearer* (1877) 98 Mass. 107; *Lindley v. Davis* (1887) 7 Mont. 306.

It is allowed for the purpose of securing in the interests of the partners themselves the payment of the firm debts and advances made by the partners respectively. *Re Codding & Russell* (1881) 9 Fed. Rep. 849; *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 653.

But the doctrine has its manifest limitations. *Re Codding & Russell, supra.*

By such doctrine partnership real estate is personal property only for the purposes of paying the debts of a firm. *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 552.

And otherwise it retains its legal character and incidents. *Campbell v. Campbell* (1879) 30 N. J. Eq. 415.

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It is not so converted absolutely for all purposes. *Re Codding & Russell, supra.*

The rule ceasing when the partnership is settled and its debts are paid. *Lindley v. Davis, supra.*

For all purposes connected with the partnership, except a sale and conveyance under the stringent provisions of the statute of frauds, partnership real estate is changed from real to personal property. *Foster v. Barnes* (1876) 81 Pa. 377.

The doctrine of equitable conversion, by which partnership lands remain personal property until the indebtedness is paid and the equities between the partners are adjusted, is an elementary principle of law in Wisconsin. *Weld v. Johnson Mfg. Co. supra*; *Bird v. Morrison* (1890) 13 Wis. 138; *Pierce v. Covert* (1875) 39 Wis. 232; *Bergeron v. Richardott* (1882) 55 Wis. 129; *Martin v. Morris* (1886) 62 Wis. 412; *Fisher v. Vaughn* (1890) 75 Wis. 809; *Riedeburg v. Schmitt* (1898) 71 Wis. 644; *Kruschke v. Stefan* (1899) 83 Wis. 373.

The doctrine that converts real estate into chattels is a creature of equity, and parties seeking to avail themselves of it are bound to set up the facts out of which the equity arises. *Cowden v. Cairns* (1859) 28 Mo. 471; *Hoxie v. Carr* (1833) 1 Sumn. 178; *Maguire v. Vice* (1855) 20 Mo. 431.

In equity, the real purposes of the acquisition of such property are considered and by means of trusts real estate is converted, when held for partnership purposes, into personality so far as is necessary to settle all the equities between the firm and its creditors, and between the partners themselves. *Percifull v. Platt* (1880) 36 Ark. 456.

And when real estate ought to be treated as partnership property, equity will so decree it at the suit of any one who shows a beneficial interest in having it so declared. *Murphy v. Abrams* (1874) 50 Ala. 236.

It will be made only when, and so far as required, for partnership purposes. *Shearer v. Shearer* (1877) 98 Mass. 107.

Being limited in its operation to the administration and adjustment of partnership affairs. *Carothers v. Alexander* (1889) 74 Tex. 300.

The intention to do so being made very clearly to appear. *Thompson v. Holden* (1898) 117 Mo. 118.

Such conversion is required only for the payment of claims against the partnership, which are in the nature of debt, balances due to individual partners for advances to the firm, or for payments made on its behalf, which are included as debts, as is likewise capital furnished by one partner to be repaid in specific amounts. *Shearer v. Shearer, supra.*

The rule grows out of the particular nature of the partnership relation, and is adopted for the purpose of doing justice between the partners, or between them and others having dealings with them, for the purpose of properly adjusting such relations, and is not an arbitrary rule by which a court of equity transmutes real estate into personality, when it is once owned and possessed by a partner and causes it to take that character, outside and independent of the exigencies of the part-

to exist in favor of creditors who had furnished machinery for the mill. But, even if the words refer to the Lamport mortgage alone, it is not certain from the testimony that the amount of that mortgage was a part of the consideration for the execution of the deed. The grantee in a deed, who purchases subject to an incumbrance to secure indebtedness, may not be under obligations to pay such indebtedness, if its amount is not included in, and does not form a part of, the consideration of the conveyance. *Drury v. Holden*, 121 Ill. 180. The amount named as the consideration in the deed was simply the

agreed value of Newton's interest, and did not include any part of this mortgage. The amount of the actual consideration agreed to be paid by the bank for the deed of Miller's interest, to wit, \$5333.33 (one third of 16,000), was paid by a credit of that amount on the firm indebtedness of \$21,585.23 due from Newton Emmons & Miller to the bank.

The judgment of the Appellate Court and the decree of the Circuit Court are affirmed.

Phillips, J., having heard this case in the appellate court, took no part in its decision in this court.

nerships, and as to persons having no relation to that partnership. *Black v. Black* (1854) 15 Ga. 445.

Where the partners, before the purchase of land, agree that at a particular period it shall be converted into money, a court of equity will specifically execute such agreement by directing such property to be sold upon the application of either of the partners, on the ground that it is held in trust for the purposes mentioned in the articles of partnership, and that each partner is interested in its conversion into money for the payment of the firm debts. *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 642.

The rule does not, however, affect the mode of changing the law relating to the transfer of the title which must be in writing. *Carothers v. Alexander* (1889) 74 Tex. 309.

The mere fact that real estate is purchased with the money of a firm and the title taken in the name of the firm is not enough to convert it into personality as partnership property. *Kepler v. Erie Dime Sav. & Loan Co.* (1892) 101 Pa. 603, following *Lefevre's App.* (1871) 69 Pa. 192, 8 Am. Rep. 220.

So the mere fact that real property held by members of a firm as tenants in common, used in the partnership business for partnership purposes, or that there is an agreement to so use it, is not of itself sufficient to convert it into partnership stock; there must be some evidence of further agreement to make it partnership property. *Hogle v. Lowe* (1877) 12 Nev. 226.

It is at no time during the partnership converted in such an unqualified sense as to give one partner an implied power to dispose of the whole partnership interest in it. *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553.

The effect of the conversion of partnership real estate into personality, upon the descent or distribution of the share of a deceased partner among his representatives is regarded as incidental merely, and not an end for which the interference of a court of equity is to be sought. *Shearer v. Shearer* (1867) 98 Mass. 107.

And with respect to the operation of the statutes of descent, equity will not interfere, either by way of counteracting or modifying it by converting real estate into personality. *Ibid.*

When a partnership is entered into for the purpose of buying and selling lands, in equity the lands acquired for the purpose of being so dealt with are, by the doctrine of conversion, considered as personality just as much as goods forming the stock in trade of a mercantile partnership are, and being so considered will in equity be dealt with by one partner just as freely as one partner in a commercial partnership can deal with goods forming the stock of the firm for partnership purposes. *Manitoba Mortg. Co. v. Bank of Montreal*, 17 Can. Sup. Ct. Rep. 662, following *Wylie v. Wylie*, 4 Grant, Ch. (U. C.) 278; *Darby v. Darby* (1856) 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Week. Rep. 412; *Waterer v. Waterer* (1878) L. R. 15 Eq. 402.

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VIII. Out and out conversion.

The partners themselves may agree that lands held for partnership purposes shall be considered as personal estate, and such an agreement will work an equitable conversion and the same will then go as personal estate on the death of one partner. *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 296; *Davis v. Smith* (1887) 82 Ala. 193; *Thornton v. Dickson* (1791) 3 Bro. Ch. 199.

Real estate bought with partnership funds for partnership purposes and for facilitating the business, and as a means of continuing and extending the partnership and its operations, resumes the characteristics of personality for all purposes as between the members of the firm *inter se* and the creditors, and also for the purpose of distribution between the administrator, heirs, and devisees of a deceased partner. *Cornwall v. Cornwall* (1869) 6 Bush, 300.

And where by the agreement real estate is to be sold and converted into money, it will be considered as personal estate in equity, and upon the decease of one partner his administrator may release his share to the surviving partner as against the heirs of such deceased partner. *Ludlow v. Cooper* (1854) 4 Ohio St. 1.

So an agreement in writing is not in equity necessary for an out and out conversion. *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22.

And there may be cases of a partnership confined to dealings in real estate, where it might be held that being thus a commodity it should be regarded as converted into personality out and out. *Holladay v. Land & River Imp. Co.* (1893) 57 Fed. Rep. 774; *Riddle v. Whitehill* (1870) 135 U. S. 621, 34 L. ed. 253; *Allen v. Withrow* (1884) 110 U. S. 119, 28 L. ed. 90; *Brown v. Slee* (1881) 103 U. S. 823, 26 L. ed. 618.

When land is purchased to be dealt in as a commodity for the purposes of such dealing, an out and out conversion of it into personality takes place, and each partner can bind the firm by contract for its disposition. *Rovelsky v. Brown* (1890) 92 Ala. 522; *Ludlow v. Cooper supra*; *Olcott v. Wing* (1845) 4 McLean, 16; *Pugh v. Currie* (1843) 5 Ala. 446; *Frost v. Wolf* (1890) 77 Tex. 455.

If the partners have invented the design to treat the lands as personality by putting them into the partnership stock, the conversion into personality is presumed to continue for all purposes, unless the contrary intention is in some way shown; and while the legal title upon the death of a partner will go in the ordinary course of descent without survivorship, yet the equitable interest will, after an ascertainment of its value by sale, be distributed according to the supposed intention of the deceased partner as personal property. *Lenow v. Fones* (1896) 48 Ark. 557; *Randall v. Randall* (1835) 7 Sim. 271, 10 Cond. Ch. Rep. 52, 4 L. J. Ch. N. S. 187; *Bell v. Phyn* (1802) 7 Ves. Jr. 453; *Thornton v. Dixon* (1791) 3 Bro. Ch. 199; *Buchan v. Sumner* (1847) 3 Barb. Ch. 199, 5 L. ed. 618, 47 Am. Dec. 305.

MARYLAND COURT OF APPEALS.

NATIONAL UNION BANK OF MARY-
LAND *Appt.*,

v.

NATIONAL MECHANICS' BANK OF
BALTIMORE *et al.*

(..... Md.)

1. A creditor of an insolvent estate, holding collateral security for his claim, must credit its value upon his demand before he can share in the distribution of the estate, whether

the collateral has been turned into money or not.

2. Entering in the partnership books and treating inter sese as partnership property real estate, devised and deeded to the partners individually, standing on the public records in their individual names and not representing partnership funds, will not make it partnership property, as against individual creditors, unless the entries were sufficient to satisfy the statute of frauds and the individual creditors were charged with notice by

Real estate may in equity be converted out and out into personality, by the agreement of the partners, or the manner in which it is conveyed to them. *Davis v. Christian* (1859) 15 Gratt. 11.

Thus where there is an agreement between the partners for a conversion and sale of the lands, after the partnership affairs are closed, and for a distribution of the proceeds, equity regards the lands as personal property, not only for partnership purposes, but for distribution, upon the principle that what the parties had directed to be done shall be taken as already done. *Hughes v. Allen* (1894) 66 Vt. 85; *Lenow v. Fones*, *supra*; *Foster's App.* (1878) 74 Pa. 391, 15 Am. Rep. 553; *Lowe v. Lowe* (1878) 18 Bush, 683.

If purposely impressed with that character. *Ware v. Owens* (1888) 42 Ala. 213, 94 Am. Dec. 642; *Lang v. Waring* (1850) 17 Ala. 153; *West Hickory Min. Assn. v. Reed* (1875) 80 Pa. 33.

By the agreement of the partners or otherwise. *Roberts v. McCarty* (1857) 9 Ind. 16, 63 Am. Dec. 604; *Hale v. Plummer* (1836) 6 Ind. 121.

But the intention to convert out and out must be made to appear clearly, yet it may be inferred from circumstances, with sufficient clearness. *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 22.

The line of demarkation between an absolute conversion and a conversion *sub modo*, is that in the former it must be needed and actually used in the partnership business, while in the latter it is enough that it is purchased with partnership means. *Ibid.*

Where in entering into articles of partnership it is agreed that all the land put in as common stock shall be to all intents personal property, it will be treated as such, but it does not follow therefrom that land merely conveyed for partnership purposes shall be changed to personality. *Wood v. Witherow* (1871) 8 Phila. 517.

Yet every such conversion, whether express or implied, complete or partial, is equitable only, and the property can only be conveyed as real estate. *Davis v. Christian* (1859) 15 Gratt. 11.

Although under the laws of Louisiana real estate can only become personal partnership property by written agreement, yet where it is purchased with partnership funds and is so admitted by deceased partner in his will, and by the parties since his decease, it will be considered partnership property in a suit between the widow and the heirs and the surviving partners, for a winding up and distribution of the partnership estate. *Tillotson v. Tillotson* (1867) 34 Conn. 335.

It is now well settled in England that by becoming partnership property real estate must be regarded as converted into personality for all purposes. *Ripley v. Waterworth* (1802) 7 Ves. Jr. 423; *Phillips v. Phillips* (1832) 1 Myl. & K. 642, 7 Cond. Ch. Rep. 203, 1 L. J. Ch. N. S. 214; *Brown v. Brown* (1834) 3 Myl. & K. 443, 9 Cond. Ch. Rep. 168; *Morris v. Kearsley* (1837) 3 Younge & C. Exch. 139; *Darby v. Darby* (1856) 3 Drew. 495, 2 Jur. N. S. 275, 25 L. J. Ch. 371, 4 Week. Rep. 413.

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Not merely as between the partners *inter se* but between the real and personal representatives of the deceased partner. *Conger v. Platt* (1866) 26 U. C. Q. B. 277, following *Darby v. Darby* (1856) 3 Drew. 506, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Week. Rep. 413.

IX. Reconversion.

If after satisfying partnership wants there remains a residuum, whether of land or its proceeds, it retains all the attributes of land in every particular in which reality is distinguished from personality. *Powers v. Robinson* (1890) 90 Ala. 225; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Caldwell v. Parmer* (1876) 56 Ala. 405, *Word v. Montgomery* (1877) 60 Ala. 500; *Slaughter v. Doe* (1890) 67 Ala. 494; *Hatchett v. Blanton* (1882) 72 Ala. 423; *Espy v. Comer* (1894) 76 Ala. 501; *Brunson v. Morgan*, *Id.* 593; *Pepper v. Pepper* (1887) 24 Ill. App. 316; *Huston v. Neil* (1873) 41 Ind. 504; *Lenow v. Fones* (1866) 43 Ark. 537; *Scruggs v. Blair* (1870) 44 Miss. 406; *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun. 407; *Buchan v. Sumner* (1847) 9 Barb. Ch. 165, 5 L. ed. 593, 47 Am. Dec. 305; *Collum v. Read* (1862) 24 N. Y. 505; *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279, affirmed *Tarbell v. West* (1881) 86 N. Y. 280; *Chamberlain v. Chamberlain* (1878) 13 Jones & S. 116; *Rank v. Grote* (1884) 13 Jones & S. 275; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 363, 7 L. ed. 627; *Buckley v. Buckley* (1850) 11 Barb. 74; *Greenwood v. Marvin* (1868) 111 N. Y. 423; *MacFarlane v. MacFarlane* (1894) 33 Hun. 238; *Dawson v. Parsons* (1894) 10 Misc. 423; *Lea's App.* (1884) 105 Pa. 505; *Martin v. Morris* (1885) 62 Wis. 413.

But it must be discharged from the trust, otherwise it cannot be regarded as realty for any purpose. *Dawson v. Parsons*, *supra*.

It is then real estate for every other purpose, and is subject to the principles and laws applicable to that species of property. *Re Codding & Russell* (1881) 9 Fed. Rep. 349.

With the attributes of a tenancy in common. *Brewer v. Browne* (1880) 63 Ala. 210; *Roulston v. Washington* (1885) 79 Ala. 539; *Espy v. Comer* (1894) 76 Ala. 501; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Lang v. Waring* (1850) 17 Ala. 145; *Sykes v. Sykes* (1873) 49 Miss. 190; *Holmes v. McGee* (1859) 27 Mo. 597; *Buckley v. Buckley* (1850) 11 Barb. 43.

Both at law and in equity, unless the partners have by agreement, either express or implied, impressed upon it the character of personal property for all purposes. *Flanagan v. Shuck* (1886) 33 Ky. 617.

In *Offutt v. Scott* (1872) 47 Ala. 104, without directly passing upon the question as to whether the balance due from partnership real estate, after paying the debts and liabilities of the firm, was to be considered as real or personal estate, the court inclined to the opinion that it ought to be treated as real property and to be disposed of as such.

In the absence of an express provision in the con-

the use made of the property or otherwise that it had been made partnership property.

3. **No estoppel against claiming that real estate of an insolvent firm is individual and not partnership property** will arise by signing a request that the court authorize a sale of the assets at a price offered, which contains a statement that a certain dividend will be thereby obtained, although such statement can only be true in case all the proceeds go to firm creditors, if no creditor is misled or injured by the statement.

(December 19, 1894.)

tract of partnership, the real estate only becomes personality *pro tanto*. *Davis v. Smith* (1837) 82 Ala. 198; *Espy v. Comer*, *supra*.

Any balance left goes as real estate equitably amongst all, regardless of the accidental position of the legal title. *Percifull v. Platt* (1880) 36 Ark. 454.

The onus, however, is on the party alleging that it has lost the character of personality to show, not only that the creditors of the partners have been paid, but that as between themselves the accounts of the partners have been settled. *Hiscock v. Jaycox* (1875) 12 Nat. Bankr. Reg. 507.

If by agreement real estate is brought into the common stock of the partnership, it is equally within the power of the partners to withdraw it and to reconvert it into the separate property of the individual partners, and such reconversion is binding as between the partners, and in the absence of fraud upon their joint and respective several creditors. *Shafer's App.* (1834) 106 Pa. 49.

Reconversion of partnership real estate into personality does not, however, take place after the death of a partner, until the partnership accounts and liabilities are wound up and settled and the surplus estate ascertained. *Logan v. Greenlaw* (1895) 25 Fed. Rep. 299, decided under sections 2011 and 2739 of the Tennessee Code.

And in the settling of balances between the partners themselves the balance of real estate is considered as such. *Wilcox v. Wilcox* (1866) 13 Allen, 252.

X. Statute of frauds.

a. In general.

As to the validity of a parol partnership for dealing in lands, see note to *Bates v. Babcock* (Cal.) 18 L. R. A. 745.

With regard to the operation of the statute of frauds upon partnership real estate, there would seem to be some conflict of opinion, both in cases where the property is purchased for partnership purposes with partnership funds and in cases where it is bought for sale and profit, but the weight of authority tends to negative the operation of the statute.

The court of equity has full jurisdiction of all cases between partners touching the partnership property, and will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal; and in such cases it will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute. *Holmes v. McCray* (1875) 51 Ind. 368, 19 Am. Rep. 785; *Bunnell v. Taintor* (1823) 4 Conn. 568.

As regards partnerships formed for the purchase and sale of lands as a business, the statute of frauds may require them to be in writing, yet when partners as an incident to their business purchase and sell lands and pay for them with partnership funds, equity treats such lands as movable partnership property is treated, whenever it may be necessary for the payment of debts of the firm, or for the ad-

APPEAL by exceptant from an order of the Circuit Court of Baltimore City overruling exceptions to an auditor's account in the matter of the distribution of the insolvent estate of the co-partnership of W. H. Hoffman & Sons, which refused to recognize any part of the estate as individual property. *Reversed.*

The facts are stated in the opinion.

Messrs. Steele, Semmes & Carey for appellant.

Messrs. Barton & Wilmer for appellees.

justment and equalization of accounts between the partners. *Causler v. Wharton* (1878) 62 Ala. 358; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Hany v. Farmer*, cited in *Causler v. Wharton*, *supra*, reported in August, 1877, in manuscript.

In order that the equities of partners, whatever they may be, may be applied to their real estate, it is not necessary to hold that in their transactions with regard to it the statute of frauds is abrogated, or that the links in the chain of title coming through a partner need not be in writing. *Carothers v. Alexander* (1889) 74 Tex. 309.

The doctrine of part performance stands upon the fraud or hardship, which would be operated by leaving the parties to an action at law for damage for the recovery of money, when their position has been so far changed that the judgment in such a case would furnish no adequate relief. *Re Farmer*, *Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207; *Purcell v. Coleman* (1887) 71 U. S. 4 Wall. 513, 18 L. ed. 436.

b. Within the statute.

Partnership real estate is unquestionably covered by the statute of frauds. *Re Codding & Russell* (1881) 9 Fed. Rep. 349.

The payment of a part of the purchase money will not take the case out of the statute of frauds. *Black v. Black* (1854) 15 Ga. 445.

It is not necessary in a partnership for the purchase and sale of land that the partners should be jointly concerned in the original purchase, where their interests are afterwards mingled, but the partners must by contract be jointly concerned in the future sale. *Gray v. Palmer* (1858) 9 Cal. 616.

Such a partnership should be as between the partners themselves be evidenced in writing, for the reason that if such partnership be by parol only, and one partner makes a purchase in his own name, although intended for the firm's benefit, the other on the mere ground of a partnership by parol, cannot take advantage of the contract, as he would acquire an interest in lands by parol, directly in opposition to the statute of frauds. *Re Warren* (1847) 2 Ware (2 Davies) 322.

So far as purchasers, mortgagees, and creditors are concerned, the agreement of partners to make real estate part of the common stock must be in writing, and ought to appear of record. *Harding v. Devitt* (1873) 10 Phila. 95; *Lefevre's App.* (1871) 69 Pa. 122, 8 Am. Rep. 223; *Warriner v. Mitchell* (1880) 128 Pa. 161; *Gedde's App.* (1877) 84 Pa. 482; *Ebbert's App.* (1871) 70 Pa. 79; *Hale v. Henrie* (1834) 3 Watts, 143, 27 Am. Dec. 289; *Ridgway's App.* (1850) 15 Pa. 177, 59 Am. Dec. 586; *Lancaster Bank v. Myley* (1850) 18 Pa. 544.

An agreement for copartnership, providing for the constitution of capital stock by a stipulation that the defendant is to bring into such stock his mill and mill tract, the plaintiff to pay an agreed sum for the advance, involves a question for the sale of lands, and is within the purview of the North Carolina Act of 1819, and therefore void unless signed as the act directed such avoidance af-

Boyd, J., delivered the opinion of the court:

In October, 1893, George W. S. Hoffman, W. E. Hoffman, and John W. Hoffman, partners trading under the firm name of W. H. Hoffman & Sons, executed a deed of trust, in which their wives joined, to John B. Ramsay and Simon P. Schott, by which they conveyed all their property, "including all of the joint stock of the copartnership and all of the separate estate of each of the partners, in trust for the payment of partnership and individual creditors according to their re-

spective rights and interests therein." The circuit court of Baltimore city assumed jurisdiction of the trust, and after the sale of the property, which will be more particularly hereinafter referred to, an audit was made, distributing the proceeds of sales, etc. The appellant held at the time of the assignment two notes of the firm, each being for the sum of \$5000, and indorsed by George W. S. Hoffman and J. W. Hoffman, individually. With each note there were deposited bonds of the Gunpowder Valley Railroad Company, of the par value of \$7500,

fecting the entire contract. *Clancey v. Craine* (1838) 17 N. C. 363.

An agreement between the parties whereby one purchases land for the joint benefit of both, each advancing half of the purchase money, is a contract within the statute of frauds. *Parker v. Bodley* (1815) 4 Bibb, 102.

In *Henley v. Brown* (1827) 1 Stew. (Ala.) 144, the court refused to enforce performance of a contract for the purchase and division of real estate, upon the ground that it was virtually a contract to sell and convey within the statute of frauds.

A partnership to buy contracts for the sale of lands is a partnership for the purchase of an equitable interest in lands, and as such is within the provisions of the statute of frauds. *Smith v. Burnham* (1838) 8 Sumn. 435.

In *Henderson v. Hudson* (1810) 1 Munt. 510, it is held that the statute of frauds applies to an agreement between a purchaser of lands and another party, that the latter should be admitted as a partner in the transaction, the proof thereof being only parol evidence of subsequent dealings and declarations between the parties.

Even though a partnership for the purchase and sale of real estate can only be established by writing, yet upon a withdrawal of some of the partners and the substitution of others, recognized and treated as partners by the continuing members of the firm by a written instrument, such instrument is sufficient to satisfy the statute of frauds. *Rowland v. Booser* (1848) 10 Ala. 690.

Where a bill was filed for a conveyance of real estate, and a cross-bill alleged a partnership or agreement between the parties, and the answer contended that if such agreement existed it was by parol merely, and therefore null and void so far as it related to real estate, and this was demurred to on the ground that the statute did not apply, it was held upon the authority of *Smith v. Burnham*, *supra*, that the demurrer was properly overruled. *Thorn v. Thorn* (1860) 11 Iowa, 144.

In *Kidd v. Carson* (1870) 33 Md. 37, the court refused to enforce a parol agreement entered into between partners, for the sale of the land and the credit of the moneys derived therefrom upon certain indebtedness, such an agreement being within the provisions of the statute of frauds, providing that all declarations or creations of trust are to be in writing.

Where trade is ancillary to the estate and the proceeds have been laid out in land, a considerable portion of which does not belong to the trade, the intention of the parties must be taken to be that all the land purchased shall be held in the same way as the land originally belonging to them, and therefore, the shares of the partners are real estate. *Steward v. Blakeway* (1868) L. R. 6 Eq. 479, 16 Week. Rep. 1104.

An agreement between the lessee of a mine and another, to become partners of the mine, paying the reserved rent and subletting the mine at a royalty and dividing the profits, is within the statute of frauds, and not sufficiently proved by a re-

ceipt signed by the lessee and given to the other party for a sum of money, as the latter's share of the head rent of the mine, the same being exactly half that rent. *Caddick v. Skidmore* (1857) 2 De G. & J. 52, 27 L. J. Ch. 153, 8 Jur. N. S. 1185.

c. Not within the statute.

Where real estate is the subject-matter of a partnership transaction, it is considered in nearly the same manner as personal property, and the real intention of the parties with reference thereto, their contracts, promises, or mutual understandings, will govern without reference to whether they were reduced to writing or not, the statute of frauds having no application. *Tenney v. Simpson* (1837) 37 Kan. 353; *Marsh v. Davis* (1835) 33 Kan. 324; *Morrill v. Colehour* (1876) 82 Ill. 619; *Knott v. Knott* (1876) 6 Or. 142; *Collins v. Decker* (1879) 70 Me. 23; *York v. Clemens* (1875) 41 Iowa, 96; *Clark's App.* (1872) 72 Pa. 142.

And such a case is not within the provisions of the statute of frauds. *McKinnon v. McKinnon* (1833) 55 Fed. Rep. 409; *Fall River Whaling Co. v. Borden* (1852) 10 Cush. 453; *Collins v. Decker*, *supra*; *Dale v. Hamilton* (1846) 5 Hare, 309, 16 L. J. Ch. N. S. 123, 11 Jur. 163; *York v. Clemens*, *supra*; *McGuire v. Ramsey* (1849) 9 Ark. 513; *Jarvis v. Brooks* (1853) 27 N. H. 37, 59 Am. Dec. 359; *Sherwood v. St. Paul & C. R. Co.* (1875) 21 Minn. 123.

For the reason that it is not a case where the consideration is paid by one person and a conveyance taken in the name of another, the consideration being paid by all. *Fairchild v. Fairchild* (1876) 64 N. Y. 471, affirming (1875) 5 Hun, 407.

And such an agreement will be enforced by one party against the other, especially where the plaintiff has actually paid and settled for his share. *Traphagen v. Burt* (1876) 67 N. Y. 30.

A partnership formed by a verbal agreement may become the equitable owner of real estate, whenever the use and ownership of such property is a necessary incident to the partnership business, or a necessary investment of the partnership funds, and such an agreement is not affected by the statute of frauds. *Knott v. Knott* (1876) 6 Or. 142.

The question is considered in the light of a trust created by operation of law which does not come within the purview of the statute of frauds upon the same principle of enforcing the execution of a trust. *Hanff v. Howard* (1857) 56 N. C. 440, following *Hargrave v. King* (1848) 40 N. C. 430; *Cloninger v. Summit* (1856) 55 N. C. 513.

The statute of frauds does not apply to a purchase in the name of one party for the benefit of the others under an agreement to share equally in the payment therefor to the equal interest of the parties when paid for. *Knauss v. Cahoon* (1891) 7 Utah, 132.

Where parties contribute equally for the purchase of realty and orally agree to share its profits the conveyance being taken in the name of one, the statute of frauds does not apply and the contract is valid as a partnership transaction. *Newell v. Cochran* (1899) 41 Minn. 374; *Hodge v. Twitcomb*

as collateral security, with the usual authority to the bank to sell at public or private sale in case of default. The appellant filed its claim for the amount of the notes, together with costs of protest, against the estates of the firm and of the individual indorsers. The National Mechanics' Bank of Baltimore excepted to the allowance by the auditor of the claim of appellant, because it had not credited the value of the collateral security held by it; and the appellant excepted to the audit for the reason, as it alleges, that the real estate held and owned by

the three members of the firm was their individual property, and not partnership assets. An agreement was filed, in which certain facts are admitted, and the court below was authorized to pass a *pro forma* order sustaining the exceptions to the claim of the appellant, and overruling those filed by it. A *pro forma* order was accordingly passed, and an appeal taken to this court.

The principal questions presented for our consideration are: (1) Is the appellant entitled to a distribution on its whole claim, without crediting the value of the securities

(1885) 38 Minn. 389; Stern v. Harris (1890) 40 Minn. 309.

Part performance of such an agreement will take it out of the statute of frauds. McKinnon v. McKinnon (1890) 55 Fed. Rep. 409; Tatum v. Brooker (1872) 51 Mo. 145; Dozier v. Matson (1897) 94 Mo. 322; Self v. Cordell (1870) 45 Mo. 345.

The statute of frauds has no bearing upon the case, real property for the purposes of payment of partnership liabilities being treated as personalty. Taylor v. Farmer (1896) (Ill.) 6 West. Rep. 710.

Thus where the agreement related to the purchase of real estate for the purpose of erecting a mill thereon, one partner to do the work, the other to furnish the money and material, the land to be paid for out of the profits, the outlay reimbursed and the work and labor paid for, the profits and losses to be shared equally, the statute does not apply. Falkner v. Hunt (1876) 78 N. C. 571.

Where a grantee of land agreed with the grantor, in case the purchase money of the sale should exceed a certain price the grantor should receive one half, it was held that the statute of frauds did not apply, the agreement merely pertaining to the purchase price and not to an interest in lands. Miller v. Kendig (1890) 55 Iowa, 174.

The statute of frauds does not apply where the property is purchased for the use of the firm. Teschmacher v. Lenz (1894) 82 Hun, 594.

Within the meaning of the statute of frauds in such cases neither partner conveys or assigns any land to the other; and hence there is no conflict with the statute which is not so broad as to prevent proof by parol of an interest in lands, it simply aiming at the creation of conveyance of an estate in lands without a writing. Holmes v. McCray (1875) 51 Ind. 353, 19 Am. Rep. 735.

The interests of the respective members of the firm in such property are not required to be established by deed or instrument in writing under the statute of frauds. Greenwood v. Marvin (1893) 111 N. Y. 423, following Chester v. Dickerson (1873) 84 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349.

While an authority to convey lands must be in writing, under the statute of frauds, yet an authority to make a contract to convey lands is not within the provisions of the statute. Lawrence v. Taylor (1843) 5 Hill, 107.

An agreement in consideration of the loan of money to pay one half of the proceeds of real estate when sold above the purchase money, interest and taxes is not within the statute of frauds and is valid. Mahagan v. Mead (1894) 63 N. H. 130, following Graves v. Graves (1864) 45 N. H. 223.

So an agreement entered into for the joint purchase of certain real estate each to contribute and pay an equal amount therefor, to share in the profit and loss arising from a resale equally, is not an agreement for the sale of real property within section 3544 of the South Dakota Compiled Laws, which require the same or some memorandum or note therefor to be in writing subscribed by the party to be charged, but is an agreement in the 97 L. R. A.

nature of a special partnership for the purpose of dealing in a particular piece of real estate, and therefore not within the provisions of the statute. Davenport v. Buchanan (S. Dak.) Dec. 15, 1894.

And see further, Personette v. Pryme (1861) 34 N. J. Eq. 26; Coles v. Coles (1818) 15 Johns. 160, 8 Am. Dec. 231, and other cases in Head XX. *infra*.

XI. Form of conveyance.

A deed made to a partnership described as a partnership name is legal and may be aided by parol proof showing the individuals composing the firm. Blanchard v. Floyd (1890) 93 Ala. 53; Jones v. Morris (1878) 61 Ala. 521; Lindsay v. Hoke (1852) 21 Ala. 542.

A firm name is always held sufficient to designate the true owner of all the persons composing the firm, and is always used in the transaction of the business of the firm, and there seems no reason for holding that a partnership in making a purchase of real estate for the benefit of the firm may not do so in the same manner as they might make other purchases, namely, in the firm name. Sherry v. Gilmore (1883) 38 Wis. 324, a case of a conveyance to partners in the firm name by tax deed. To the same effect, Shaw v. Loud (1815) 12 Mass. 447; Stroman v. Rottenbury (1812) 4 Desaus. Eq. 268; Lady Superior of Cong. Nunnery of Montreal v. McNamara, 3 Barb. Ch. 875, 5 L. ed. 839, 46 Am. Dec. 184; Newton v. McKay, 29 Mich. 1; Staak v. Sigelkow (1890) 13 Wis. 235; Hogg v. Odum (1852) Dudley (Ga.) 185.

But if the deed be to a name adopted by the firm style, which includes the name of no party, it passes nothing at law, and the same is the case where the deed is to one already dead. Percifull v. Platt (1890) 36 Ark. 455.

Yet a deed made to or by a partnership in the firm name, the full name of neither partner being given, although not sufficient to pass the title to the land at law, will operate in equity to pass an equitable estate. Dunlap v. Green (1894) 60 Fed. Rep. 242; Frost v. Wolf (1890) 77 Tex. 455.

And whatever may be the form of the conveyance, it will be held subject to all the equitable rights and liens of the partners which would apply to it if it were personal estate. Murrell v. Mandelbaum (1892) 35 Tex. 22; Arnold v. Wainwright (1861) 6 Minn. 358, 30 Am. Dec. 450.

The form of the conveyance making no difference, where the property is paid for out of partnership funds and devoted to the uses of the partnership, such property being regarded as partnership property. Cilley v. Huse (1890) 40 N. H. 368; Jarvis v. Brooks (1853) 27 N. H. 87, 50 Am. Dec. 359; Burnside v. Merrick (1842) 4 Met. 541; Dyer v. Clark (1843) 5 Met. 562, 39 Am. Dec. 697; Howard v. Priest (1843) 5 Met. 582.

A conveyance to a partnership firm, "to be held by them as partnership property according to their respective interests in the firm" duly recorded, makes such real estate partnership stock. Du Bree v. Albert (1832) 100 Pa. 453.

But the form of the conveyance does not settle

held by it as collateral? (2) Is the real estate held by the members of this firm to be treated as partnership or individual property, so far as the appellant is concerned?

If the appellant had sold the securities held by it between the dates of the assignment and the distribution, there could be no question about the right of the trustees or the creditors to require it to credit its claim with the net proceeds of such sale. The case of *Third Nat. Bank of Baltimore v. Lanahan*, 66 Md. 461, has established that as the law of this state, whatever may be the effect of

the decisions elsewhere, cited by the appellant, and it is a just and equitable rule. Such being the case would there be any equity in permitting the appellant to receive a dividend on its whole claim simply because it saw proper to delay realizing on its securities until after distribution was made? We think not. The creditor who holds collateral securities for his claim has the advantage over other creditors to the extent of their value, or what he may realize upon them; but he should not be permitted to have, in addition thereto, what in many cases

the question. *Ex parte Neale, Re Laurence*, Case of the Bank of England (1861) 8 De G. F. & J. 645.

XII. When not considered personally.

If a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although paid for out of their joint funds and to be used for partnership purposes, it will not in the absence of an agreement to the contrary be deemed real estate. *Smith v. Jackson* (1839) 2 Edw. Ch. 23, 6 L. ed. 205.

The mere purchase of lands with partnership moneys, and their use for the purpose of carrying on the business of farming, is not sufficient evidence of an intention on the part of the partners to convert the land into personality. *Lowe v. Lowe* (1878) 13 Bush, 683.

So the mere purchase by two parties, who erect dwelling houses thereon in their joint names, together with the confusion of their interest, is not sufficient evidence of a partnership, where the houses are occupied by the parties separately, in the absence of other independent proof of such partnership. *Fall River Whaling Co. v. Borden* (1882) 10 Cush, 453.

And where it is not sufficiently shown that the partners intend such real estate to resume the character of personality, as where it is not bought for the purposes of a partnership business, it will not resume the character of personal estate. *Galbraith v. Gedge* (1856) 16 B. Mo. 631.

Where there was a partnership in the business of a livery stable and saw mill, but no real intention shown that the real estate was to be taken into the partnership stock, or that such property was bought with the social funds for partnership purposes, it was held it still retained its character of real estate. *Alexander v. Kimbro* (1873) 49 Miss. 529.

Again where real estate is held in trust for the benefit of the partners and conveyed to others, who subsequently execute a declaration of trust specifying the proportions belonging to each of the *cestuis que trust*, the property is no longer considered as personality, but as real estate and vests in each of the *cestuis que trust* an equitable title out of which the widow is entitled to dower. *Nicoll v. Ogden* (1882) 29 Ill. 823, 81 Am. Dec. 811.

Upon a dissolution of a partnership, the land will be regarded as real estate as between the partners, where they are all living. *Summey v. Patton* (1864) Winst. Eq. 52, 86 Am. Dec. 451.

Partnership real estate was not considered as personality in *Ferguson v. Hass* (1867) 62 N. C. 113.

So far as creditors are concerned, partnership real estate is not converted into personality. *Moore v. Moore* (1863) 153 Pa. 495.

An interest in land held by two persons for a common object was held to devolve as real estate. *Re Wilson, Wilson v. Holloway* (1893) 2 Ch. 840.

Where a testator and his son carried on business in a freehold dwelling house, in which, when the testator's other son was admitted into the firm, it was agreed the partnership business should still be
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carried on, the partnership paying the rent for it to the testator and his first son who were entitled to aliquot shares in it, it was held that although previously to the admission of the second son into the partnership, the house formed part of the partnership capital and was to be considered as personality, yet by the terms of the subsequent agreement it became real estate. *Rowley v. Adams* (1844) 8 Jur. 904, 7 Beav. 543.

XIII. The question of notice.

Notice that real estate is partnership property is to be presumed when such property is used in the manufacture of the goods and merchandise. *Re Farmer, Ex parte Griffin* (1879) 13 Nat. Bankr. Reg. 207.

In the case of lands not conveyed to the partners jointly, but acquired at different times and from different persons, nothing appearing upon the record to indicate that it is held as property of the partnership, no agreement being shown that it is so held, nor that the complainant knew that the rights of the parties in the land are otherwise than those of tenants in common, a bona fide purchaser from one of such partners is not bound by notice that the property is partnership estate, merely from the fact that the parties are partners and make use of the property for partnership purposes. *Reynolds v. Ruckman* (1876) 85 Mich. 80.

And where the record was silent as to the uses made by the partners of certain real estate not necessarily incident to the partnership business without some notice that it is treated as partnership property, no one dealing with the individual members of the firm will be expected to regard it as such, and the ordinary use of such property will not put creditors on inquiry or be sufficient notice that it is treated as partnership property. *National Union Bank of Maryland v. National Mechanic's Bank of Baltimore (Md.)* Dec. 19, 1894.

When land is brought into a concern as stock, it is, as between partners and a person who has knowingly dealt with one of them for it, to be treated as personal estate belonging, not to the partners individually, but to the company collectively. *West Hickory Min. Assn. v. Reed* (1875) 80 Pa. 38; *Kramer v. Arthurs* (1847) 7 Pa. 165.

From the Pennsylvania cases of *Lancaster Bank v. Myley* (1850) 13 Pa. 544; *Ridgway's App.* (1850) 15 Pa. 177, 53 Am. Dec. 553, and *Hale v. Henrie* (1894) 2 Watts, 143, 27 Am. Dec. 390, it appears that proof in writing, and even record, is more rigidly required in conveyances to partnerships than in other sales. *McCormick's App.* (1868) 57 Pa. 54, 98 Am. Dec. 191.

Real estate purchased with partnership money and held and used for the benefit of the firm for partnership purposes, as between the partners and their creditors must be treated as personal property, and by agreement it may be brought into common stock and be considered as personal among themselves, and if the instrument showing how the land is held, is duly recorded, it will be so as to the rest of the world, and will not be held as a tenancy

might be equivalent to double dividends, or even more. If, for example, the collaterals realized 50 per centum of the creditor's claim, and the debtor's estate would only pay 50 cents on the dollar, the creditor with the security would be paid in full, while the others would receive only one half of their claims. Great inconvenience and cost would oftentimes follow the practice contended for in the distribution of insolvent estates, in addition to the undue advantage given the creditor holding the collaterals; for if the whole claim be distributed to, and

the dividend exceeded the difference between the value of the collaterals and the amount of the claim, the creditor would have to refund or deduct from his dividend the balance, which would require another audit, thus involving the estate in unnecessary cost and delay. The value of the collaterals would have to be ascertained before the dividend was paid to the creditor, so as to properly protect the insolvent estate; for if this be not done, and the dividend was more than the difference between the value of the collaterals and the amount of the claim, the

in common. *Wood v. Witherow* (1871) 8 Phila. 517; *M'Dermot v. Laurence* (1821) 7 Serg. & R. 440, 10 Am. Dec. 468; *Hale v. Henrie*, *supra*; *Kramer v. Arthurs* (1847) 7 Pa. 172.

Upon the question of notice as affecting purchasers and other third parties, see *note to Goldthwaite v. Janney* (Ala.) *post*, —.

XIV. When partnership formed for the purchase and sale of real estate.

There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. *Chester v. Dickerson* (1878) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 53 Barb. 349; *Dudley v. Littlefield* (1842) 21 Me. 418; *Sage v. Sherman* (1849) 2 N. Y. 417; *Mead v. Shepard* (1867) 54 Barb. 474; *Pendleton v. Wambersie* (1807) 8 U. S. 4 Cranch, 73, 2 L. ed. 554; *Thompson v. Bowman* (1867) 73 U. S. 6 Wall. 316, 18 L. ed. 736; *Hoxie v. Carr* (1832) 1 Sumn. 173.

There may be a partnership in buying and selling land, as well as in any other vendible property. *Dudley v. Littlefield*, *supra*; *Tyler v. Waddingham* (1890) 8 L. R. A. 657, 58 Conn. 375; *Brady v. Colhoun* (1829) 1 Penr. & W. 140; *Morse v. Richmond* (1881) 97 Ill. 303; *Hulett v. Fairbanks* (1883) 40 Ohio St. 233; *Dale v. Hamilton* (1846) 5 Hare, 369, 16 L. J. Ch. N. S. 126, 11 Jur. 163; *Benners v. Harrison* (1854) 19 Barb. 53; *Terrill v. Richards* (1817) 1 Nott & McC. 20; *Sigourney v. Munn* (1828) 7 Conn. 11; *Robinson v. Crowder* (1823) 4 McCord, L. 519, 17 Am. Dec. 702; *Kramer v. Arthurs* (1847) 7 Pa. 165; *Chester v. Dickerson* (1878) *supra*; *Re Warren* (1847) 2 Ware (3 Daves) 322; *Shaeffer v. Blair* (1893) 149 U. S. 243, 37 L. ed. 721.

The manifest intention of the parties to create as between themselves a joint interest in the proceeds of land constitutes a partnership. *Hyman v. Peters* (1899) 30 Ill. App. 184, following *Nicoll v. Ogden* (1862) 29 Ill. 323, 31 Am. Dec. 311.

Each partner of such a copartnership possessing full power and authority to contract for the sale or other disposition of its entire property, though for technical reasons the legal title vests in all the co-partners and can only be transferred by their joint act. *Thompson v. Bowman* (1867) 73 U. S. 6 Wall. 316, 18 L. ed. 736.

An agreement to share in any profits which may arise out of the purchase of real estate makes the parties entering into it partners as to third persons, no matter what they may be *inter se*. *Williams v. Gillies* (1876) 53 How. Pr. 429; *Manhattan Brass & Mfg. Co. v. Sears* (1871) 45 N. Y. 797, 6 Am. Rep. 177; *Leggett v. Hyde* (1874) 58 N. Y. 278, 17 Am. Rep. 244.

In *Sage v. Sherman* (1849) 2 N. Y. 417, the question as to whether or not a partnership can be formed in the buying and selling of real estate solely, was questioned, if not finally decided, by the court.

And where persons engage as partners in the exclusive business of buying and selling, and dealing in real estate, the real estate owned by the firm is, in equity and for partnership purposes, to be

treated as personality. *Thompson v. Holden* (1868) 117 Mo. 118, following *Young v. Thrasher* (1863) 115 Mo. 222.

The principles governing ordinary partnerships apply to partnerships for the purpose of buying and selling land. *Olcott v. Wing* (1845) 4 McLean, 15. Equity, however, does not as a general rule enforce contracts to enter into partnership, and it seems clear that it would not compel in any case specific performance of a verbal contract to enter into a partnership to trade in lands. *Meason v. Kaine* (1839) 63 Pa. 335.

A joint-stock company, if for the purpose of dealing in real estate, is a partnership. *Claggett v. Kilbourne* (1832) 66 U. S. 1 Black, 343, 17 L. ed. 213. So an unincorporated company or firm may deal in land and hold the title, incur, or convey it as it pleases. *Oliver's Estate* (1890) 9 L. R. A. 421, 126 Pa. 43; *Brady v. Colhoun* (1829) 1 Penr. & W. 140.

If there is a joint purchase with a view to a joint sale, and a communion of a profit and loss, it is a partnership contract, although it is confined to a single thing. *Re Warren* (1847) 2 Ware (3 Daves) 322.

Where every purchase is made with a view to a joint sale on joint account, so that without any general agreement for a partnership the parties are in law partners in every purchase, by such habit of buying and selling, they hold themselves out to the public as general partners in the business. *Ibid*.

Whether a parol agreement between two persons to purchase a specific parcel of real estate, and pay for the same from their individual means, taking the deed in the name of one, although with a view of selling at a profit, is valid and binding upon the ground that it constitutes a partnership in any commercial sense and is therefore not violative of the statute of frauds, has been questioned. *Williams v. Gillies* (1878) 75 N. Y. 303, reversing 13 Hun, 422; *Patterson v. Brewster* (1844) 4 Edw. Ch. 353, 354, 6 L. ed. 902, 904.

Although a partnership may exist in the use and working of land, yet there cannot be one for the buying and selling of real estate, so as to carry with it the rights, powers, duties, and responsibilities of power in the law-merchant. *Patterson v. Brewster*, *supra*.

But in *Chester v. Dickerson* (1878) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 53 Barb. 349, the court disapproved of the doctrine laid down in *Pitts v. Waugh* (1808) 4 Mass. 424, and the above case of *Patterson v. Brewster*, to the effect that the law-merchant, respecting dormant partners, did not extend to speculations in land.

Where the purchase was made for the purpose of sale and the acquisition of profit, and not for the purpose of holding the property as land, but as an article of commerce and for speculation, it was regarded as personal property among the partners, the intention of the partners stamping the character of the transaction. *Boone v. Clark* (1899) 5 L. R. A. 279, 129 Ill. 466, *Morrill v. Colehour* (1876) 68 Ill. 618, followed.

trustee would have to look to the creditor holding the collaterals for the excess paid him, and possibly the estate would sustain loss, by not being able to recover the amount. The long established practice in proceedings of this kind, in this state, requires the creditor, in presenting to the auditor *prima facie* proof of his claim, to swear "that no part of the money intended to be secured by such note hath been received, or any security or satisfaction given for the same, except what (if any) is credited," following the language required for authenticating claims in

the orphans' court. The claim in controversy in this case was supported by the affidavit of the cashier of the bank to the above effect. Such language is not meaningless, but was evidently inserted for the purpose of requiring the creditor either to surrender the securities, or credit his claim with their value, before it is distributed to. The value of the securities thus held should be ascertained and credited on the claim, before distribution is made. That can easily be done by relevant testimony, taken under authority of the court, when no sale has taken place.

In *Wormser v. Meyer* (1877) 54 How Pr. 189, the plaintiffs had numerous speculative transactions in real estate on joint account of the defendant, some of which showed a profit which was divided, the defendant taking his share, but a large decline in real estate taking place, other parcels owned by them existed upon which the defendant had paid nothing, the whole money being furnished by the plaintiffs under defendant's agreement to pay, the facts showing no written agreement between the parties, the defendant's refusal denying the agreement and his interest in the lots, and relying upon the statute of frauds as a defense, the plaintiffs claiming that a partnership could be formed to speculate in real estate the same as in merchandise, and that such partnership need not be in writing, and the court upheld the plaintiff's contention.

Where land was purchased in the name of the firm and sold to a third party, the evidence showing that the parties acted together in the purchase and sale of lands, one partner acting for the firm the other expressing himself satisfied with the result of the sale, it was held there was sufficient evidence to submit to the jury upon the question of partnership, and as to the consent of the parties to the sale. *Bonner v. Campbell* (1864) 42 Pa. 236.

In *Laffan v. Naglee* (1858) 9 Cal. 662, 70 Am. Dec. 678, it was held that there was no difference between a partnership in the purchase and sale of lands, and that of a joint purchase, improvement and leasing the property for profit, all the circumstances necessary to constitute a partnership existing in the latter case, where the partners contribute equal proportions of the costs and then divide the profits arising therefrom, the purposes of the arrangement being the profit to be derived from the property, and not the enjoyment or use of it by the individual partners themselves.

In *Davis v. Darling* (1894) 80 Hun. 299, the defendant a real estate broker and speculator in real estate, entered into partnership with the plaintiff under a written agreement which declared that the parties associated themselves as copartners in the "Regular Real Estate Insurance & Mortgage Loan Business" and the defendants claimed that the term "Regular Real Estate Business" meant the business of real estate brokers and not the business of operating or speculating in real estate, the court upholding the defendant's contention, the partnership articles further providing for a division of the "net profits arising from the said brokerage business."

Where there was no express indication of an intention to become partners, nor authority for either party without the consent of the other to sell any property or to contract any debts on behalf of both, and no stipulation as to the shares of the losses in case it proved unsuccessful, it was not construed as a partnership contract relating to real estate. *Shaeffer v. Blair* (1898) 149 U. S. 248, 37 L. ed. 721.

Upon the question whether or not such a partnership is within the provisions of the statute of 27 L. R. A.

frauds, see note to *Bates v. Babcock* (1892) (Cal.) 19 L. R. A. 745.

XV. Real estate acquired in payment of debts.

Real estate taken for a partnership debt is to be considered as partnership property, and the legal title is held in trust for partnership purposes, and in equity is to be treated as the property of the members of the firm collectively, liable to all the equitable rights of the partners, *inter se*. *Martin v. Wagner* (1873) 1 Thomp. & C. 515.

If so received under deeds in common form conveying the estate to them by their several names, it is to be considered at law as their several property as tenants in common, but subject to a trust arising by implication of law by which it is liable to be sold and the proceeds brought into the partnership fund for the payment of debts, and the settlement of balances as between the partners. *Burnside v. Merriok* (1842) 4 Met. 597; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Moran v. Palmer* (1865) 13 Mich. 377; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Collumb v. Read* (1862) 24 N. Y. 505.

A conveyance of real estate for the debts and benefit of a partnership should run to the individual partners jointly as tenants in common, yet if the deed has been executed in the firm name and no subsequent contract has been made, such deed will be sufficient. *McMurry v. Fletcher* (1880) 24 Kan. 574.

The purchase by partners of real estate, taken by them to secure a debt under foreclosure proceedings, the land being taken to them jointly without specifying their interests, vests a moiety of the legal title in each, holding in equity according to their respective interests as partners. *Putnam v. Dobbins* (1865) 38 Ill. 394.

The fact that a mortgage is given to a firm in its firm name does not affect its validity. *Orr v. How* (1874) 55 Mo. 328.

So a mortgage taken in the name of the partnership carrying on business, under an assumed name, has an actual grantee, although such grantee is merely the name and style of the partnership. *Chicago Lumber Co. v. Ashworth* (1881) 23 Kan. 212.

A mortgage made to J. K. S., P. W. & J. N. B., doing business under the firm name of S. W. & Co., the parties composing the members of the firm, will pass the estate to the partnership. *Morrison v. Mendenhall* (1872) 13 Minn. 232.

And the partners can prove that they carried on business in partnership together and were the holders of the same. *Chicago Lumber Co. v. Ashworth*, *supra*.

Under a mortgage to a firm under its name "D. B. Dormon & Co." the legal title is in D. B. Dormon, the partner named in the firm's name. *Gille v. Hunt* (1886) 35 Minn. 367.

Where a firm took the title to an undivided interest in land in payment of a debt, the court held on conflicting evidence that the land was taken for an investment, and that a loss upon the transac-

This was the practice in bankruptcy proceedings, and is not without precedent in other courts. See *Re Bridgeman*, 1 Nat. Bankr. Reg. 812, Fed. Cas. No. 1,866; *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 18 Met. 159; *First Nat. Bank of Boston v. Eastern R. Co.* 124 Mass. 524; and *Bell v. Fleming*, 12 N. J. Eq. 18. There was therefore no error in the *pro forma* decree in regard to that ruling.

In considering the question as to the right of the appellant to have the real estate treated as the individual property of the members

of the firm, and not as partnership assets, we must bear in mind the fact that W. H. Hoffman was the original owner of all this property, and that while it was thus owned by him he was in partnership with his three sons, trading under the name of William H. Hoffman & Sons, being the style of the firm subsequently adopted by them. If a deed of trust similar to the one made by the sons had been made in the lifetime of the father, by the members of the original firm, it would hardly be contended that the real estate should be treated as partnership property,—

tion was to be considered as a partnership loss. *Daniels v. McCormick* (1894) 87 Wis. 255.

So a partner, to whom real estate is conveyed in discharge of the debt of the firm holds it in trust for the partnership. *Smith v. Ramsey* (1844) 6 Ill. 873.

During the existence of the copartnership, and also upon its dissolution by death or otherwise. *Martin v. Wagener* (1873) 1 Thomp. & C. 515.

Where partners bought property upon a mortgage sale with a view to secure a debt due their firm, and also purchased other real estate upon speculation, paying for it out of partnership funds debiting it to "merchandise account" and also to pay the money upon the mortgage of the premises which was put into the same account, and failed, one of the partners dying intestate, the survivor conveying to trustees all his rights in the real estate for the benefit of the firm's creditors; foreclosures upon the mortgages being executed by the firm and carried through, a balance of the fund remaining in court, it was held that the real estate was to be considered as partnership property and the funds in court were liable for partnership purposes. *Smith v. Jackson* (1893) 2 Edw. Ch. 23, 6 L. ed. 205.

XVI. Real estate held under lease.

a. In general.

A lease granted to the partners for partnership purposes, and treated and considered by them as a part of their partnership stock, will be regarded as personalty. *Cowden v. Cairns* (1859) 28 Mo. 471.

So if a partner takes a lease of land in his own name for the purposes of the partnership, he will be considered in equity as a trustee of such lease for himself and his copartners, the lease being deemed an incident of the partnership. *Chamberlin v. Chamberlin* (1873) 13 Jones & S. 114, cited in *Collyer*, Partn. § 160.

Leaseholds conveyed by a corporation to a partner and purchased by him with partnership funds are partnership property. *Ballantine v. Frelinghuysen* (1894) 88 N. J. Eq. 266.

There is, however, no presumption that a leasehold, standing in the name of one of several copartners constitutes partnership assets, notwithstanding that the partnership business is carried on upon the demised premises, the legal presumption being otherwise, and it must expressly appear that such was the purpose and intent of the parties before a trust for all can be inferred. *Chamberlin v. Chamberlin*, *supra*.

If a lease is partnership property and used as such, it will, though made by one partner in his own name, inure for the benefit of the firm, the partners being agents of each other in partnership transactions. *Moderwell v. Mullison* (1853) 21 Pa. 257.

Yet a lease made to the lessees in their individual names is to be regarded at law according to the legal title, and *prima facie* they hold as tenants in common. *Cowden v. Cairns*, *supra*.

Where a lease is partnership property the good-

will of the business enters into the value of the lease and affects the amount of the purchase price. *Mitchell v. Read* (1851) 34 N. Y. 556.

The sealed lease of partnership real estate executed by one partner only, in the name of the firm, without evidence of prior authority, or of the subsequent ratification of the lease by the other partners, will not pass the estate of the other partners. *Dillon v. Brown* (1858) 11 Gray, 179, 71 Am. Dec. 700.

Leasehold property, the principal value of which consists in the white lead manufactory, with the steam engine, machinery, and other fixtures with which persons conduct their business together, is subject in equity to the incidents of the personal property of the partnership. *Day v. Perkins* (1845) 2 Sandf. Ch. 359, 7 L. ed. 625.

So leasehold property purchased with partnership funds, a deed of trust being executed, under which it was sold upon the death of one partner, is partnership property which the survivor is entitled to administer after payment of the debt. *Carlisle v. Mulhern* (1853) 19 Mo. 55.

In *Kyle v. Roberts* (1855) 6 Leigh, 495, a partner took a lease in the partnership name by deed, signed and sealed by him in the firm name without authority, the premises being used and occupied by the firm, the rent credited to the lessor on the firm's books. Upon the death of the partner taking such lease, the survivors abandoned the premises. The lessor proceeded in chancery against the survivors and the administratrix of the deceased partner, for specific performance of the lease, producing the deed executed by the partner as evidence. It was held that he was entitled to equitable relief; that the fact that the deed was executed by the partner alone in the firm name ratified by the firm who took the benefits of the lease, was sufficient to entitle the plaintiffs to an execution of the agreement to fulfillment of its terms, the agreement being sufficient evidence within the statute of frauds.

Where by the terms of the partnership deed a lease was to be used and occupied by the partners during the partnership only, it was held that upon the termination of the partnership there was an end of the tenancy, and that no notice to quit was necessary prior to bringing an action of ejectment to recover possession. *Doe v. Miles* (1816) 1 Stark. 181, 4 Campb. 373.

Where two persons take a lease of a farm jointly, the lease survives. *Jefferys v. Small* (1653) 1 Vern. 217.

b. The question of renewal.

While one of several copartners may not, during the existence of a continuing partnership of undetermined duration, secure to his individual use and benefit, without the knowledge of the others, the renewal or continuance of a lease of premises held and used by the firm, yet no principle of law or equity precludes partners from severally taking title to land, either in fee or for a term of years, in respect to which no fiduciary relation between

certainly not as against the individual creditors of William H. Hoffman. By his last will and testament, the senior Hoffman charged an annuity upon the Gunpowder Mill property, for the purpose of keeping a burying ground, etc., in proper condition, and made certain provisions for his wife. He directed his executors to ascertain the value of the rest of his property, and gave it—with the exception of one twentieth thereof, left to Peter Vondersmith, his son-in-law—to his three sons and his daughter, Lydia A. Smyser, to be divided between them equally,

share and share alike. He directed that in the division his son John W. Hoffman should have the property known as the "Gunpowder Mill," chargeable with the annuity aforesaid, together with certain water rights and 400 acres of land connected therewith, known as "Paper Mill Hills;" also a part of the tract of the land known as "Laurel Hills," 100 yards wide on each side of a stream. He also directed that in the distribution his son George W. S. Hoffman was to have the Marble Vale Mill property, containing 218 acres, and his son William E. Hoffman was

account for his portion of its value. *Mitchell v. Read, supra*.

A new lease taken by a partner in his own name of the business premises of the firm for a term extending beyond the limitation of the partnership will inure for the firm's benefit and such lessee will be held to account for the profits arising from such lease. *Leach v. Leach* (1896) 18 Pick. 68.

Where a firm holding leases of the premises in part of which the business was done was dissolved and subsequently the partners agreed to carry on the liquidation of the business together upon the premises occupied by the firm, when the defendant and his son with the knowledge of the circumstances procured new leases for the premises, the interest of the partners in the lease was held to form part of the good-will of the business, and as such to form part of the partnership assets, the power of renewal remaining with the firm as part of the good-will, the firm still retaining their joint control over such lease. *Spies v. Roesswog* (1892) 68 How. Pr. 401.

So the rule is not changed by the fact that the renewal was obtained after the dissolution of the partnership. *Johnson's App.* (1887) 115 Pa. 129, following *Spies v. Roesswog* (1884) 96 N. Y. 651.

The right to the renewal of a lease after the determination of a partnership not being an estate but a right, the subject of grant before entry, and where it is shown that if the partnership had acquired this *inter esse termini*, it might have been disposed of for a large sum of money, such partnership will be entitled thereto and one partner cannot take advantage of it. *Mitchell v. Read* (1872) 61 Barb. 810.

Where negotiations for the renewal of a partnership lease were pending at the time of the dissolution of the partnership, it was held that one partner might make the lease for his own benefit. *Chittenden v. Witbeck* (1883) 50 Mich. 401.

Where money of the firm has been expended in the improvement of real estate purchased with partnership funds for partnership purposes, it will be treated as partnership property and liable as such to the partnership debts. *Hiscock v. Phelps* (1872) 49 N. Y. 97.

Improvements made, even on lands owned by one partner, if made with partnership funds, or for the purposes of the partnership, are to be treated as the personal property of the firm. *Grisom v. Moore* (1896) 106 Ind. 296, 55 Am. Rep. 745; *Lane v. Tyler* (1861) 49 Me. 252; *Averill v. Loucks* (1849) 6 Barb. 19.

And especially is this so when the improvements exceed the value of the land, the property being in such a case considered as that of the firm. *Lyman v. Lyman* (1899) 2 Paine, C. C. 11.

The fact that each partner contributed distinct portions of the improvements makes no difference,

them exists, and neither nor any of them can claim the right to share with the other or others in the benefits to be derived from the purchase or tenancy of such land. *Chamberlin v. Chamberlin* (1878) 12 Jones & S. 116.

The doctrine that a trustee cannot obtain an advantage over his *cestui que trust* applies to the case of a partnership, and upon this ground it is held that a partner cannot obtain the renewal of a partnership lease for his own purposes to commence after the expiration of the original lease, or indeed after the termination of the partnership. *Mitchell v. Read* (1872) 61 Barb. 810; *Leach v. Leach* (1896) 18 Pick. 68; *Featherstonhaugh v. Fenwick* (1810) 17 Ves. Jr. 299; *Clegg v. Edmondson* (1859) 8 DeG. M. & G. 787; *Clements v. Hall* (1858) 2 De G. & J. 173; *Clegg v. Fishwick* (1849) 1 Macn. & G. 294, 1 Hall & T. 896, 19 L. J. Ch. N. S. 49, 13 Jur. 998; *Struthers v. Pearce* (1878) 51 N. Y. 887.

Yet it is difficult, especially in the case of a managing partner, to make out such a case, and the mere intimation of an intention to apply for such a lease after a dissolution is not sufficient to exclude the interest of the partners, although the partnership is at will. *Clegg v. Edmondson, supra*.

An administratrix of a deceased partner may be entitled to a receiver in respect to an intestate's share of partnership estate, including renewed leases. *Clegg v. Fishwick, supra*.

Where a lease to a partnership is during the partnership term, renewed in the name of one or more partners, it still continues partnership property, and upon dissolution must be valued as such. *Struthers v. Pearce, supra*.

If the renewal of such a lease is secret in one partner's own name, he holds as a trustee for the firm. *Mitchell v. Read* (1874) 61 N. Y. 122, 19 Am. Rep. 262; *Featherstonhaugh v. Fenwick, supra*.

A partner taking a renewed lease in his own name, when the right of the renewal belonged to the firm, being compelled to account for its value. *Betts v. June* (1873) 51 N. Y. 274.

Even though the consideration for the new lease is the covenant of the partner obtaining it. *Johnson's App.* (1887) 115 Pa. 129; *Lacy v. Hall* (1861) 87 Pa. 360.

His relation being such as to forbid his treating it for his own individual benefit. *Ibid.*

And in such cases it is not material that the landlord would not have granted a new lease to the other partners, or to the firm. *Mitchell v. Read* (1872) 61 Barb. 810.

The renewed lease is in equity considered as a mere continuance of the original subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who have any interest, either legal or equitable, in the old lease. *Ibid.*; *Phyfe v. Wardell* (1856) 5 Paige, 268, 8 L. ed. 714, 28 Am. Dec. 430; *Gibbes v. Jenkins* (1845) 8 Sandf. Ch. 121, 7 L. ed. 798.

Common justice and a due regard to the rules of public policy demand that the renewed lease should in such cases be declared to belong to the firm, and that the partner so taking it should be required to

XVII. The effect of improvements.

Where money of the firm has been expended in the improvement of real estate purchased with partnership funds for partnership purposes, it will be treated as partnership property and liable as such to the partnership debts. *Hiscock v. Phelps* (1872) 49 N. Y. 97.

Improvements made, even on lands owned by one partner, if made with partnership funds, or for the purposes of the partnership, are to be treated as the personal property of the firm. *Grisom v. Moore* (1896) 106 Ind. 296, 55 Am. Rep. 745; *Lane v. Tyler* (1861) 49 Me. 252; *Averill v. Loucks* (1849) 6 Barb. 19.

And especially is this so when the improvements exceed the value of the land, the property being in such a case considered as that of the firm. *Lyman v. Lyman* (1899) 2 Paine, C. C. 11.

The fact that each partner contributed distinct portions of the improvements makes no difference,

to have his Clipper Mill, together with a tract of land called "Gristmill Hills," containing 257 acres; also a tract called "Addition to Grant Mill Hills," containing 7½ acres, and some houses named by him. He provided that the property thus given to his three sons should be taken by them in the distribution at the prices or values fixed by the appraisers, as provided for in his will, and then directed that "all the rest of my property and estate, not hereinbefore devised or specially distributed, . . . shall be sold or disposed of by my said executors,

. . . and the proceeds of such sale or sales be so distributed among my said four children as to make the share of each, under these provisions of my will, equal the one to the other." Subsequently, his son-in-law and his daughter conveyed their respective interests to the three sons, "as individuals." It is admitted in the agreed statement of facts that after the father died the three sons continued to trade under the firm name of William H. Hoffman & Sons, and opened on their firm books an account headed "Real Estate," in which they entered all the property so

as when brought together they constitute partnership property. *Grisson v. Moore* (1886) *supra*.

Improvements made by the erection of a store with partnership funds upon real estate of which the partners were seised as tenants in common, are regarded as partnership property, though the land be owned by one partner alone. *Land v. Tyler, and Averill & Loucks, supra*; *Deming v. Colt* (1850) 8 Sandf. 264; *King v. Wilcomb* (1849) 7 Barb. 263.

Even though made without authority, upon property owned by a deceased and another partner, used in the copartnership business, if ratified by the other partners. *Beck v. Thompson* (Nev.) May 7, 1894.

Improvements made in partnership real estate of a permanent character, for the purpose of increasing its capacity, add to its permanent value, and must therefore be regarded as capital, and cannot be taken into consideration in estimating the profits of the business. *Braun's App.* (1884) 105 Pa. 414.

The use by a firm of firm moneys in the improvement of real estate owned by the partners prior to the partnership, separately and as tenants in common, will not be held to be a fraud in law upon the partnership creditors in the absence of facts showing actual fraud. *Parker v. Bowles* (1876) 57 N. H. 491.

Improvements made with partnership funds on the real estate of one partner, come *pro tanto* within the same principle. *Deveney v. Mohoney* (1872) 23 N. J. Eq. 247.

A purchase by the financial partner of a concern, for the purpose of promoting the firm business, of real estate improved with partnership money, is firm property, even though the purchase be taken in the partner's own name out of funds kept by him separate and distinct from the firm's. *Lacy v. Hall* (1861) 37 Pa. 360.

But permanent improvements erected upon real estate, the property of one member of a partnership, although such property is used as the business premises of the firm, will be presumed to be the individual property of the partner, in the absence of evidence showing that they are made by the firm and paid for out of the firm assets, or contributed by such partner as part of the firm capital. *Goepfer v. Kinsinger* (1883) 39 Ohio St. 429.

Improvements made by being placed upon land by the partnership, the parties being engaged in the raising of stock upon state lands, which during the partnership were purchased by one member in his own name and with his own money, are not sufficient to raise a trust in favor of the partnership where there is an understanding between the partners that each shall secure and own his own land, the improvements all resting upon the surface. *Burgess v. Rice* (1888) 74 Cal. 560.

So circumstances showing a sale of an undivided half of real estate by the sole owner in contemplation of a partnership the consideration moving from such partner individually, the partnership being formed at the same time the property being subsequently improved for partnership purposes, 27 L. R. A.

are not sufficient alone to change the state of their respective titles, nor the nature of their tenancy, the deed of conveyance constituting them tenants in common, which they remain, notwithstanding the copartnership and the improvements of the property, for its use and accommodation. *Frink v. Branch* (1844) 16 Conn. 200.

In the above case the deed had been taken by the partner in his own name and for his own use, without any intimation that a copartnership had been formed, or was even contemplated; the property was not purchased with common funds, or with common capital withdrawn from the power of creditors to make the purchase, nor was there any agreement that such property should become partnership stock, or constitute any part of capital, the only agreement being by parol that the property should be improved in the prosecution of the company's business, for temporary use only. *Ibid*.

Where valuable improvements have been made upon property leased to a partnership, one of the partners cannot, during the existence of the firm, obtain a renewal of the lease for his own benefit, without the knowledge and consent of his copartners, even though such renewed lease does not commence to run until after the expiration of the partnership. *Mitchell v. Reed* (1874) 61 N. Y. 123, 19 Am. Rep. 252; *Mitchell v. Reed* (1873) 61 Barb. 310, reversed.

In *Lake v. Craddock* (1782) 3 P. Wms. 158, partners purchasing as joint tenants, and contributing ratably to the purchase which was for the purposes of improvement, were treated as tenants in common in equity, and though one of the partners absented himself for thirty years he was afterwards let in upon terms.

XVIII. Lands owned by partner prior to partnership.

Individual real property brought into the partnership by the partners at the time of its formation, or afterwards, and by proper agreement of the partners converted into partnership property and appropriated to its use, becomes a portion of the capital stock of the firm and is treated in equity as personalty, although standing in the name of an individual partner. *Hoxie v. Lowe* (1877) 12 Nev. 268, following *Hoxie v. Carr* (1832) 1 Sumn. 180; *Duryea v. Burt* (1895) 28 Cal. 588; *Sigourney v. Munn* (1828) 7 Conn. 11; *Frink v. Branch* (1844) 16 Conn. 200; *Markham v. Merrett* (1843) 7 How. (Miss.) 444, 40 Am. Dec. 78.

Land used in the adopting of a partnership business, held by the partners as tenants in common, prior to and at the time of the formation of the partnership, will continue to retain that character, unless the same be altered by some express contract or agreement of the parties. *Robertson v. Baker* (1866-7) 11 Fla. 192.

Whether real estate owned by one or more members of the firm at the time of its organization, and which is to be used by the firm thereafter, becomes partnership property for all purposes,

derived by them, and continued the same on their books in that way; "that, between the said three sons, all the said real estate was always considered, in their business, as co-partnership property, and was treated between themselves as such, but that the title to the same appeared in the land records of Baltimore county and in the office of the register of wills of Baltimore county as having been derived by them under the will of their said father and the conveyances of said Vondersmith and Smyser, as has been herebefore stated, and no conveyance was made by them to the said partnership."

depends mainly upon the question whether the person bringing the property into the firm contributes it to the firm as his part of the joint stock and has credit with the firm for the value thereof as the whole or a part of his contribution to such stock. *Riedeburg v. Schmitt* (1888) 71 Wis. 644.

Where buildings and improvements were erected upon land belonging to one partner prior to the partnership, by reason of partnership funds, and such improvements greatly exceeded the value of the land itself, and the proceeds of its sale were applied to the firm uses, it was held that the whole was partnership property. *Lyman v. Lyman* (1829) 2 Paine, C. C. 11.

A partnership occupying individual real estate and setting up trade fixtures in it, upon the occupation ceasing has the right to remove the fixtures in the same way that the tenant would have under similar circumstances. *Robertson v. Corsett* (1878) 89 Mich. 777.

In land purchased by partners with their individual funds a partner holds only such an interest as arises from the fact that it is individual property. *Stadler v. Allen* (1876) 44 Iowa, 198.

XIX. Position of incoming partner.

In the case of a new partner being admitted into a firm already in possession of real estate purchased for partnership purposes and appropriated thereto, such real estate is partnership property, and the partner by acquiring an interest in the partnership by verbal contract, and acting under such contract as one of the partners with the consent of all, is not to be deprived of his interest in the partnership, either as to the personal or real estate, by reason of the statute of frauds. *Marsh v. Davis* (1886) 83 Kan. 328.

Such partner having paid his share upon the basis that it belongs to the firm is entitled to an interest therein to the extent of his share. *Gordon v. Scott* (1858) 12 Moore, P. C. C. 1.

Land credited to a firm, upon its dissolution, in the books of the new firm, with the knowledge of the partner holding the legal title, is treated in equity as partnership property of the new firm. *Bergeron v. Richardott* (1882) 55 Wis. 129.

Where a partner purchases an interest in real estate, and in a business carried on thereon, there being a prior mortgage upon the real estate which was to be removed by the owners, and also a mechanic's lien of which such partner had no notice, such real estate is partnership property, and in such a case the incoming partner will be entitled, as a creditor of the firm, to reimbursements out of the joint fund to the exclusion of the separate creditors, so far as such liens have been satisfied from the real estate, or firm property. *Rainey v. Nance* (1870) 64 Ill. 29.

Where parties purchased real estate out of their partnership assets, which was used for partnership purposes and was in equity to be considered as personality, a new partnership being formed, and the real estate continued to be used for the partner-

It must be conceded that there is nothing on the face of the will that would indicate any intention of the testator to vest the property in his three sons, as partners; but, on the contrary, it is apparent that he intended them to own individually certain properties, which he directed to be given them as above stated. The property was, at the time the partnership was formed, the individual property of the three members. So far as the record discloses, nothing has since been done to transfer the property to the firm, or vest any interest in it, excepting the entries in the books, and the fact that the real estate

ship purposes, the old partners stipulating for a rent to be paid by the new partnership, it was held upon the death of one of the old partners, that the property was in equity to be considered as part of the real estate. *Rowley v. Adams* (1844) 7 Beav. 548 & Jur. 994.

XX. Facts and circumstances held sufficient to constitute real estate partnership property.

The general principles as above laid down have been applied by the courts of the various states to the circumstances as illustrated in the cases following.

A purchase by one partner of the fee in leasehold property held in partnership in his own name, with his own money, will be construed as for the benefit of the partners equally, and the other partners will become entitled to their proportions on payment of their share of the purchase money, the relationship between the partners being one of confidence, and any waiver of the right must be clearly established. *Laffan v. Naglee* (1868) 9 Cal. 602, 70 Am. Dec. 678.

Real estate conveyed so as to make the partners tenants in common, in the absence of express agreement or circumstances showing an intention to hold it for the partner's support, will be considered in equity as vested in the partners in their partnership capacity. *Louhat v. Nourse* (1856) 5 Fla. 350.

An agreement between parties that a certain business, in which real estate belonging to one of them is used and is denominated "a lease" the fruit accruing therefrom being styled "rent," will constitute them partners if such fruit comes "only" from the "net profits" and is not to exceed a given proportion. *Dalton City Co. v. Dalton Mfg. Co.* (1882) 83 Ga. 243.

So where under verbal agreement of partnership, land is purchased for mill purposes and conveyed to them in their several names, each holding the legal title to an undivided one fourth, the land with the improvements made thereon is partnership property, the money paid being partnership money and the purchase for partnership purposes. *Bopp v. Fox* (1872) 63 Ill. 544; *Dyer v. Clark* (1843) 5 Met. 502, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 582.

And a purchase of real estate for the erection of business premises under a verbal agreement for a partnership, the same being conveyed to them in their several names, written articles being subsequently entered into, the costs of the erection of the building being paid by each progressively, will inure for the partnership estate. *Bopp v. Fox*, *supra*.

So again where one partner contributes a building together with the machinery thereto to the capital stock, the others contributing specified sums of money, interest being paid by them on the excess of capital put in by such partner, each has a joint ownership in such building and machinery; and a provision that "losses in all business trans-

was considered in the business as copartnership property, and so treated between the members, as above stated. We are therefore met with the inquiry whether that is sufficient to authorize a court of equity to treat the proceeds of sale as partnership assets, when called upon to decide between the creditors of the firm and those of the individual members. If this property had been purchased with partnership funds, for the use and on account of the firm, it would be immaterial that the title stood in the name of the individual members, as a court of equity

would treat it, for all the purposes of the partnership, as firm property; and hence it would be liable to the partnership creditors, to the exclusion of the individual creditors, until the former are satisfied. In that case there would be an implied or constructive trust in favor of the partners, as such, which would inure to the benefit of the creditors of the firm. But, when it has been acquired in the manner above stated, the question arises whether those dealing with the members of the firm have not the right, in the absence of some notice or knowledge to the

actions during the said partnership" shall be borne in such proportions has no effect upon the rule. *Taft v. Schwamb* (1875) 80 Ill. 230.

Against the purchase of land by partners in a common enterprise, in the name of one of them as an article of commerce, and not as land for the purposes of speculation, the fact that they share in contributing the purchase money and agree to share in the profits, stamps the transaction as a partnership with some of the incidents and obligations growing out of that relation. *Boone v. Clark* (1889) 5 L. R. A. 279, 129 Ill. 406.

Where property, although not acquired with partnership funds, is purchased with a view to the formation of a partnership, and brought into the firm and used for that purpose, the clear deduction from the nature of the partnership as well as from the conduct of the partners, being that they intended such property should belong to the firm, it will so belong when it appears that the business cannot progress without it, and that the partnership assets are used in defraying the expenses of its repairs, improvements, and protection. *Roberts v. McCarty* (1857) 9 Ind. 18, 68 Am. Dec. 604.

Real estate which is almost the sole property of the firm, and necessary for its business, the taxes of which are paid by the firm, each partner having contributed half the money going into the firm, of which property the firm has sole possession and use for its business purposes, repairing it when required and improving it, will be considered firm property no matter how acquired. *Boober v. Perwill* (Ind.) March 13, 1896, following *Roberts v. McCarty*, *supra*.

So where real estate purchased by partners with partnership funds, and on joint account is placed upon the firm books as partnership property and treated as assets of the firm upon its dissolution by the death of one partner, the other having contributed his whole share of the purchase money, although the title is taken in the deceased's name, the surviving partner has an equal equitable interest therein of such a character as can be enforced in a proper proceeding in the courts. *Johnson v. Clark* (1877) 18 Kan. 157.

In the case of a joint purchase of property, each paying an equal proportion of the purchase money, except a certain amount for which the partners' notes are given, one partner giving the note as security, the notes being subsequently paid in part by the firm and the residue by such partner, a conveyance being taken to them jointly; the property is purchased with a view to constituting it joint stock of the firm, and it is to be so considered and held. *Divine v. Mitchum* (1844) 4 B. Mon. 488, 41 Am. Dec. 241.

Also where one partner in the possession of partnership funds contracts for the purchase of real estate beyond the extent of such funds, giving his note as security for the balance, inducing the vendor to believe that the same would be paid by his copartner along with himself and that the purchase is for partnership purposes, that the seller was referred to such deceased partner for the pay-

ment of the balance, together with the assent of the deceased partner to become a partner by reason of his paying the same in discharge of the note, a partnership is constituted. *Hart v. Hawkins* (1814) 3 Bibb, 502, 6 Am. Dec. 668.

And where the primary object of the purchase is the erection of a storehouse, and to sell or improve and rent so much of the lands as is not required therefor, the parties previously being partners together, by the purchase they become partners in the whole of the real estate and the property being bought with partnership funds for the purpose of division and resale on joint account,—such a joint venture may constitute a partnership and convert the realty into personalty. *Holmes v. Self* (1881) 79 Ky. 297, following *Lowe v. Lowe* (1878) 13 Bush, 688; *Darby v. Darby* (1856) 8 Drew. 485, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Week. Rep. 413.

Evidence showing that real estate purchased at a commissioner's sale is purchased for the firm for use in its business, the purchase being taken in the name of one person as principal, the other one joining in the purchase money bonds and surety, not for the purpose of vesting the title to the property in the one partner individually, but as a matter of convenience to avoid calling in outsiders to give security, proves it is partnership property. *Seiler v. Brenner* (Ky.) March 22, 1857.

Facts showing that when the parties moved to such estate a written agreement existed between them that they were to own it equally, which agreement was taken to the clerk's office and there left and placed in the care of the deceased partner, who was afraid that it would be in the way of a sale of a portion of the farm if needed; there being repeated declarations by the deceased that the parties are equally interested and that the legal title was left in the one party for convenience,—constitute such land partnership property, the fact that the surviving partner qualifies as administrator not affecting the case. *Lucas v. Cooper* (1888) 15 Ky. L. Rep. 642.

So where a party, having entered into a contract for the purchase of real estate, agrees to sell it, receiving money in part payment, the purchaser taking possession, repairing and improving the same and carrying on business thereon for a short time, when subsequently the vendor joins him in partnership under a verbal agreement; the property being taxed to the company and the taxes paid out of its funds, the purchase money originally owing by the vendor being paid out of partnership funds; the parties afterwards agreeing to a dissolution; the vendor of the property taking a conveyance to himself; discharging his original bond upon the property to the exclusion of his partner, mortgaging the property to secure partnership debts and his own; the evidence showing that the original contract between the partners for the sale and purchase of the property is abandoned by mutual consent, and an agreement substituted to treat the property as partnership,—the statute of frauds does not prevent equities arising from the attachment of such partnership property, which is

contrary, to assume that the public records inform them correctly as to the ownership of the property, notwithstanding the private understanding between the partners themselves. Creditors have sometimes suffered great hardships by courts of equity declaring property standing in the name of one person to be in trust for the benefit of others; but such decisions are rendered to prevent injustice being done those whose money purchased the property, and relief is only granted to them when their claims are established by clear, direct, and explicit proof.

This court has said, "This strictness of proof is required because of the danger of rendering titles depending upon deeds and other written documents insecure." *Witts v. Horney*, 59 Md. 587. The same reasoning applies to real estate held of record by members of a firm as tenants in common. When it is sought to change such property from individual to partnership property, the record evidence all pointing to it being the former, a court of equity should not act upon doubtful proof, particularly when the rights of strangers or third parties are to be af-

liable for the partnership debts and the balance due between the parties, and the legal title cannot be interfered with except for partnership purposes. *Collins v. Decker* (1879) 70 Me. 23.

And where property bought and held under an arrangement between the parties to share the profit and loss, is sold and mortgages taken back by one partner to secure the whole or portions of the purchase money, such mortgages constitute part of the trust or partnership fund and must be deemed part of the trust property of the partnership. *Montague v. Hayes* (1858) 10 Gray, 609.

The fact that real estate required for the purposes of the business is purchased and paid for in part out of the joint funds, notes being given in the partnership name for the balance of the purchase money, the estate being regarded as partnership effects, the repairs and improvements being charged to the joint account, are indications of joint property and that the real estate is a part of the capital stock of the firm. *Dyer v. Clark* (1848) 5 Met. 562, 39 Am. Dec. 697.

A verbal understanding between two parties, at the time of the purchase of real property, that the profit and loss shall be divided after deducting interest, together with a letter to an attorney stating: "We have purchased an estate . . . which has by mutual consent been conveyed to me. I have paid and secured the purchase money. Whatever disposition is made of the property, the profit and loss is to be divided between us deducting interest. You will please make such papers as are necessary to carry this agreement into effect;" and the fact that the partner afterward with the consent of the plaintiff expends money upon the estate and sells it in separate lots,—create a contract between them either in the nature of a trust or a partnership, the letter acted upon by the parties being a sufficient memorandum in writing to satisfy the statute of frauds. *Montague v. Hays*, *supra*.

Evidence of a partnership in land consisting in the books of account, the schedules of partnership property made by the partners themselves, or by their direction, and other written memoranda and partnership transactions, is sufficient to create a partnership and trust in such land sufficient to satisfy the statute of frauds. *Fall River Whaling Co. v. Borden* (1852) 10 Cush. 458.

Where real estate stands in the name of one partner, but by written articles of copartnership the other is charged on the books of the partnership with one half of the costs, and upon the books the first partner is credited with the agreed value of the property, the estate becomes part of the capital of the firm, even though the legal title is in the partner only. *Collins v. Charlestown Mut. F. Ins. Co.* (1857) 10 Gray, 155.

In *Converse v. Citizens Mut. Ins. Co.* (1852) 10 Cush. 37, the question of partnership in real estate arose upon the contention as to whether the plaintiff had an insurable interest in property destroyed by fire the facts showing that plaintiff and his father transacted the business jointly as, *inter alia*, the holders of real estate, such estate standing in the

name of the father, their entire earnings being put into a common stock, the building in question being purchased out of the common stock and removed on to the father's land, and partly occupied by him and part let to a tenant by the joint act of father and son, the property being purchased and fitted up out of the joint stock, the rent going into the common fund and constituting part of the joint property. It was held a partnership was constituted and an insurable interest created in such partner.

Where lands are conveyed in trust for the stockholders of the company according to the articles of association executed by the vendor, whose heirs quitclaim the lands to the plaintiff who brings ejectment for their possession, upon the ground that the deed of trust is absolutely null and void as not complying with the statute of uses and trusts, the facts showing articles of association designed to create a joint-stock arrangement to be subsequently incorporated, but in the meantime partnership being constituted with managing trustees, naming such trustees and several others as partners or stockholders entitled to their shares on certain contributions or payments, the articles pointing out the mode of managing the business and the rights, powers, and duties of those concerned,—in such a case, for all purposes, the transaction is neither more nor less than a sale to a partnership, some of the partners in which are named and the rest are to be determined by admission in the future, and is in no way beyond that which would exist in all partnerships, when all, or where select partners, of the firm may act in a fiduciary relation with their associates. *Turner v. Ontonagon River Imp. Co.* (1899) 77 Mich. 603.

So in a suit brought by a surviving partner against the administrator and heirs-at-law of his deceased partner, with respect to certain lands claimed to be partnership property, facts showing a purchase in the name of the parties individually; entry in the firm's books of the transactions in like manner as other partnership transactions, the expenses of a journey respecting the same being credited to the deceased partner, with evidence showing sufficient intention to treat the same as partnership property, notwithstanding a statement made by the surviving partner that the deceased's share in the land was one third,—such statement coupled with a statement made as to the interest of the partner in the business, showing no intention to withdraw such land from the rights of the firm creditors. *Lindsay v. Race* (Mich.) Dec. 17, 1894.

Parties purchasing land and giving their joint and several notes for the purchase money, the title vesting in them jointly; separate portions of the land being cultivated by each, under an agreement that the net earnings are to be applied for the payment of the purchase money, an interest in the land in proportion to the amount paid to become vested in each party, the organization styling themselves by the name of the "Bear Camp Colony" with a president,—such organization con-

fect. The public records will be of but little avail, if the private books and intentions of partners are to entirely control and determine the character of ownership of real estate. If property is purchased with partnership funds, and conveyed to one or more of the partners, as individuals, the entries of the firm books would have great—possibly controlling—weight as to whether it should be treated as partnership or individual property; but courts should require more than private entries and understandings between partners, to overcome the public records, in

cases such as this. No one would suppose, from reading the will of William H. Hoffman, that the property belonged to the partnership. Persons dealing with the individual members would be led to believe, from that will, that they owned the property individually; and, inasmuch as it was once the separate property of the members, we are not prepared to break down all the safeguards and protection intended by our registry acts, by announcing as the law of this state that partners can so change the character of real estate, originally owned by

stitutes them partners and not tenants in common, and therefore homestead exemptions do not apply to the case of a debt contracted by them for such joint benefit, nor to the security given by them thereto. *Hamilton v. Halpin* (1890) 68 Miss. 99.

A lease granted of a plot of land with a sulphur spring thereon, with an agreement that the lessor is to make certain improvements therein, the lessee to live upon the premises, erect buildings, furnish the same and care for and manage the place as a health resort for their profit, the lessor receiving half of the net profits after deducting expenses and losses, constitutes a partnership between the parties so as to render the lessor liable to a party fitting up the buildings. *Brownlee v. Allen* (1855) 21 Mo. 122.

Facts showing the pooling of interests in the property upon certain conditions, for the purpose of development and sale and division of the proceeds to the respective interests of the parties, to which end the plaintiff conveyed to defendant an undivided one-third interest to secure the necessary development of the property, and to engage his efforts in negotiating a sale, the defendant agreeing to develop and to consummate a sale for their mutual advantage, under the express agreement that defendant would bear all expense of development and of negotiating the sale, in consideration of the right to retain two thirds of the proceeds derived therefrom, and to account and pay over to plaintiff one third of the gross proceeds derived from the sale, constitute a partnership relation in respect to the property and the enterprise of which it is the subject. *McIntosh v. Perkins* (1898) 13 Mont. 143.

Property purchased by one partner with the money of the firm, and held by such partner and his wife, is partnership assets and should be applied in discharge of the firm liabilities, upon the ground that the partners hold to each other the relation of trustee and *cestui que trust*, and the fact that a trustee invests trust property, or that which it represents, in the name of his wife, gives her no right to the property as against the *cestui que trust*. *Partridge v. Wells* (1878) 30 N. J. Eq. 176.

Where a testator, a man of means, and his son entered into copartnership as general real estate dealers and agents, two equal undivided thirds of a tract of land being conveyed to the father and son as tenants in common, the deed indicating nothing showing a partnership, the same, however, being paid for with partnership moneys, the son in the firm books charging one half the costs to his father, the other to himself, no prior account existing in their books with "real estate," a subsequent account with real estate being opened charging all costs of recent purchases, and also two thirds of the property in question, each partner being credited in the ledger with one half of its value, the property being subsequently improved at the expense of the partnership, the rents being accounted for in the partnership and the taxes, repairs, and improvements paid for out of partnership funds, a partnership exists as to such prop-

erty. *Harney v. First Nat. Bank of Jersey City* (N. J.) May 15, 1894, following *Baldwin v. Johnson* (1851) 1 N. J. Eq. 441.

So where the complainant's intestate and the defendant owners in equal shares of real estate agreed that the property should during the joint lives of them and of the widow of the testator, be considered and conducted by them as partnership property, bound for the support of the widow during her life, to contribute jointly to the support of the widow and to the expense of managing the property, and the payment of taxes, keeping an account of the proceeds of the sale of the produce of the property, and of the money required to be expended in the support, the money allowed or advanced to the widow by either, being credited in the partnership accounts, and that on the death of any one of the three there should be an account, the agreement, although by parol, constitutes a partnership and the agreement is not within the statute of frauds. *Personette v. Pryme* (1851) 34 N. J. Eq. 26.

And evidence showing that the copartnership funds have been used for real estate occupied and enjoyed by the copartnership, and in payment of all expenses incident to its ownership including annual taxes, charges for alteration, improvements, and repairs, a large portion of the property being actually occupied by the firm in its business, sufficiently shows that such property is that of the copartnership. *Tarbell v. Bradley* (1878) 7 Abb. N. C. 379, affirmed *Tarbell v. West* (1881) 86 N. Y. 230.

In an action to set aside two deeds of land, upon the ground that it was purchased with the funds of a copartnership composed of the plaintiff and defendant, evidence showing the plaintiff and defendant to be entitled to the net profits of the partnership business carried on by them, and the purchase of the land out of such profits, sufficiently shows that the land is subject to the partnership agreement. *Maloy v. Associated Lace Makers Co.* (1890) 30 N. Y. S. R. 153.

Where a bond and mortgage executed by three persons on leasehold property, the principal value of which was in a white lead manufactory with steam engine, machinery and other fixtures with which the mortgagors conducted the business together, the premises being insured in the name of two of them; the three depositing the bond and mortgage with the mortgagee for the purpose of raising money on their behalf; such mortgagee giving no consideration but some time afterwards delivering the documents to another as security for a loan of stocks made to him thereon, such stocks not being replaced when due; the two partners assigning the policy of insurance upon request, the nature of the property and the business conducted, and the joint interest of the mortgagors, make them partners. *Day v. Perkins* (1845) 2 Sandf. Ch. 369, 7 L. ed. 623.

Real estate which, although recorded in the individual names of three members of the partnership firm, is purchased by moneys of the copartnership and charged upon the firm books, occupied

them as individuals, and not in any way derived from the partnership, as to give priority to firm creditors over their separate creditors, simply by making entries in their books, and treating it between themselves as partnership property, without giving some notice, or doing some acts equivalent to notice, to their individual creditors. The agreed statement of facts does not show that the appellant had notice of any facts that should have put its officers on inquiry. The statement is not as full as it might have been. It does not even show what business

the firm was engaged in. But from the arguments, and what we gather from the record, we assume that they were manufacturing paper. Nor is it definitely stated whether the business was conducted in one or more paper mills, although it is shown that William H. Hoffman died owning real estate consisting of three paper mills, farm lands, etc. It would certainly have been much more satisfactory if the facts had been fully set out, so as to enable the court to understand the exact character and extent of the use of the real estate by the firm. But it is

by the firm for the purposes of the business, the expenses of maintaining it being paid by the partnership who kept it insured and entered it as part of the copartnership assets, is treated in every way as partnership property and is to be considered as such. *Dawson v. Parsons* (1894) 10 Misc. 428.

Where, previous to the final consummation of a partnership arrangement, the defendant purchased lands, afterwards selected as the place of the copartnership business, a certain number of the lots being conveyed to the plaintiff and the other lots to the defendants, part of the capital paid in being applied in payment of the real estate and in the erection of buildings thereon for business purposes, such lands formed part of the partnership estate. *Smith v. Danvers* (1852) 5 Sandf. 609.

So a contract entered into by one partner for the purchase of land, with a subsequent agreement that the purchase shall be made for the joint benefit of himself and two others, one of whom contributed half and each of the others a quarter of the purchase money, with the understanding that the title should be taken in the name of the one partner with power to mortgage it, the parties paying their proportion of part of their interest on the mortgage, constitutes them partners in the real estate purchased. *Williams v. Gillies* (1876) 58 How. Pr. 429.

The case of *Smith v. Jackson* (1893) 2 Edw. Ch. 34, 4 L. ed. 298, was considered in the case of *Dawson v. Parsons*, *supra*, as no longer authority in the state of New York, in so far as it held that real estate could only become partnership property by some express agreement between the partners, and that the mere purchasing thereof with joint funds and taking title in their joint names was not enough, the court holding that the purchase with partnership funds and its use for partnership purposes being treated by the members of the copartnership as partnership property, together with the manner in which the accounts are kept, whether the purchase money is severally charged to the members of the firm or whether the account treated it the same as other firm property as to purchase money, incoming expenses, etc., are controlling circumstances in determining such intention, from which an agreement may be inferred. *Dawson v. Parsons* (1894) 10 Misc. 428.

An agreement at the time of sale of a half interest in a grist mill for a partnership in the mill entered into for the purpose of running it, another partner being subsequently taken in who purchased one third of the mill, upon an agreement that the repairs were to be made at the expense of the firm; the purchase money owing by the two partners to be paid for out of their shares of the profits,—makes the mill partnership property liable to the creditors of the firm. *Parker v. Parker* (1873) 66 Barb. 206.

A deed in ordinary form of bargain and sale, naming four grantees and describing them as composing a firm of "G. F. & Co.," G. being a member of the firm at the date of the execution of the deed, the partnership not being evidenced by writing,

takes effect according to its terms, nor is it material that the lot is paid for with partnership funds and used for partnership purposes, the legal title to an undivided fourth passing to him incumbered only by an equitable lien in favor of the other partners, the deed not being void under the statute of frauds. *Coles v. Coles* (1818) 15 Johns. 160, 8 Am. Dec. 231.

And where the grantees formed a partnership prior to the execution of the conveyance agreeing upon the capital, and the proportion thereof to be paid in by each partner, and the amount to be applied to the purchase of partnership real estate, and in its improvement, and in the supply of machinery; real estate purchased pursuant to the agreement, a mortgage being taken to secure a portion of the purchase money, and possession taken of the premises as partners and money actually expended in its improvement, the copartners contributing to the same, constitutes such property in equity that of partnership property. *Hiscock v. Phelps* (1872) 49 N. Y. 97.

Parties agreeing to purchase land for the purpose of erecting a mill thereon, one partner doing the work, the other finding the money and material, the land being paid for out of the profits, the outlay and work reimbursed and paid for, and the profits and losses being shared equally between them constitute themselves partners. *Falkner v. Hunt* (1875) 73 N. C. 571.

The members of a land syndicate contributing a certain amount of money, placing it in the hands of trustees to purchase and improve land with power to sell when improved, the proceeds to be distributed among the shareholders; the right of the shareholders to participate in the profits arising from the sale of the land,—constitute themselves partners as to such profits. *Horner v. Meyers* (1898) 29 Ohio L. J. 408.

An agreement signed by the parties creating an association under the style of "Grant's Pass Real Estate Association," makes them partners *inter se* for all purposes connected therewith. *Kelley v. Bourne* (1897) 15 Or. 476.

Real estate contributed to the capital stock of a company at an estimated valuation; afterwards destroyed by fire and rebuilt by mutual consent with partnership funds, the loss falling upon the firm, is partnership property and part of its capital, the contributing partner being credited with its value in the stock account. *Clark's App.* (1873) 72 Pa. 142.

Where the surplus estate was a portion of the proceeds of real estate purchased for the use of the firm, and wholly paid for out of its funds, and greatly enhanced in value by large expenditure of the firm upon it, treated by the firm as part of their common property; used exclusively in their business; inventoried as a part of their common stock; insured as the property of the firm; mortgaged to secure, and assigned to pay the company's debts and liabilities,—the mere fact that the legal title thereto was originally taken in the name of the members of the firm as tenants in common, and that when their assignment was released it was

admitted that the property was acquired under the will of William H. Hoffman, and by the deeds of Mr. Vondersmith and Mrs. Smyser, and that no conveyance was made by the members of the firm to the partnership. As to what uses, if any, this firm, engaged in manufacturing paper, made of the farm, dwelling houses, and other property not necessarily incident to the paper mills, the record is silent; but it is certain that, without some notice that they were treated as partnership property, no one dealing with the individual members of the firm

would be expected to so regard it; and the ordinary use of that kind of property, such as cultivating or renting the farms, occupying or renting the houses, etc., would not put creditors on inquiry, or be sufficient notice that they were treated as partnership property. If the paper mills themselves, and such other real estate as would properly be used in connection with them, were treated by the partners as firm property, and were so used as to give notice to creditors of the individual members of the firm that they had been put into the partnership as part of

returned to them in that character, could not countervail the decisive presumption arising from the source of the funds out of which it was purchased, and the purposes for which it was bought and to which it was applied, that it was intended to be held as partnership property. *Lime Rock Bank v. Phetteplace* (1864) 8 R. I. 66.

So real estate divided as assets between the partners, and treated as stock of the partnership, appropriated in the division to partnership purposes, allotted with other property of the firm to pay and discharge the partnership debts, is to be regarded as part of the partnership stock. *Murrell v. Maudelbaum* (1892) 85 Tex. 22.

And an agreement to purchase lands, to share equally in the payment thereof, to the equal interests of the parties when paid for, the deed being taken in the name of one for the benefit of the others, constitutes the enterprise a partnership. *Knauss v. Cahoon* (1891) 7 Utah, 182.

Land not purchased for speculation, but for the purpose of carrying on a business (furnace operations) an ordinary and legitimate subject of commercial partnership, is partnership property. *Brooke v. Washington* (1851) 8 Gratt. 248, 56 Am. Dec. 142.

So real estate purchased by a member of a banking firm in his wife's name, with moneys taken by him from the bank without the knowledge of the other partners, such moneys being part of an overdraft, is firm property. *Daniels v. McCormick* (1894) 37 Wis. 255.

Evidence showing that by the articles of copartnership a partner contributed a distillery and fixtures as his share to the joint stock, at a fixed valuation, being paid interest on its value as part of the capital stock before any division of profits, the other partners receiving interest upon their capital; a United States lien being subsequently secured by the partners upon the property as that of the firm, which paid the taxes and insurance, the property being entered on the books of the firm to the credit of such partner as his capital invested in the business, is sufficient to constitute such property in equity firm property so as to be subject to the payment of the share of the losses chargeable to such partner, the court approving of the holding in *Bergeron v. Richardott* (1883) 55 Wis. 129; *Riedeburg v. Schmitt* (1888) 71 Wis. 644.

Upon oral evidence that real estate, upon which the partners carried on their business and upon which they expended their money, was part of the partnership stock contributed by them, the property will be treated in bankruptcy as that of the firm, if on no other ground, clearly upon that of part performance of the contract. *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207.

The joint note of the partners, or a note made by one and executed by the others, will be sufficient to prove a partnership where one contract is made in the firm name, and the succeeding ones, whether in the firm name or not, are adopted by it and taken on the joint account, even though the

securities are not taken in the firm name. *Re Warren* (1847) 2 Ware (2 Daves) 322.

Attorneys and counselors at law extending their partnership business to speculations in real estate on an extensive scale, the name of the firm being freely used in such transactions, constitute themselves partners therein where it is impossible for the business to be carried on in the manner it is in the partnership name, without its being generally understood that a partnership exists. *Id.*

A partnership exists where, by the terms of the partnership agreement, real estate is brought in by one partner at a valuation. *Wiegand v. Copeland* (1882) 14 Fed. Rep. 118, 7 Sawy. 442.

Where the facts showed a purchase at the commencement of the partnership, part of the consideration being then paid, and possession taken and used by the partnership, payment of the balance from the profits of the business; improvements made thereon from the like source; the title standing in the names of the individual partners in proportion to their partnership interests, deeds being from time to time given to the partners and from the settlement of the partnership account,—such property will as to creditors be deemed partnership estate although there is no agreement to that effect. *Ames v. Ames* (1886) 37 Fed. Rep. 30.

Evidence showing the naked real estate in point of value to be an insignificant part of the firm capital invested in the business, the greater portion being in the plant, improvements, and good-will, the value of the business carried on being largely dependent upon the circumstance that the nature of the articles manufactured was kept on the market, raises a reasonable inference that the real estate, plant, and improvements and the personal property, together with the good-will, all make up an entire thing, which if separated into parts diminishes its value and loses its usefulness as an investment; it is therefore to the interest of the partnership to have the real estate treated as part of the personalty on the dissolution of the firm, for the purpose of securing a prompt and profitable distribution of the firm assets, the presumption being that such is the intention and tacit agreement of the partners. *Perin v. Megibben* (1892) 6 U. S. App. 348, 53 Fed. Rep. 83.

An agreement between parties to labor together and be equal partners in law and equity of the product of their labor; to bear the expenses and debts incurred by carrying on business, including the raising of stock, the purchase of land and other property sometimes jointly and sometimes individually extending to all business in which any of them might engage, and providing that in case of death before the winding up of the firm the continuing partners should take all the property after the settlement of all debts and claims, constitutes property purchased on the joint account or in the names of the partners individually, partnership property. *Houston v. Stanton*, 11 Ala. 618. In *Galbraith v. Tracy* (1894) post, —, 158 Ill. 34, the court treated real estate upon which the part-

the common stock, and were entered on the books of the firm in such way as to comply with the statute of frauds, then the partnership creditors might properly be given priority over the separate creditors, to the extent of the proceeds of sales of such property. The record does not disclose such facts as would justify us in determining that question; but, as the decree must be reversed, the court below can authorize testimony to be taken on that subject. We have carefully examined the authorities cited by the counsel for the respective parties, as well as many

others, and have found considerable apparent conflict between some of them. But, when the facts of them are carefully examined, it will be found that the most of them are in accord with our conclusions, which might be summarized as follows: (1) That as the farms, houses, and similar property were not purchased with partnership funds, for partnership purposes, but were, as far as the public records show, the separate property of the individual members, and were not incident to the business of the firm, the fact that the partners entered them on the firm

ners conducted the business of raising and dealing in live stock, as partnership property, the same standing in their joint names, and being presumably purchased for the purposes of the partnership, and regarded by them as partnership property.

Where two persons, tenants in common under a lease of coal mines, associated themselves together for the purpose of mining, shipping, and selling coal during the existence of the lease, it was held that such lease became partnership property. *Patterson v. Silliman* (1857) 23 Pa. 304.

Where parties acquire a mining claim, working some and extracting the mineral, sharing the profits and loss between them, a partnership exists even though there be no express agreement to that effect. *Duryea v. Burt* (1867) 25 Cal. 568.

Where the deed in evidence showed that the premises were conveyed to the partners in their individual names, it was held that the evidence unexplained would make them tenants in common at law, but that in equity if purchased with partnership funds the premises would be regarded as partnership assets where it was bought and occupied for the firm business, the presumption being that it was paid for with partnership money. *Haynes v. Brooks* (1871) 8 N. Y. Civ. Proc. Rep. 103.

Whether, where partnership funds are vested in vacant lots, or other real estate not necessary or intended for the use of the firm in carrying on its business, the purchase being for speculation and as an investment of partnership funds not needed to carry on the regular business of the partnership, the same principle is to prevail, was a question not decided by the court in *Buck v. Winn* (1850) 11 B. Mon. 320, but it was said to be the better opinion that in such a case equity would consider the property as forming a part of the partnership fund, and subject to the same disposition as personal property, liable, however, to be conveyed or charged by one partner on his individual account to the extent of his legal title, if the purchaser accepts bona fide without notice of the partnership rights, there being nothing in the condition of the property or in the transaction from which notice might reasonably be inferred.

Where, in an action for the dissolution of a partnership and accounting, it was claimed that the real estate ordered to be sold was the individual property of one of the partners, it was held that evidence that it was bought while the partners were partners, part of the consideration being a note given by the firm and money borrowed by the claimant on his own note, and it was subsequently paid by the firm, the property was used in the prosecution of the business, and was assessed as the firm's property, and the taxes were paid and credited to the partners paying them on the firm's books, and that such real estate was bought as a firm and for the firm, and had always been used in its business, was sufficient to justify the court in finding it partnership real estate. *Roberts v. Eldred* (1857) 73 Cal. 304.

97 L. R. A.

XXI. *Facts and circumstances held not sufficient to create a partnership in real estate.*

Partnerships may be found in the possession and use of real estate of which partners either have no title or hold the same as tenants in common, and such real estate forms no part of the assets of such firm. *Hammond v. Paxton* (1855) 58 Mich. 393.

A joint purchase of land by two does not constitute a co-partnership in respect thereto, nor does an agreement to share the profits and losses of the sale of land create a partnership, the parties being only tenants in common. *Clark v. Sidway* (1892) 142 U. S. 582, 35 L. ed. 1157.

Where the real estate in consideration is not purchased with partnership funds, nor any common capital withdrawn from the power of creditors to make the purchase, nor is any agreement entered into that the property thus owned in common shall become partnership stock, or constitute any part of the capital of the firm in the business carried on, it is not partnership stock. *Alexander v. Kimbro* (1875) 49 Miss. 520.

And real estate purchased by a partner in his own name and not intended or used for partnership purposes is not partnership property. *Cox v. McBurney* (1849) 2 Sandf. 561.

A firm leasing real estate from a partner who purchased it in his own name cannot claim the land as partnership property though it erected business premises thereon. *Slemmer's App.* (1868) 58 Pa. 163, 38 Am. Dec. 255.

Partners engaged as such, in a particular business specified in their articles, buying land not necessary to their business but with views and purposes beyond and outside of it hold such land as tenants in common and not as partnership property, and the fact that the purchase money is taken out of the capital or the profits of the partnership business does not alter the case, nor does it seem that the deed having been taken in the name of one partner changes his equitable relation to the other. *Coder v. Huling* (1856) 27 Pa. 84.

If real estate is purchased by a partner with moneys withdrawn by him from the firm, with the knowledge and consent and acquiescence of his copartners, under circumstances which show that such withdrawal was a loan, the property so purchased will be his individual property and not the firm's, but if the evidence does not show that such withdrawal amounted to a loan, the property will not be considered his individual property, even though he may purchase for his own use and in his own name. *Hunt v. Benson* (1841) 2 Humph. 459.

Where the land is purchased with the firm's check from its funds, the conveyance being made to the copartners as tenants in common, without reference to any partnership, the payment of the money from the copartners' fund is prima facie evidence of an intention to treat the property purchased as copartnership property, but where the land is neither intended nor used for partnership purposes, raises a question requiring much less evidence to overcome the presumption arising from

books, and treated them as firm property, is not sufficient to change them into partnership property, and the proceeds of sales of them should be applied to the payment of the claims of individual creditors prior to those of the partnership creditors. (2) That if the paper mills, and such other real estate connected therewith as would be necessary for the convenient and proper conduct of the business, were treated by the partners as partnership property, were put into the firm business as part of the common stock, and were so entered in the books of the firm as

to comply with the statute of frauds, then the partnership creditors should have priority over the general creditors of the individual partners, in the distribution of the proceeds of sale of such property, provided this class of property was so used as to give notice to the latter that it was treated as partnership property, and was substantially involved in the business of the firm.

There is still another question to be disposed of. It is contended that the appellant is estopped from claiming that the real estate is individual and not partnership prop-

erty, the payment of the money. *Providence v. Bullock* (1884) 14 R. I. 353.

In *Smith v. Wood* (1880) 1 N. J. Eq. 74, the court doubted whether land purchased by partners in trade was as between themselves, or as between themselves and their creditors, to be considered as real or personal estate, but held that where no claim of the creditors interfered and the partners had not considered the property as partnership assets, but had dealt with it as real estate and conveyed their several shares from time to time, it was to be considered as real property and all balance due upon a bond of one partner for purchase money due, was a claim against the property and not a partnership debt.

The mere fact that two or more persons make use of property in which their interests are apparently several for partnership purposes, does not indicate an understanding that it is partnership estate. *Reynolds v. Ruckman* (1876) 85 Mich. 80.

If the lands are not in terms put in as a part of the stock, and one of the partners has no interest in them whatever beyond the present right of use with the rest of the firm, the articles of partnership do not make the land partnership property. *Gordon v. Gordon* (1882) 49 Mich. 501.

Although real estate may be held in the joint name of two or more persons, yet if there is no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by the partners as joint tenants, or tenants in common. *Pepper v. Pepper* (1887) 24 Ill. App. 516.

If real estate is not paid for with partnership funds, but each partner purchases his interest and pays for it with his own funds, the presumption arises that the parties do not intend to hold it as partnership property but as real estate, subject to all the incidents of a tenancy in common; such presumption, however, is rebuttable. *Willhite v. Boulware* (1889) 88 Ky. 169.

Even though used for their joint purpose, in the absence of an agreement that it shall be so considered. *McGrath v. Sinclair* (1877) 55 Miss. 89; *Alexander v. Kimbro* (1878) 49 Miss. 529.

Land bought by partners, and paid for out of partnership funds, but not for the use or convenience of the copartnership business, or for the purposes of the copartnership, vests in the individual partners as tenants in common, as real, and not as personal property. *Price v. Hicks* (1874) 14 Fla. 565.

If it is not shown that the property in question is used for partnership purposes and as a means of continuing, facilitating, and enlarging the business, or even for any one of those objects, it is not partnership property within the rule, and is therefore not impressed with the characteristics of personality, and is consequently liable to attachment for the individual debts of partners. *Bank of Louisville v. Hall* (1871) 8 Bush. 672.

Thus where two persons purchased land jointly, and afterwards one of them built thereon with the consent of the other, without any agreement between them to share the profits and loss of the

joint undertaking, they are not partners, their relation being only that of tenants in common; and for the money expended in such erections the party becomes liable for his share of the portion as for money laid out at his request. *Sikes v. Work* (1856) 6 Gray, 483; *Merrill v. Bartlett* (1823) 6 Pick. 46; *Thorndike v. DeWolf*, Id. 120.

So an agreement entered into between two tenants in common, to erect mills upon the property at their joint expense, and for the working of the same thereafter, dividing the profits, creates no partnership with relation to the real estate, and no claim attaches to the realty. *Moody v. Rathburn* (1882) 7 Minn. 89.

And where the title to the land by the use of which the business is carried on is in common; nothing in the conveyances indicating that it is partnership property; one partner mortgaging his interest; the partnership articles, recorded in the office of the register of deeds, showing that the partners are to occupy for the purposes of their business, and further that one third of the amount is paid therefor by the incoming partner who is entitled to an equal undivided third,—such real estate is not partnership property. *Gordon v. Gordon* (1882) 49 Mich. 501.

Real estate purchased and paid for with the firm note in the name of one partner, who is debited with the expenses and discount, and renewal of the note, and taxes payable upon such property, in the partnership account, is not partnership stock, and the profits produced thereby are the individual property of the partner. *Hay's App.* (1880) 91 Pa. 265.

Where an agreement between partners relates to the sale of standing timber to be removed at a future date from land of one partner, with a future partnership agreement as to the remainder, the agreement is not a partnership transaction but the individual engagement of the parties with each other and not being performed, the property is not that of the partnership. *Reid v. McQuesten* (1881) 61 N. H. 481; *Glover v. Tuck* (1840) 24 Wend. 153.

A mere executory agreement amounting to nothing more than a contract to purchase a house, the house being yet to be built, constitutes no partnership. *Demarest v. Kooh* (1891) 129 N. Y. 218.

A conveyance of the family homestead, furniture, and other property connected with it by a father to his sons, in consideration of their joint undertaking to pay his outstanding debts and to support him and his wife for life, the evidence not showing any agreement between the sons to make the property partnership, one son taking a power of attorney to hold and manage the property, fulfilling the promise, and maintaining his father and mother till their death, and operating the farm, does not operate to create a partnership as to the real estate. *Howe v. Howe* (1868) 99 Mass. 71.

An allegation that real estate bought in the name of one partner is so purchased with the firm's money, under an express agreement that such property is to be the firm's, will not uphold a suit for specific performance of such agreement where

erty by reason of its signing a recommendation to the court to ratify its sale reported May 1, 1894, by John B. Ramsay, one of the trustees. Mr. Ramsay and Mr. Schott, the trustees, differed as to the propriety of a sale of the property remaining unsold, at the price which had been offered; the latter thinking that in time a better price could be obtained, while the former thought it best to sell at once. Mr. Ramsay reported the sale, and Mr. Schott was required to show cause why it should not be made. The American National Bank, of which Mr. Schott was

cashier, was the only creditor opposing the sale, and Mr. Ramsay undertook to secure the concurrence of enough creditors to overcome the opposition of that bank. Accordingly, the National Mechanics' Bank, of which Mr. Ramsay was president, and which was the largest creditor, signified, through its attorneys, who were also attorneys for the trustees, its concurrence in the sale, to the officers of the appellant, which was the next largest creditor, and sought their consent. It was explained to them that by the proposed sale the creditors of William H. Hoff-

the evidence does not prove such specific agreement. *Russell v. Miller* (1872) 28 Mich. 1.

A single special adventure of a joint account, involving the payment in equal proportions of designated sums of money, amounts to a mere community of interest in the property, and the agreement to share the profits and losses on the sale of the land creates no partnership, the parties being merely tenants in common, and therefore an action at law will lie for recovery of moneys as between the parties. *Clark v. Sidway* (1892) 142 U. S. 682, 35 L. ed. 1157. To the same effect, *Jordan v. Soule* (1887) 79 Me. 590; *Gwineth v. Thompson* (1829) 9 Pick. 51, 19 Am. Dec. 350; *Haven v. Mehlgarten* (1857) 19 Ill. 91; *Fowler v. Fowler* (1882) 50 Conn. 256; *Dickinson v. Williams* (1858) 11 Cush. 258, 59 Am. Dec. 142; *Fisher v. Kinaston's Estate* (1846) 18 Vt. 489; *Fanning v. Chadwick* (1826) 3 Pick. 430, 15 Am. Dec. 238; *Coles v. Coles* (1818) 15 Johns. 159, 8 Am. Dec. 231; *Galbreath v. Moore* (1838) 2 Watts. 86; *Harding v. Foxcroft* (1829) 6 Me. 76.

Tenants in common of real estate conveyed to them by separate deeds, each paying for the portion conveyed to him and owning an undivided half, do not, by afterwards entering into a parol partnership whereby such property is to be considered as belonging to the firm and using it for firm purposes, render it liable as firm property for the payment of the partnership debts, as against separate creditors who have given credit to the partners individually upon the strength of the partners being tenants in common. *Parker v. Bowles* (1876) 57 N. H. 461.

A number of individuals owning land do not by the mere act of associating themselves together as partners invest the firm with a title to their real estate, nor can a firm by the mere act of incorporating themselves by the same name, invest the corporation with the title to the real estate owned by the firm. *Carothers v. Alexander* (1899) 74 Tex. 809.

Where the deed does not state that the purchase is made by the partners for the use of the firm, nor describe them as partners, but merely states a conveyance to them as individuals, such deed may be misleading as to creditors or purchasers, and therefore the doctrine as to its being partnership property does not properly apply. *Forde v. Herron* (1814) 4 Munf. 316.

Where every particle of property both real and personal, except household furniture and apparel, together with the liabilities, was put into common stock, without any express provision as to future acquisitions or liabilities, each vesting of all present possessions and binding himself to apply himself faithfully and diligently to the business, there being no ground for supposing that the parties expected any such thing as the individual property or liabilities, there is not strictly speaking a partnership, but rather a universal hotch pot of all their properties and liabilities. *Rice v. Barnard* (1848) 20 Vt. 479, 50 Am. Dec. 54.

An agreement between partners engaged in the business of "real estate and note brokers" to furnish

information as to bargains in real estate, and give the partners the option of taking the benefits of such bargains, does not enlarge the scope of the partnership business so as to include therein the purchase and sale of real estate on a joint account. *Latta v. Kilbourn* (1898) 150 U. S. 524, 37 L. ed. 1169. And no partnership will take place until the contemplated event actually occurs. *Id.*

A description of the premises upon a transfer of a business, as follows: "The property known and described as the Mobile Daily and Weekly Newspaper, and all the property and materials in and belonging to the printing establishment thereof and of the job printing and book-binding establishment, and of the offices connected therewith, with the right, contracts, and privileges attached thereto; and including and embracing the property mortgaged,"—does not include premises used by the firm for business purposes which are the sole property of an individual partner the use thereof ceasing on the termination of the partnership there being no express contract or lease. *Rapier v. Gulf City Paper Co.* (1879) 64 Ala. 380.

Where the parties were engaged in mining operations under articles of partnership containing provisions for the getting of mineral substances, and developing the same with provisions for selling the same, or the rights, privileges, or leases, or any land the title to which the firm might secure, the enterprise to enhance the purchase of the title to any coal or mining lands in fee, a purchase made by a partner of land without authority, the articles being explicit that no member of the firm less than the whole had authority to buy, conferred no title to such property by the firm which was not bound by the purchase. *Judge v. Braswell* (1877) 13 Bush, 69, 23 Am. Rep. 185.

Real estate purchased by partners and others in a firm showing a conveyance to them in their individual names as joint owners and tenants in specific proportions, with an agreement stating the liability of each to be equal to his individual interest, as shown by the purchase; providing for the reimbursement and a lien in favor of any party paying more than his proportion of the indebtedness; none of the firm money being used, although there was a subsequent entry in the books showing what might have been an intention to treat it as partnership property, if proved, is not partnership property. *Lindsay v. Race* (Mich.) Dec. 18, 1894.

Every fact essential to the plaintiff's title to maintain his bill and obtain the relief sought must be stated, and no proof can be offered nor can relief be granted upon matters not charged in the bill; where, therefore, neither the pleadings nor the proofs showed any ground for holding real property, or the proceeds of its sale as partnership property, the cross-bill not seeking an account of the partnership property or showing the state of accounts between the partners, no proof being taken upon the point, it is erroneous to decree that the alleged partner is entitled to any interest in the avails of such real estate. *Bowman v. O'Reilly* (1866) 31 Miss. 261.

man & Sons would get about 33 $\frac{1}{3}$ per cent of their claims, and it was thought that the concurrence of two such large creditors would influence the others. It is apparent that appellant fully understood that the 33 $\frac{1}{3}$ per cent was to come from the sale of the property mentioned in these proceedings. The appellant, the Mechanics' Bank, and another creditor signed a paper requesting the court to ratify the sale, whereupon Mr. Ramsay sent out a circular letter to the creditors of the firm, asking their concurrence in the sale; stating that the proposed sale would pay the

creditors about 33 $\frac{1}{3}$ per cent of their claims, and that these two banks approved of it. It is admitted that the officers of the Union Bank asked the counsel for the trustees and Mechanics' Bank whether the signing of the concurrence to the sale would affect the claim of the Union Bank, and "were told that it would not, and that it only meant an assent to said sale at the price proposed. But nothing was said by either side as to the claim against the property, as individual or firm property." We do not think the facts stated in the record are sufficient to estop the ap-

Where the contract shows a purchase, upon certain conditions, for a partnership in one-half interest in the proceeds, arising from the sale, partition, and transfer of a certain parcel of land, and by the terms of the agreement a certain amount was to be paid out of the proceeds of the sale, together with interest to the parties of the first part, until the sum realized from the sale equaled a certain amount due to such parties as individual capital; that under such agreement no bargain, sale, or transfer of the land was to be made without the written consent of all parties, and the partnership was to continue in full force until all the land was sold and the proceeds disposed of according to the terms of the agreement, an equal division to be made after the specified sums had been paid to the parties as mentioned in the agreement, such agreement does not constitute the parties partners in such real estate, and that they are entitled to partition. *Thompson v. Holden* (1893) 117 Mo. 118.

Where plaintiff and defendants, the joint owners of timber lands, made a division assigning one part to the former and the other to the latter partners in the lumber business no lines being drawn, the agreement being that if each encroached upon the other and took timber, an equal quantity should be allowed from the other's amount, though the defendants are partners, such partnership does not extend to the real estate, the parties being tenants in common. *Baker v. Wheeler* (1832) 8 Wend. 505, 24 Am. Dec. 66.

Where the plaintiff alleged the agreement between himself and the defendant, that the latter should purchase lots jointly, that the bids should be taken in the latter's name and the deed in their joint names, which agreement the defendant refused to recognize, and plaintiff prayed a conveyance to them as tenants in common, and also an injunction to restrain the taking of the conveyance in defendant's name, no partnership existed between the parties in respect to such lands. *Levy v. Brush* (1871) 45 N. Y. 589, reversing (1869) 1 Sweeney, 653. *Sage v. Sherman* (1849) 2 N. Y. 418, followed.

In a suit involving two parcels of land, of which the half of one was owned by a firm and the remaining half by another person, the property being held under a lease by one partner in the firm, who conveyed the one half to the other partner, it being arranged that the property was all to be put into the business of the partnership, the other half being also purchased by such partner and paid for with partnership funds, other property being subsequently purchased and used as part of the premises upon which the business was carried on, and paid for with partnership money, a finding that the lands were taken as tenants in common was not sustained. *Leary v. Borge* (1890) 1 N. Y. S. R. 571.

An agreement, whereby one is to procure the title to land and take a purchase-money mortgage thereon, for the purpose of building at his own expense, one half of the money over and above the amount procured by mortgage to be furnished by

the other party, with an understanding that upon completion part is to be conveyed to the other party subject to the mortgage, or in case of sale the net proceeds to be equally divided, the intention of the parties being to divide the profits equally between them, a mortgage being given for the performance of the contract, does not constitute a partnership between the parties, and therefore the one not a party to the building contract cannot be held liable for work and labor done, the contract between the parties themselves being merely executory. *Demarest v. Koch* (1891) 129 N. Y. 218.

Where one partner contributed real estate at its estimated value as part of his capital stock, reserving the right not to be bound upon dissolution by the estimated value, and to withdraw the property, and such property was afterwards destroyed by fire, it was held that upon a dissolution the attached lots, not the subject of the removal of the partnership and not necessary for the use of the rebuilt portion, would not be considered a part of the partnership property, and might be withdrawn by such partner. *Clark's App.* (1872) 73 Pa. 142.

In *Grubb's App.* (1870) 66 Pa. 117, the parties owners of real estate, consisting of one lands as tenants in common, entered into partnership arrangements for the manufacture of iron and for the purchase of other real estate, the profits arising from the operations and the purchase money paid being carried into the partnership books, and it was held that no partnership existed with respect to the land, the court stating that real estate held in common and not in partnership, was not inconsistent with its use for partnership purposes, and its appearance in the partnership books to the extent made necessary for the use of the partnership in the iron business, and in such a case the parties being equal as tenants in common as well as equal partners, the use of the land would in the settlement of their partnership account be the same in its result to them, as if as partners they had leased the land to themselves as tenants in common.

If real estate has been purchased and paid for by the firm's check from its funds, the conveyance taken to the copartners as tenants in common without reference to partnership, but neither intended nor used for partnership purposes, and without any uniformity in keeping the account of the firm or of entering receipts and expenditures as to the property and other real estate held by the partners as tenants in common confessedly as individual property, and without claim by either partner until about the time of the commencement of action, indicating an intention to treat the land as partnership property, such property cannot be considered as part of the partnership estates. *Providence v. Bullock* (1884) 14 R. I. 353.

Where parties agreed to jointly purchase land, one party to arrange for the payment, the other to pay him his proportion, the property being con-

pellant. It is perfectly apparent that the difference between the trustees was as to the price to be obtained for the property,—whether the offer received by Mr. Ramsay should be accepted, or they should wait for a better price. There is not a particle of evidence tending to show that the property did not bring its full value, or that any of the creditors have been injured. The only creditor that filed objections to the appellant's claim on this ground is the Mechanics' Bank, which had concurred in the sale before the appellant did. It could not, therefore, claim that it was misled by the act of the appellant. But, before the officers of the appel-

lant signed the recommendation, they inquired of the attorneys representing the Mechanics' Bank, and the trustees who were seeking their concurrence, whether it would affect the claim of the Union Bank, and were told it would not. There can be no question as to what claim was referred to, as the agreed statement shows that "the claim of the Union Bank was filed, long prior to any sale, against both the partnership and the indorsers of the notes held by the bank." It would, perhaps, be more equitable to say that the Mechanics' Bank should be estopped from questioning the right of the Union Bank to assert its claim, after having in-

veyed to the latter who never conveyed the share to the former, the purchase money being secured by the bond of the parties, and by means of a deed of trust executed to a third party, the parties subsequently carrying on business upon the premises, the first installment being paid from the proceeds of the business, money being borrowed for the payment of the subsequent ones, the notes for which were renewed till after the dissolution of the partnership, when the parties conveyed to a trustee for the purpose of discharging their indebtedness, it was held that such property could not be considered partnership property, even though the parties carried on business thereon. *Wheatley v. Calhoun* (1841) 12 Leigh, 204, 37 Am. Dec. 654.

Where by the articles of partnership one partner was "to contribute as his capital" certain lands and buildings, "the title to and ownership of" the same being "the sole property" of such partner, the other partner contributing cash under a like provision, the agreement was construed as meaning only the contribution of the use of the property, to be withdrawn at the end of the term, the profits only being the subject of a division. *Richmond v. Voorhees* (Wash.) Dec. 18, 1894.

Dunbar, Ch. J., dissented from the above construction of the court.

Where the fact sought to be proved by the production of books and papers was the existence of a deed from one of the partners of a firm to the firm itself, secondary proof that an entry existed on the books of the transfer of the real estate to the firm; that an account was opened in them with the property; that the money of the firm was applied to the purchase; that the persons erecting the buildings on the property were paid by the firm, the buildings being afterwards rented in the name and partly furnished through the funds of the partnership, the taxes being paid in the same manner,—was held not sufficient to raise a presumption of a deed by a jury as a matter of direction from the court. *Hanson v. Eustace* (1844) 43 U. S. 3 How. 653, 11 L. ed. 418.

Cases in which real estate has been held partnership property:

In *Ebbert's App.* (1871) 70 Pa. 79, the defendants in execution were partners, and had conveyed to them real estate adjoining their place of business, the grant being in the usual form, the habendum showing a grant of the said two described lots "unto the said parties of the second part, their heirs and assigns" the lots being bought for partnership purposes, and paid for with partnership property, and used for partnership purposes, but it did not appear in the deed, nor could it be discovered in any way from it, that the lots were so paid for or so to be used, the contention being that a judgment recovered by one partner against the other on a settlement of the partnership accounts should be paid for out of the proceeds of the lots, on the ground that they were

partnership property and the judgment a partnership debt. The court held that as to purchasers of the title and creditors having liens on it, a deed to persons, who were in fact partners, but who took the title to themselves as tenants in common, must stand as the foundation of their rights and govern in the distribution of the proceeds of the sale of the title, and the partnership creditors could not by parol evidence change the effect of the deed and convert lands, so individually held, into assets of the partnership, and thereby dislodge and postpone the other always preferred liens of other creditors, the court following *Hale v. Henrie* (1834) 2 Watts. 143, 27 Am. Dec. 238; *M'Dermot v. Laurence* (1821) 7 Serg. & R. 433, 10 Am. Dec. 463; *Ridgway's App.* (1850) 15 Pa. 177, 63 Am. Dec. 586; *Kramer v. Arturs* (1847) 7 Pa. 170; *Lancaster Bank v. Myley* (1850) 18 Pa. 544; *Cumming's App.* (1855) 25 Pa. 263, 64 Am. Dec. 695; *Erwin's App.* (1861) 30 Pa. 535, 80 Am. Dec. 542.

In *Erwin's App.*, *supra*, and *Lacy v. Hall* (1861) 37 Pa. 360, the lands were acquired after the partnership had been formed and while the joint business was in progress, while in *McCormick's App.* the agreement was made before the firm had any being and the partnership funds did not pay for it, and therefore it was held that the parol agreement to put lands into a firm, or to consider it as firm property, made before the firm existed, was wholly ineffectual to pass any title either in law or in equity. *McCormick's App.* (1868) 57 Pa. 54, 98 Am. Dec. 191.

XXII. Louisiana doctrine.

If land or slaves could be partnership property where the firm is mercantile, it follows that they must be governed by commercial law and as the code of commerce in France, although not limiting in express terms commercial partnerships to personal property, nevertheless such an association as was formed in the principal case could only act on things which are movable. Code Commerce, note by Paillet Manuel Driot Francais; *Skillman v. Purnell* (1832) 3 La. 497.

Under the Louisiana code, a commercial partnership is stated to be for the buying and selling of personal property in the right of the firm, or buying and selling personal property as agents, or carrying personal property for hire, and it has been held that the purchase of slaves or houses to enable a firm the more conveniently to carry out its business does not come within any branch of such definition and is not a commercial partnership. *Ibid.*

The owners of real estate in Louisiana are considered as owning the same as joint tenants and not as partners. *McKee v. Griffin* (1871) 23 La. Ann. 417; *Bernard v. Dufour* (1841) 17 La. 598; *Caldar v. Their Creditors* (1895) 47 La. Ann. 346; *Baca v. Ramos* (1836) 10 La. 417, 23 Am. Dec. 463; *Gulibeau Bros. v. Melancon* (1876) 23 La. Ann. 627; *Thomas v. Scott* (1842) 3 Rob. (La.) 256; *Weld v. Peters* (1846) 1 La. Ann. 432; *May v. New Orleans &*

duced it to sign the concurrence by the assurance that such act would not affect its claim. But there is no proof that any creditor was either misled or injured by the action of the appellant, and nothing in the record to justify an inference that such was the case. This court, in *Hardy v. Chesapeake Bank*, 51 Md. 590, 34 Am. Rep. 325, in speaking of the doctrine of an estoppel *in pais*, said: "It can, therefore, only be set up and relied on by a party who has actually been misled, to his injury; for, if not so misled,

he can have no ground for the protection that the principle affords." From what we have already said, it can be seen that we think that an application of the above principle of law to the facts of this case disposes of the question of estoppel. The decree *pro forma* must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Decree reversed and cause remanded, with costs to the appellant.

C. R. Co. (1893) 44 La. Ann. 444; *Allen v. Whetstone* (1893) 35 La. Ann. 849; *Theriot v. Michel* (1876) 23 La. Ann. 107.

Under article 2796 of the Louisiana Code, commercial partnerships are not allowed to deal in landed property. *Bernard v. Dufour*, *supra*.

It cannot own immovable property. *Calder v. Their Creditors*, and *McKee v. Griffin*, *supra*.

Where it was alleged that the real estate in question partitioned between two parties, belonged to a partnership, and that it could not be partitioned before the debts of the partnership had been paid, and no partnership was proved to be in existence prior to the purchase of the land, it was held that the purchase at the sale of the property did not create a partnership, nor did the fact that the partners subsequently planted in partnership, make the lands bought by them the property of the partnership, there being no proof on the record to show the existence of a partnership which had for its object the acquisition of real estate, or which was intended to embrace such property, the civil code requiring such partnerships to be in writing under article 2807. *Pecot v. Armelin Bros.* (1890) 21 La. Ann. 667; *Slocumb v. DeLizardi*, *Id.* 355, 99 Am. Dec. 740.

The mere joint ownership of real estate does not create a partnership as to such estate, for that purpose a special contract in writing is necessary under article 2807 of the Louisiana Civil Code. *Benton v. Roberts* (1849) 4 La. Ann. 216.

So if it is included in a partnership, the contract of partnership must be in writing according to the rules prescribed for the conveyance of real estate, under section 2807 of the Louisiana Civil Code. *Dunbar v. Bullard* (1847) 3 La. Ann. 810; *Gantt v. Gantt* (1851) 6 La. Ann. 677.

Real estate acquired by a partnership is not partnership property, and therefore where it was owned by three partners it was held that a deed signed by two partners conveyed their interests alone. *Willey v. Carter* (1849) 4 La. Ann. 66.

Yet it has been held that though the legal title vests in the individual partners, still as between themselves the property is equitably and practically that of the firm. *May v. New Orleans & C. R. Co.* (1893) 44 La. Ann. 444, 452.

In *Battle v. Jenkins* (1878) 25 La. Ann. 593, it was held upon the question of the nature of evidence necessary to prove a planting partnership, that there was no law requiring such proof to be in writing, there being no partnership in the ownership of real estate, or in the *usus fructus* or use of real estate, such as would render its character that of real estate.

If either the purchase of slaves or real estate was requisite to facilitate the business of the firm, it is competent for the firm to purchase the same with any funds they choose, but the law confines that partnership to personal property and leaves them joint owners, and not partners, with respect

to the real estate. *Skillman v. Purnell* (1832) 3 La. 497.

Where real estate was used by the parties by common consent, for carrying on the cultivation of sugar by the partnership, which was dissolved by the seizure and sale of one partner's share of the land by one of his individual creditors, it was held that such land constituted no part of the partnership property, and that the partners were joint owners of it. *Theriot v. Michel* (1876) 23 La. Ann. 107.

If one of the proprietors in real estate owned by the parties in common makes some change in the property in the other's absence, not necessary for its preservation, and such change occasions a loss to the co-owner, or is such that he has just cause not to approve of, the former makes such change at his own risk, and under the obligation of an equitable restoration, such transaction not necessarily being part of the partnership. *Smith v. Wilson* (1855) 10 La. Ann. 255.

If immovable property is purchased with partnership funds by one of the partners, in his own name and without the consent of his copartners, the property itself belongs to the partner purchasing, but its value at the time of the purchase belongs to the partnership and no decree of a court can be rendered to vest the title of such property in the partnership, the partnership being incapable of acquiring title. *McKee v. Griffin* (1871) 23 La. Ann. 417.

In considering the question whether or not real estate is partnership property, entries in the partnership books which are binding upon the partners are admissible as evidence, their admissibility not infringing on the dignity the law attaches to the authentic act and manifestly are not to be viewed as parol proof. *Calder v. Their Creditors* (1806) 47 La. Ann. 846. *Armistead v. Spring* (1842) 1 Rob. (La.) 567, followed.

Partnership lands paid for with partnership funds, or funds advanced by the firm to an individual partner, for the purpose of paying for or improving the property purchased, creates no individual indebtedness of the partners towards the firm, and the firm cannot be rendered owner by those means, neither does such a purchase confer on the firm or its creditors any privilege on the proceeds of the property. *Bernard v. Dufour* (1841) 17 La. 596.

Where a partnership existed for the sale of goods and merchandise which was its only object, and real estate was only to be purchased when necessary for the purpose of convenience in carrying on such trade, and 20,686 arpents were purchased by the defendant on account of the partnership, it was held that such purchase did not bind the firm and that a decree in partition by the court below was erroneous. *Brooks Syndic v. Hamilton* (1821) 10 Mart. (La.) 265, 13 Am. Dec. 823.

R. W.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut, *Appt.*,

v.

D. J. E. LEE.

(.....Conn.....)

1. A statutory right of appeal by the state in a criminal case to obtain a new trial for errors of law after an acquittal is not in violation of the fundamentals of the common law of Connecticut nor inconsistent with the principle that enforces the conclusiveness of a valid and final judgment.
2. After acquittal by a jury as well as after trial by the court an appeal may be taken by the state under Gen. Stat., § 1637, authorizing the state to appeal in the same manner and to the same effect as the accused on questions of law.
3. The opinion of a physician that a wound on the interior of the womb of a woman could not have been self inflicted, is admissible as expert testimony.
4. The requirement of a distinct statement of errors complained of is not made by four or five pages of claims consisting mostly of argumentative comments as to errors in the charge of the court.
5. The finding of facts by the presiding judge for the purpose of an appeal is sufficient evidence as to permission to appeal, although formal permission should appear on the record.

(December 1, 1894.)

APPEAL by the state from a judgment acquitting defendant of the crime of murder in the second degree for which he had been indicted. *New trial granted.*

The facts are stated in the opinion.

Mr. Levi N. Blydenburgh for appellant.

Messrs. Joseph P. Goodrich and Arthur C. Graves for appellee.

Hamersley, J., delivered the opinion of the court:

The defendant was indicted for the crime of murder in the second degree, was acquitted upon the trial to the jury, and this is an appeal by the state, in the nature of a motion for a new trial on the ground of alleged errors in the charge of the court, and in the admission and exclusion of evidence.

The defendant makes a preliminary claim that the state has, under our law, no right of appeal to this court when the accused has been acquitted by a jury, and bases his claim upon two propositions: (1) A law authorizing procedure for the correction of errors in instructions to the jury, or in the admission and exclusion of evidence, made by the court in a criminal trial, and followed by an acquittal of the accused, is in violation of that fundamental principle of the com-

mon law: "No person shall be subject for the same offense to be twice put in jeopardy." U. S. Const. Amend. 5. (2) Section 1637 of the General Statutes does not, in express terms, authorize an appeal when the accused has been tried and acquitted by the jury.

1. "That no one shall be put in jeopardy twice for the same offense is a universal maxim, thought worthy to be incorporated to a certain extent into the Constitution of the United States; and that an acquittal or conviction by a court having jurisdiction, on a sufficient indictment or information, is in all cases a bar, is equally clear." *State v. Benham*, 7 Conn. 418. This maxim is based upon a principle common to all systems of jurisprudence, *i. e.* the finality of judicial proceedings. *Broom, Legal Maxims*, p. 812. If questions once tried and determined could be again agitated, at the option of the parties, one main object of any administration of justice would be defeated. The function of courts is to settle controversies according to law. The object of settlement is secured by the principle of finality of judgments. "*Finis inem litibus imponit.*" The object of settlement in accordance with law, the same in all cases, is secured by the correction of errors in the application of law in each case. Neither object is inconsistent with the other. The end is not reached, the cause is not finished, until both the facts, and the law applicable to the facts, are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement. The adjustment of these principles in the establishment of procedure by means of which the final judgment shall not only settle the controversy, but settle it in accordance with law, is determined in each jurisdiction by considerations of public policy, and not by fundamental principles of jurisprudence. The principle, "*nemo bis nezari eadem causa*," gives protection against a second judicial proceeding, and, in the event of such proceeding, gives to a party the right, in criminal cases, to the plea of *autrefois acquit* or *autrefois convict*, and in civil causes to the plea of *res judicata*; but the principle does not control the question whether the judgment pleaded in bar is in fact a legal and final judgment, and has no legitimate relation to the question whether existing procedure provides for correction of errors occurring in the trial.

This distinction has been lost sight of in some cases which discuss the application of common-law rules or statutory provisions to the correction of errors in criminal causes; and, owing to the confusion of principle with practice, a theory seems to have at times prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens; and therefore a procedure which proves incompetent to the

NOTE.—The right of the state to appeal in a criminal case, which is strongly emphasized in the above case, is the subject of annotation to *People v. Miner* (Ill.) 19 L. R. A. 342.

correct application of legal principles in criminal trials can be changed, like any other rule of practice, when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence, that cannot be altered, when the change may tend to secure his just punishment. It needs no argument to dispel such an illusion, or to demonstrate that the natural rights of the individual, as well as the interests of public order, are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law. Judicious legislation for securing a full, fair, legal trial of each criminal cause is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. That maxim, as we have seen, is based on the truth that a judicial proceeding lawfully carried on to its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the "putting in jeopardy" means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undetermined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a *nolle*; nor by a *nolle* after the trial has commenced, when the prisoner does not claim a verdict. 2 Swift, Dig. 402; *State v. Garvey*, 42 Conn. 233. Nor by the discharge of a jury in case of the sickness of a judge (*Nugent v. State*, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746), the sickness of a juror (*Rea v. Sealbert*, 2 Leach, C. C. 620; *Rea v. Edwards*, 2 Campb. 207n.; *Com. v. Merrill*, Thacher, Crim. Cas. 1); or the sickness of the prisoner (*Rea v. Stevenson*, 2 Leach, C. C. 646; *Rea v. Streek*, 2 Car. & P. 413; *State v. McKee*, 1 Bail. L. 651, 21 Am. Dec. 499); in the case of the expiration of the term of court during the progress of the trial (*Reg. v. Newton*, 8 Cox, Crim. Cas. 489; *State v. McLemore*, 2 Hill, L. 680); in case of the inability of the jury to agree (*State v. Woodruff*, 2 Day, 504, 2 Am. Dec. 122; *Reg. v. Charlesworth*, 1 Best & S. 460; *Reg. v. Davison*, 2 Fost. & F. 252; *People v. Olcott*, 2 Johns. Cas. 801; *Com. v. Bowden*, 9 Mass. 494; *Hoffman v. State*, 20 Md. 425; *Hurley v. State*, 6 Ohio, 399; *United States v. Perez*, 22 U. S. 9 Wheat. 579, 6 L. ed. 165); in case of influence exerted on the jury, against the prosecution, by an officer in charge of the jury (*State v. Wiseman*, 68 N. C. 203); in case of misconduct or incapacity of a juror (*United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; *People v. Damon*, 18 27 L. R. A.

Wend. 351; *Stone v. People*, 8 Ill. 326; *Dilworth v. Com.* 12 Gratt. 689, 65 Am. Dec. 264; *Reg. v. Ward*, 10 Cox, Crim. Cas. 578); even after the case has been committed to the jury (*State v. Tuller*, 84 Conn. 294); and when the prisoner offers to waive the disqualification of a juror who has expressed an opinion against him, and protests against the discharge of the jury. *State v. Allen*, 46 Conn. 531. Nor is it exhausted by an acquittal when the verdict has been obtained through the fraud of the accused. Chitty, Crim. L. p. 657; *State v. Reed*, 26 Conn. 208.

The great significance of these cases lies in their illustration of the inherent power and duty of the court to see that the trial is conducted according to law, even if the impaneling of new juries and new trials are involved. The same underlying principle of justice which demands a retrial because a juror is legally disqualified calls for a retrial when illegal evidence has been admitted or legal evidence excluded. In either case the trial is tainted, and should not support a valid final judgment. Before the verdict is returned, the trial court, of its own motion, can award a retrial. After the verdict is returned, a retrial is awarded only on further proceedings in the cause, which may or may not be authorized by the law regulating procedure. If such further proceedings are not authorized by law, the cause is ended, and the one jeopardy of the accused is exhausted; but this results, not from any special sanctity attributable to a verdict tainted with illegality, but solely from the fact that the state, influenced by considerations of public policy, has decided to make such verdict, whether just or unjust, the end of that controversy. But when the state sees fit to provide that the cause shall not necessarily be so ended, but that further proceedings, on motion of the accused, may be had, an unjust verdict resumes its normal position of a legal nullity; and when the state provides for like proceedings on the motion of the prosecutor a similar result must follow. The rule as formulated by this court in *State v. Garvey*, *supra*, rests upon solid foundations. "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established, and fully recognized. The question, however, as to what constitutes a trial, depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

The power and duty of the state to extend to criminal trials those methods of procedure which are found essential to that pure and impartial administration of justice to which every one, both as an individual and as a member of the body politic, when the state itself appears as a party to the trial, is entitled by virtue of a principle which lies at the root of our jurisprudence, would never have been questioned, were it not that the *dicta* of judges as to matters of practice became confused with statements of the legal principle that insists on the conclusiveness of a valid and final judgment. The rule that

a criminal cause once submitted to a jury cannot be submitted to another jury may be traced to a *dictum* of Coke. An able and interesting discussion of its authority will be found in an opinion of Judge Kent, given in full in a note to *State v. Woodruff*, 2 Day, 507. That *dictum* was at most a statement of existing procedure, and, as such, has been repeatedly discredited in a large number of cases; and a rule of procedure in criminal law advanced during the seventeenth century cannot be held to dominate the settled principles of jurisprudence in the nineteenth. The administration of criminal law as it formerly prevailed in England has justly been regarded, in some respects, as an object lesson of barbaric codes. Its continuance theoretically unchanged during the wonderful evolution of a system of civil liberty and sound jurisprudence is a marvel, not inexplicable, perhaps, but none the less strange. Judges were compelled to administer a criminal code in many ways sharply antagonistic to the system of civil liberty and justice which legislature and courts were slowly developing. It is not surprising that under such limitations they should have been acute in stretching the technics to modify the harshness of the law, and should have occasionally given utterance to *dicta* praiseworthy in view of existing conditions, but unsound when applied to conditions such as now happily prevail. General rules enunciated under such circumstances, and based on such *dicta*, are not authority for the fundamental principles of the common law of this state. At most, they are general statements touching procedure, which must yield to the necessities of justice. The uncertainty of such rules was felt, and the principles to be followed in applying them were clearly stated by Sir Michael Foster, as early as 1746: "Upon the whole, my opinion is that all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases where a strict adherence would clash with those fundamental principles are to be considered as so many exceptions to it." *Kinlock's Case*, Fost. C. L. 16.

The defendant lays great stress upon the claim that at English common law the procedure did not permit a writ of error after acquittal. We are inclined to think that it cannot be fairly assumed, from a comparison of all the early authorities, that such writ of error was forbidden. A difficulty in reaching a certain conclusion arises from the fact that originally a writ of error in criminal causes was a writ of grace, and not of right, and that bills of exceptions were not allowed in criminal trials, so that neither the prosecutor nor the accused could place on record the grounds on which a writ of error would ordinarily be sought. But the common practice of reserving questions of law arising in the trial of a cause, for the advice of the court of king's bench, demonstrates the recognition of the principle that the final judgment in a criminal cause should not be rendered until opportunity has been given for the correction of errors which, if not cor-

rected, would make that judgment unjust. To what extent such corrections should be allowed, and whether they shall be accomplished by reservation before judgment, or by proceeding in error after judgment, is a matter of practice, to be settled on considerations of public policy. The United States Supreme Court, in an opinion delivered by Justice Gray, has collated the authorities, English and American, on the common-law practice, and reached conclusions which will doubtless be generally accepted, *i. e.*: The right of the crown, at common law, to a writ of error after acquittal is not wholly free from doubt. The practice in a few of our states recognizes the right of the prosecutor to proceedings in error. In a great majority of the states the courts hold "that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether the judgment is rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." *United States v. Sanges*, 144 U. S. 810, 36 L. ed. 445.

It is, however, immaterial to the defendant what the practice at common law may have been. The gist of his contention is that, assuming the practice to have been as he claims, such failure of the ancient common-law procedure to provide for the correction of errors in a criminal trial was based on a settled and universal principle of jurisprudence, incorporated into our common law, and binding upon our courts, if not upon our legislature. For reasons already stated, we deem such contention to be utterly unsound. Regulations for enforcing the correct application of law in all criminal trials are essential to the administration of justice; and a statute prescribing procedure for that purpose, and requiring the verdict of the jury to be reached in accordance with the settled principles of law and justice before it can support a valid judgment, is not in derogation of any fundamental doctrine of our common law, nor inconsistent with the principle that enforces the conclusiveness of a valid and final judgment. In this state there was, at common law, no practice authorizing a motion for a new trial after acquittal. *State v. Brown*, 16 Conn. 54. In 1821 the legislature authorized such motion on behalf of the accused after conviction, and in 1886 wisely extended the authority to the state after acquittal.

2. The defendant urges that the Act of 1886, incorporated into the General Statutes as section 1687, only authorizes an appeal by the state after judgment by the court, without the intervention of a jury, and does not authorize an appeal in the nature of a motion for a new trial after acquittal. There is no ground for such a construction. The language of the statute is as explicit as its meaning is plain. In the Revision of 1875 the title relating to civil actions provided that "upon the trial of all matters of fact . . . whether to court or jury, if either party shall think himself aggrieved by the decision of the court upon any question of law arising in such trial . . . he may

make a motion for a new trial, stating therein the question or questions of law so decided, and the court shall grant a rule to show cause and reserve said motion and rule for the advice of the supreme court of errors." Page 448. The title relating to crimes and criminal prosecutions provided that "any defendant, in a criminal prosecution, aggrieved by any decision of the superior court upon the trial thereof, . . . may be relieved by motion for new trial . . . in the same manner and with the same effect as in civil actions." Page 539. The Act of 1882 provided that "all questions of law arising on the trial of any cause . . . which may now by law be carried to . . . the supreme court of errors for revision by motion for a new trial . . . shall hereafter be removed to such higher court by an appeal from the judgment of the court . . . and no motions for a new trial shall be hereafter allowed." Pub. Acts 1882, p. 144. The Act of 1886 provided that "appeals from the rulings and decisions of the superior court upon all questions of law arising on the trial of criminal causes may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused. Pub. Acts 1886, p. 560. These several provisions of the law were incorporated, without substantial change, in the General Statutes of 1888, and, in express terms, provide for a new trial upon motion of the state as well as upon motion of the accused. *State v. Clerkin*, 58 Conn. 98. The preliminary claim of the defendant cannot be sustained, and the appeal is properly before us.

The fifth assignment of error is as follows: "The court erred in excluding the following question asked by Mr. Doolittle of the same witness (Moses C. White): 'You examined the uterus in this case, under the conditions you testified to. You made the *post mortem* and examined the uterus in this case, and have described its conditions. Now, I wish to ask you whether, from your examination of the body of the uterus, in your opinion, the wounds which you have described, upon the wall of the uterus, were self inflicted.'" The finding details in full the facts in the case claimed to have been proved by the state and by the defense. The victim of the crime charged was a woman whose death was caused by a lacerated wound in the uterus, made by some instrument used in the production of an abortion shortly prior to her death. The defendant was a practicing physician, whom the deceased consulted for the first time after she decided on suffering an abortion. The testimony introduced in chief by the state was sufficient to justify the jury, if they believed the witnesses, in drawing an inference of the defendant's guilt. The testimony introduced by the defendant consisted mainly in contradictions of the state's witnesses; the most important contradiction being that of the accused himself, who denied having performed any operation upon the deceased, and stated that in attending the deceased during her last illness, caused by the abortion, and superintending her delivery of a dead fetus

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and afterbirth, he acted only as an honest medical practitioner would act when called to attend a woman suffering from such injuries. He said the injuries were inflicted by the deceased herself, and offered testimony claimed as tending to show that she was familiar with the mode of producing abortion by mechanical means, and also testimony that the deceased stated she had inflicted the injury upon herself, and had made this statement subsequent to her dying declaration testified to by the state's witnesses, in which she charged the defendant with having produced the abortion. Upon rebuttal the state called the witness Moses C. White, a practicing physician and medical examiner for the county, who had, as such public officer, performed an autopsy on the body of the deceased. Dr. White had been previously examined by the state, and cross-examined by the defense, as a medical expert. It is patent that under these circumstances the opinion of Dr. White, as a medical and surgical expert, upon the question whether the wound he had examined and described to the jury was so situated and of such a nature as to render its self-infliction impracticable, was admissible evidence. It is true that a wound may be so situated that the practicability of self-infliction is an inference which all men are competent to draw, requiring no peculiar knowledge or experience, and therefore not a proper subject of expert testimony. But to draw such an inference from this particular wound on the interior surface of the womb of the deceased plainly required peculiar knowledge and experience, not common to the world; and therefore the opinion of an expert, founded on such knowledge and experience, is admissible. *Taylor v. Monroe*, 48 Conn. 44; *Whart. Crim. Ev.* p. 403. The importance of the excluded testimony is not less clear. The testimony in the case, as appears from the record, was of such a nature that the question of the defendant's guilt might have wholly turned on the disputed fact of self-infliction of the wound. The defendant himself relied on the possibility of that fact existing as a principal hypothesis consistent with the evidence and his own innocence. The evidence excluded was relevant to that fact. Justice required the admission of the evidence. What weight might have been given to it cannot be known, but it well may be that the opinion of Dr. White would have convinced the jury that the wound was not self inflicted, and that there remained no reasonable hypothesis consistent with the evidence and the innocence of the prisoner. The exclusion of legal evidence, which the court can see might, if admitted, have justly changed the result, is an error which destroys the judicial value of the verdict, and demands a new trial.

It is not necessary to comment in detail upon the other errors assigned. Whether such as are well taken might, if standing by themselves, furnish sufficient ground for a new trial in this case, is immaterial. There is no need for strengthening the conclusion that the course of trial and verdict of the jury were not in accordance with law.

The record in this case is faulty in some respects, to which attention should be called. The appeal contains four or five pages of printed matter called "State's Claim as to Errors in the Charge of the Court, and Exceptions Thereto," consisting mainly of argumentative comments on the charge of the court. This is not that distinct statement of the special errors complained of which the statute requires. A similar fault appears in the appeal in *State v. Smith* (tried at this term), and a much more flagrant instance occurred at a recent term. Such practice cannot be permitted.

The permission of the presiding judge, allowing the state to take this appeal, does not appear in the record. It did not appear in the record in *State v. Clerk*, *supra*, although in that case the fact that the permission was granted at the time of the judgment

appealed from was known to this court. We think the authority of *Reboul v. Ohalter*, 27 Conn. 128, requires us to treat the finding of facts by the presiding judge, for the purpose of appeal, as sufficient evidence that the necessary permission was granted, but we do not think the formal permission is properly omitted from the record. Without passing on questions suggested in argument, but which cannot be decided on this appeal, we think, as a matter of practice, certainly, that in all appeals under section 1637 the permission of the presiding judge should be asked and granted, and a formal record thereof made at the time of the judgment, and that the accused, if in custody, should then be admitted to bail.

There is error in the judgment of the Superior Court, and a new trial is granted.

The other Judges concurred.

ARKANSAS SUPREME COURT.

M. C. TOMBLER *et al.*, *Appts.*,

v.

Adolph KOELLING.

(.....Ark.....)

1. Possession of a check for a watch and other valuables, given by the keeper of a bath-house to a patron as a means of identifying his property, is not proof of a right to the property and will not justify its delivery to one who had no right to the check where the custodian knows both the bailor and the property and would have known that the person presenting the check was not entitled to the property if he had looked at him.

2. Lack of care by a bailor in keeping a check for his property given him by the bailee will not prevent recovery for wrongful surrender of the property by the bailee to one who presented the check but had no right to it, if the bailee could have avoided the loss by the exercise of reasonable care.

(December 15, 1894.)

A PPEAL by defendants from a judgment of the Circuit Court for Garland County in favor of plaintiff in an action brought to recover the value of certain articles of personal property which had been left by plaintiff with defendants and lost by them. *Affirmed.*

The facts are stated in the opinion.

Mr. G. G. Latta for appellants.

Mr. G. W. Murphy, for appellee.

Defendant should at least have looked at the man; that act would have involved no labor—no consumption of time—and yet, on his own statement, it would have prevented the

loss. Even a gratuitous bailee must do that much.

Wear v. Gleason, 52 Ark. 364.

Defendant says he required his employes to exercise no care over the clothing of bathers. This, if true, was, of itself, negligence.

Woodruff v. Painter, 16 L. R. A. 451, 150 Pa. 91; *Bunnell v. Stern*, 10 L. R. A. 481, 123 N. Y. 589.

Hughes, J., delivered the opinion of the court:

The appellee had been bathing at the bath-house owned by appellant Tombler, in the city of Hot Springs, for about three weeks, depositing his watch, chain, a railroad ticket, and money at the bath-house office daily with appellant Clark, and receiving a metallic check from Clark, the superintendent or manager of the bath-house; when one day, depositing these articles as usual with Clark, he received a check for them, which he put in a pocket in his clothes, entered the bath-house, disrobed, hung his clothes on a hook in the bath-room, took a bath, and went into a hall to cool off, and shortly afterwards returned to the bath-room, got his clothing, and went to the bath-room office, and presented a check for his property left with Clark, who handed him something corresponding to the check, which he declined to receive, it not being the property he had left with Clark. Some one else had presented his check to Clark, and received the property of the appellee, and had substituted another check for appellee's while his clothing was hanging in the bath-room.

NOTE.—A novel question as to the effect of a bailee's check for property as evidence of title thereto, and of the true owner's right to claim the property without presenting the check, is involved in the above case. It is the first decision that we remember to have seen in which that question has actually been decided. The present case necessarily includes as part of the decision the right of the owner to demand the property without presenting

the check, if that was impossible, when the property was still in the bailee's custody. While this question may seem fairly plain on general principles, an adjudication thereon is of considerable interest.

For the liability of a merchant as temporary bailee of a customer's garment, see *Bunnell v. Stern* (N. Y.) 10 L. R. A. 481; *Woodruff v. Painter* (Pa.) 16 L. R. A. 451.

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Clark says he told the appellee that he would have to be "very careful with his check and other matters." He admitted that he knew the appellee and his watch and chain well, and further says: "If I had looked at the party who presented the check, I would have known that he was not entitled to the package." There were two dressing rooms to each bath tub, and there was access from one to the other and from each to the bath tub. Another man was in one of these rooms when the appellee was in his, and he knew it. There was an attendant on the bath-rooms, one attendant having six rooms and three bath tubs to attend to, going from one to another. It was about 10 o'clock in the morning, and many bathers were at the bath-house. The appellee recovered a judgment for the value of his property, from which the appeal pending here was taken.

No exceptions to the instructions given in this case were saved in appellants' motion for new trial, and were therefore abandoned. Four were asked on the part of the appellants which were refused. They are as follows: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff, after having secured a check from the manager of the bath-house, went into his bath-room, and took his bath in a room that was adjoining another room, and that such adjoining room was so situated that any person bathing in said room had access to the room that plaintiff was bathing in, and that plaintiff knew this, and, after taking his bath, he left his room, and went out into the hall of the bath-house, and left the clothes in his bath-room, they will find that said plaintiff in so acting was guilty of such negligence and of such acts that the defendants cannot be held responsible for anything that occurred during the absence of the plaintiff from his bath-room, and they will find for the defendants. (2) The court instructs the jury that if they believe from the evidence that the plaintiff left his bath-room, in a nude condition, and went into the halls of the bath-house, and left his clothes, with the check therein, in such a position that the same could be reached by persons bathing in adjoining room, and while out of his room he lost his check, they will find that the defendants cannot be held for this act of negligence on the part of the plaintiff; and they will find for the defendants. (3) The court instructs the jury that if they believe from the evidence that the plaintiff was informed, at the time he commenced bathing at the bath-house, that packages would be delivered upon the return of the check given at the office, that it becomes the duty of plaintiff to take care of the check, and to see that the same was not lost or stolen or mislaid; and if, after receiving the check, the plaintiff so placed the check that the same was substituted by some designing party, and the check was presented and the package delivered thereon, they will find that the defendants are not responsible for the loss and substitution of the check. (4) The court instructs the jury that if they believe from the evidence that the plaintiff was informed by the manager, Clark, that he must

be careful while in the bath-room, and that all kinds of men and characters were liable to be bathing in the bath-house, and that the plaintiff bathed at the bath-house three weeks, and had opportunity of seeing the parties who bathed at said bath-house, that he was required to exercise the necessary care and control over his clothes and their contents as a prudent person would exercise under the same or similar circumstances."

This is a case of bailment for a consideration received by the bailee, who was bound to exercise ordinary care and diligence to preserve and restore the property delivered by the bailor to the bailee, or to some one who was authorized by the bailor to receive it. The property was not so delivered by the bailee, but was delivered to another, who was not authorized to receive it. The bailee knew the bailor and his property well, and testified: "If I had looked at the party who presented the check, I would have known he was not entitled to the package." The check was a means of identification of the property, but was no evidence that the owner of the property had parted with his title to it, or that he had authorized its delivery to any one who might present the check, though not entitled to receive it. Where property is committed to the custody of a bailee for safe-keeping, it is the bailee's duty to use ordinary care and diligence to keep the property safely; and if it is lost through the failure on his part to do so, he is liable. A negligent delivery of the property by him to another, whereby it is lost to the owner, will not relieve him from liability. Had the bailee not previously known the bailor and the property, there might have been some excuse for delivery of the property to the person who presented the check for it, though he was not entitled to receive it; but such a case is not presented or decided here. It seems that, though the bailor was not as prudent as he ought to have been, yet the bailee might have avoided the loss by the exercise of ordinary care, which is such care as a prudent man would exercise, under like circumstances, to protect his own interest. The instructions numbered 1, 2, and 3, refused, ignored the negligence of the superintendent, Clark, and were properly refused. The fourth, refused, does not seem objectionable, but the refusal of it was not prejudicial, as the evidence clearly shows that the property was lost through the want of ordinary care upon the part of the bailee.

The judgment is affirmed.

STATE OF Arkansas

v.

J. B. NEELLY, *Appt.*

(.....Ark.....)

Selling intoxicating liquors to a minor
who says that he is buying it as agent for two

NOTE.—As to sales of Intoxicating Liquors to minors, see note to *Fletcher v. Forler* (Mich.) 10 L. R. A. 80; *State v. Soiggins* (N. C.) 10 L. R. A. 642, and note; *Gill v. State* (Ga.) 12 L. R. A. 422, and note.

sick teachers not named, at a college where there are more than two teachers, is a violation of a statute against selling to minors.

(December 15, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for White County convicting him of selling liquor to a minor. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. S. Brundidge, Jr.**, for appellant:

If Dye was in good faith sent by adult persons for the whiskey, and he stated at the time that he wanted it for another and gave their money in payment of it and then carried it and delivered it to the adult just as he had received it and as he states, and had no other interest in the whiskey except as an errand boy for adult persons, there was no sale to him and the jury should have been so instructed.

Wallace v. State, 54 Ark. 644; *Com. v. Lat-tinville*, 120 Mass. 385; *Monaghan v. State*, 4 L. R. A. 800, 66 Miss. 513; *Johnson v. State*, 68 Miss. 238; *Com. v. Remby*, 2 Gray, 508; *Young v. State*, 58 Ala. 358.

Messrs. James P. Clarke, Atty-Gen., and **Charles T. Coleman**, for appellee:

A liquor seller who contracts with a minor may be convicted of selling liquor to a minor, notwithstanding the fact may subsequently be disclosed that the minor acted as agent for his parent.

Siceluff v. State, 52 Ark. 56.

If the agent should, at the time of the purchase of the goods, acknowledge that he is purchasing for another person, but should not then name him, in such case he would be held personally liable, although the principal, when discovered, might also be liable for the debt.

Story, Ag. § 267.

An agent who conceals the fact of his agency and contracts as the ostensible principal is undoubtedly liable in the same manner and to the same extent as though he were the real principal in interest.

Mechem, Ag. § 554; *Winsor v. Griggs*, 5 Cush. 210; *Royce v. Allen*, 28 Vt. 234; *Cabot Bank v. Morton*, 4 Gray, 156.

Wood, J., delivered the opinion of the court:

The defendant was convicted of selling liquor to a minor, under section 1812, S. & H. Dig. The proof on behalf of the state showed that a minor purchased of the defendant one bottle of whiskey, without the written consent of his parents, but informed defendant at the time that he wanted the whiskey for two sick teachers, of Galloway College, who had furnished him the money, and sent him for the whiskey; that the whiskey was delivered to them, and he did not drink any himself. The names of the teachers, he did not want to disclose, and thinks he did not tell defendant their names. The defendant, for himself, testified that he did not sell the liquor, but sent it to the teachers, whose names the minor gave him; and as they were his friends, and sick, he did not charge them for the whiskey. The substance of the court's instructions was that if the minor purchased the whiskey for two teachers, as their agent, without disclosing their names to the defend-

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ant at the time of the purchase, the defendant would be guilty. But if the defendant gave the whiskey to the minor for the adults, although their names were not disclosed, or if he did not sell the whiskey, he would not be guilty, under this indictment. The defendant asked the court to charge the jury, in substance, that if the minor bought the liquor for the two teachers, and told the defendant he was purchasing for them, the defendant would not be guilty, although the names of the teachers were not disclosed.

The question is, Was it a sale to the minor, who disclosed the fact of agency, but did not give the name of his principal? This court is committed to the doctrine that a minor may be the agent of a purchaser or donee of liquor. *Wallace v. State*, 54 Ark. 542; *Siceluff v. State*, 52 Ark. 56. In the latter case it is said: "As between a seller and an agent who deals with him without disclosing the fact that he acts as agent, the latter, as well as the principal, is the purchaser." It is also a well-recognized principle that "though the agent discloses the fact that he is agent, if he conceals the name of his principal, he may be held personally liable as principal." *Mechem*, Ag. § 554. *Chancellor Kent* says: "It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent. If he contracts in behalf of his principal, and discloses his name at the time, he is not personally liable. But, if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf." 2 Kent, Com. 630, 631. And in *Judge Story's* work on Agency it is said: "If the agent, at the time of the purchase of the goods, acknowledged that he is purchasing for another person, but should not then name him, in such case he would be held personally liable, although the principal, when discovered, might also be liable for the debt." *Story*, Ag. § 267. The doctrine of these text-writers is approved and well supported by others, and by many adjudicated cases. *Whart. Ag. § 500; Owen v. Gooch*, 2 Esp. 567; *Thomson v. Davenport*, 9 Barn. & C. 78; *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Smith*, Mercantile Law, § 201; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Dunlap, Paley*, Ag. 369 *et seq.*

The rule is for the protection of the party dealing with the agent; as *Judge Kent* says, "to enable him to have recourse to the principal in case the agent had authority to bind him." 2 Kent, Com. p. 631. But it may be said that in this case the principal was sufficiently designated. Not so. The language of the minor, whom the jury believed, was: "I told the defendant I had two sick teachers and I wanted some whiskey for them. I don't think I told the defendant the names of the teachers." This is not naming the principal, in the sense the law requires. Had it been shown that there were only two teachers in

Galloway College, who were known to defendant, the case might have been different. In a suit against the agent, in such a case, upon a valid contract, the burden would be upon him to show that there were only two teachers. If there were more than two, it would be impossible, without a disclosure of their names, to tell which two of the teachers was intended at the time as principal, and which two the seller was contracting with. An agent could not exonerate himself, under such circumstances, from liability, although the real principal, when discovered, might also be bound. Story, Ag. § 367; Smith, Mercantile Law, § 201; *Winsor v. Griggs*, 5 Cush. 210; *Cabot Bank v. Morton*, 4 Gray, 160. In *Cobb v. Knapp*, 71 N. Y. 352, 27 Am. Rep. 51, it is held that: "It is not sufficient that the seller may have the means of ascertaining the principal of the agent. He must have actual knowledge." 1 Parsons, Cont. 64, note; *Raymond v. Crown & Eagle Mills Proprs.* 2 Met. 819.

Where the name of the principal is not disclosed, the presumption is the agent intended to be liable. And where the seller does not ask the name of the principal, when unknown, the presumption is he only intended to bind the agent. The case under consideration was a cash transaction. But it was necessary to discuss it from the standpoint of a credit transaction, in order to determine the true test of agency.

In the light of the above familiar principles, no error is found in the charge of the court, and its judgment is therefore affirmed.

FLORSHEIM BROTHERS DRY GOODS
CO., Appt.,
v.
LESTER & LESTER.

(.....Ark.....)

The taking of a single mortgage by a foreign corporation for past-due indebtedness for goods sold at its domicile is not doing business in the state within the meaning of restrictions on business of foreign corporations.

(January 5, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lafayette County in favor of defendants in an action brought to foreclose a mortgage. *Reversed.*

Statement by Hughes, J.:

The appellant, a foreign corporation, organized under the laws of the state of Louisiana, and doing business at Shreveport, in said state, through its president took a mortgage from the appellees at New Lewisville, in the state of Arkansas, to secure the

NOTE.—On the question, what constitutes doing business by a foreign corporation within the meaning of statutes restricting or imposing conditions upon such business, see authorities collected in note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 229, also case of *Milan Milling & Mfg. Co. v. Gorton* (Tenn.) 26 L. R. A. 125, 27 L. R. A.

payment of \$1,600, with interest, which the appellees owed it for the purchase price of goods sold them on a credit, the debt having matured at the time the mortgage was given. This suit was brought in equity, to foreclose said mortgage, in the Lafayette circuit court. The defense was made that the appellant was a foreign corporation, and that it had failed to comply with section 11, article 12, of the Constitution of Arkansas, which provides that "foreign corporations may be authorized to do business in the state, under such limitations and restrictions as may be prescribed by law, provided that no corporation shall do any business in this state except while it maintains therein one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." The act of the legislature passed in pursuance of this section of the constitution is that, "before any foreign corporation shall begin to carry on business in the state, it shall, by its certificate, under the hand of the president and seal of the company, filed in the office of the secretary of state, designating an agent, who shall be a citizen of this state, upon whom service, summons and other process may be served," etc. Acts 1887, p. 234, § 1. A further defense was that the suit was brought before the lapse of the time for which an extension had been given, after maturity of the mortgage; but as there was a decision against the appellees upon this defense, and they have not appealed, no question in relation to it is before this court. The demurrer was overruled as to the first defense.

Mr. T. E. Webber, for appellant:

The taking of the mortgage to secure a valid debt, after its maturity, in the state of Arkansas, was not "carrying on business" in this state, within the terms of the statute prohibiting foreign corporations from so doing.

Gunn v. White Sewing Mach. Co. 18 L. R. A. 206, 57 Ark. 24, 4 Inters. Com. Rep. 309; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1187; *Scruggs v. Scottish Mortg. Co.* 54 Ark. 568.

The taking of the mortgage was security only for valid business transactions already consummated, just as the taking of a note for an antecedent debt.

The power of a corporation to hold real estate is shown in 4 Am. & Eng. Encyclop. Law, pp. 230 *et seq.*

The presumption is in favor of the power of the corporation so to do unless rebutted.

American & Foreign Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Runyan v. Coster*, 39 U. S. 14 Pet. 122, 180, 10 L. ed. 383, 386; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 78; *Boulware v. Davis*, 9 L. R. A. 601, 90 Ala. 207; 8 Am. & Eng. Encyclop. Law, p. 357, note 5.

A foreign corporation may take a mortgage to secure a debt.

8 Am. & Eng. Encyclop. Law, p. 360, note 1. And that, too, even though it has not complied with statutory conditions.

Northwestern Mut. L. Ins. Co. v. Overholt, 4 Dill. 297; *Daly v. National L. Ins. Co.* of

United States, 64 Ind. 5; *Walter A. Wood Moving Mach. Co. v. Caldwell*, 55 Ind. 270, 28 Am. Rep. 641.

Where it is an exceptional act, as in this case, the authority of the corporation is recognized, not only to do the act, but even if prohibited from dealing in such property, the corporation may take it, in the face of such prohibition, in satisfaction of a valid debt or by way of security.

1 Morawetz, Priv. Corp. § 321; 2 Morawetz, Priv. Corp. § 662, note 3; *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387; *Cooper Mfg. Co. v. Ferguson*, 181 U. S. 727, 28 L. ed. 1187; *Boulevard v. Davis*, 9 L. R. A. 601, 90 Ala. 207; *Morgan v. White*, 101 Ind. 415.

Mr. L. A. Byrne, for appellees:

The prohibition of the constitution is against doing "any business" in this state without compliance with the condition specified.

The doing of a single act of business, if it be in the exercise of a corporation function, is as much prohibited as the doing of a hundred such acts.

The phrase "doing any business" is more comprehensive in meaning than "carrying on or engaging in business," generally, which involves the idea of continuance or "the repetition of like acts."

Farrior v. New England Mortg. Secur. Co. 88 Ala. 275.

In that case it was determined by that court that the execution of a single mortgage in the state of Alabama to secure notes which were made payable in another state, is an act of business transaction, which is prohibited by the constitution and the legislative act.

Horn Silver Min. Co. v. New York, 148 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57.

Hughes, J., delivered the opinion of the court:

The only question in this case is whether the taking of a single mortgage in this state, by a foreign corporation, for a past-due indebtedness for goods sold in the foreign state, the domicile of the foreign corporation, is doing business in this state, within the meaning of the constitution and the act of the general assembly above quoted. There can be no doubt that the sale and shipment of the goods was interstate commerce. It does not matter, then, how many sales and shipments there might have been; they could not be prohibited by the statute. There is no evidence that more than one mortgage was taken by the appellant in this state. Was the taking of this mortgage doing any business prohibited by the laws of this state to be done by a foreign corporation before complying with the provisions of the constitution and statute referred to? If so, the mortgage cannot be enforced in the courts of this state, for if a single act of business be done by a foreign corporation in this state, within the meaning of these provisions of the law, it is

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as much within the prohibition contained in them as any number of acts of business would be. But we are of the opinion that the taking of a single mortgage to secure a past-due debt, with no intention apparent to transact other business of the kind in the state, is not doing business, within the meaning of the constitution or the statute.

There is a division of authorities on this question. But we think the better view of the question is presented in *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 737, 28 L. ed. 1187, in which the court said: "Reasonably construed, the constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business, by a foreign corporation, without the filing of the certificate and the appointment of an agent, as required by the statute." The constitution requires the foreign corporation to have one or more known places of business in the state before doing any business therein. This implies a purpose, at least, to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the state. To have known places of business, it must be carrying on or intending to carry on business. The statute passed to carry the provision of the constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the state where the business of the corporation is to be carried on. The meaning of the phrase "to carry on," when applied to business, is well settled. In Worcester's Dictionary the definition is: "To prosecute, to help forward, to continue; as to carry on business," etc. The obvious construction, therefore, of the constitution and the statute, is that no foreign corporation shall begin any business in the state, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the state, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate, as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business, or have a place of business, in this state, would be unreasonable and incongruous." The constitution and statute of Colorado, construed in this opinion, are substantially the same as ours. The strongest case, perhaps, apparently in conflict with the case in 118 U. S. is *Farrior v. New England Mortg. Secur. Co.*, 88 Ala. 275. The demurrer to the answer of appellees should have been sustained.

The judgment is reversed, and the cause is remanded, with directions to sustain the demurrer to the answer.

M. E. HATCHER

v.

A. B. BUFORD.

(.....Ark.....)

1. The presumption is that gifts made during the donor's last illness and when all hope of recovery was gone, are *causa mortis*.
2. A gift of notes by the payee to his sister, the mother of the maker, made as an indirect way of giving the maker of the notes an interest in a mercantile business for which the notes were given, at a time when the donor was able to be at the store, although nearing death from consumption, should be regarded as a gift *inter vivos* and not *causa mortis*.
3. Bank stock given a few nights before the donor's death from consumption and while on his death-bed is a gift *causa mortis*.
4. A donor *causa mortis* remains seised or possessed of the property until death within the meaning of a statute giving dower in personal property of which he dies seised.
5. The law at the time of the husband's death governs the wife's right of dower, as her inchoate right is not a vested one.

(January 12, 1896.)

CROSS-APPEALS from a decree of the Circuit Court for St. Francis County in a proceeding brought to establish dower rights in the estate of T. A. Hatcher, deceased, the defendant appealing from so much of the decree as allowed dower out of the realty in fee and the plaintiff appealing from so much of the decree as denied dower in certain personalty which had been transferred prior to the decedent's death. *Reversed on plaintiff's appeal.*

Statement by Wood, J.:

T. A. Hatcher, a prosperous merchant of Forrest City, Ark., died December 10, 1891. He had never had any children, but left a widow, M. E. Hatcher, the appellant. About two months prior to his death, he sold an interest in his store to Walter Buford, his nephew, taking in payment therefor notes of the said Walter amounting to \$2,500. These notes Hatcher indorsed to his sister Mrs. A. B. Buford, and mailed them to her on the 9th of October, 1891. About one month before his death, Hatcher directed his agent to buy \$4,000 of bank stock, and, about 10 days before, \$1,000 more. This stock was issued in the name of Mrs. Buford, and was delivered by Hatcher's agent to her son Walter. Hatcher made a will, in which, among other bequests, was a provision for his wife; and Mrs. Buford was declared residuary legatee and devisee. Appellant's bill (omitting non-essentials) sets up a renunciation of the will, and that the disposition of the notes and bank stock in the manner indicated was done with intent to defeat appellant's dower, and was fraudulent; that the lands of which her husband died seised were a new acqui-

sition. She prays to be endowed of half the notes and bank stock, also of half the fee in the real estate. The answer denied the fraud, claimed an absolute gift of the personalty, and that dower in the realty should be of one half for life. The decree refused dower in the notes and bank stock, but granted it in one half the real estate in fee. Both parties have appealed, and the issues presented by this record are: First. Was there a gift? Second. If a gift, was it *inter vivos* or *causa mortis*? Third. If a gift *causa mortis*, did it defeat the widow's dower? Fourth. Should dower in the realty be according to the law at the time of the marriage or at the death of the husband?

Mr. N. W. Norton, for appellant:

The testamentary character of the act makes the widow's rights.

Baker v. Smith (N. H.) March 18, 1891; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Reynolds v. Vance*, 1 Heisk. 344; *Killinger v. Reidenhauer*, 6 Serg. & R. 531; *Brewer v. Connell*, 11 Humph. 500; *Jenny v. Jenny*, 24 Vt. 824; *Gilson v. Hutchinson*, 120 Mass. 27; *Jiggitt v. Jiggitt*, 40 Miss. 718; *Creelius v. Horst*, 4 Mo. 419; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 505.

Where the conveyance is fraudulent, the wife it not bound.

Brown v. Bronson, 35 Mich. 415; *Rabbitt v. Gaither*, 67 Md. 94; *Manikoe v. Beard*, 85 Ky. 20.

A gift made by one in his last sickness, during the whole course of which he does not expect to recover, is presumptively a gift *mortis causa*.

Merchant v. Merchant, 2 Bradf. 432; *Cutting v. Gilman*, 41 N. H. 151; *Kenitons v. Seava*, 54 N. H. 37; *Roper, Legacies*, pp. 2, 23.

Mears, John Gatling and Rose, Hemingway & Rose, for appellee:

No gift which a husband may make during his life can be set aside on account of its being a fraud upon his wife's dower right, because she has no dower right while he is alive.

McClure v. Owens, 32 Ark. 444; *Wolff v. Perkins*, 51 Ark. 45; *Hawitt v. Cox*, 55 Ark. 236; *Cameron v. Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; 9 Am. & Eng. Encyclop. Law, p. 849; *Holmes v. Holmes*, 8 Paige, 363, 8 L. ed. 186; *Richards v. Richards*, 11 Humph. 429; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Padfield v. Padfield*, 78 Ill. 16; *Dunnoch v. Dunnoch*, 8 Md. Ch. 141; *Stewart v. Stewart*, 5 Conn. 317; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 219.

The wife is to be endowed according to the law existing at the time of the marriage.

Hill v. Mitchell, 5 Ark. 611; *Meniffee v. Meniffee*, 8 Ark. 40; *Tate v. Jay*, 31 Ark. 579; *Russell v. Rumsey*, 35 Ill. 371; *Williams v. Courtney*, 77 Mo. 587; *O'Kelly v. Williams*, 84 N. C. 281; *Johnston v. Vandyke*, 6 McLean, 423; *Lawrence v. Miller*, 2 N. Y. 250; *Royston v. Royston*, 21 Ga. 172; *Tiller v. McCoy*, 88 Ark. 91; *Shryock v. Cannon*, 39 Ark. 484; *Criscoe v. Hambrick*, 47 Ark. 287; *Brwin v. Puryear*, 50 Ark. 356; *Sutton v. Askeu*, 66 N. C. 172, 8 Am. Rep. 500; *Williams v. Munroe*, 67 N. C. 164; *Bruce v. Strickland*, 81 N. C. 270; *O'Con-*

NOTE.—For general subject of gifts *causa mortis*, see cases in note to *Ridden v. Thrall* (N. Y.) 11 L. R. A. 634.

As to constructive delivery of such gift, see note to *Page v. Lewis* (Va.) 13 L. R. A. 170, 37 L. R. A.

nor v. Harris, Id. 279; *Jenkins v. Jenkins*, 82 N. C. 208; *Moreau v. Detchemendy*, 18 Mo. 522.

A statute will never be construed to have a retrospective operation where that construction may be avoided.

Crittenden v. Johnson, 14 Ark. 464; *Baldwin v. Cross*, 5 Ark. 510; *Couch v. McKee*, 6 Ark. 493; *Moore v. McLendon*, 10 Ark. 514; *Duke v. State*, 56 Ark. 485.

Wood, J., delivered the opinion of the court:

1. Was there a gift? The only controversy on this point was as to the delivery. Delivery, of course, is essential to a gift. 8 Pom. Eq. Jur. § 1150; *Ammon v. Martin*, 59 Ark. 191. Mrs. Buford testified that the bank stock was not delivered to her until after her brother's death, while Walter, her son, testified that he delivered the bank stock to his mother before Hatcher's death. No question is raised as to the delivery of the notes. The evidence supports the finding of the chancellor that there was a gift of the bank stock and notes.

2. Was the gift *inter vivos* or *causa mortis*? The *donatio inter vivos*, as its name imports, is a gift between the living. It is perfected and becomes absolute during the life of the parties. The *donatio causa mortis*, literally, "is a gift in view of death." But this does not give us an adequate conception of the gift as it is understood and treated by the authorities. We find from an examination of these that where one, in anticipation of death from a severe illness then afflicting him, or from some imminent peril to his life, to which he expects to be exposed, makes a gift accompanied by the delivery of the thing given either actual or symbolic, which is accepted by the donee, the law denominates such a gift a "*donatio causa mortis*." 3 Pom. Eq. Jur. §§ 1146 *et seq.*; 3 Redf. Wills, p. 322, §§ 42 *et seq.*; 2 Beach, Eq. Jur. p. 1144, § 1062; 1 Woerner, Administration, §§ 57, 58; Thornton Gifts & Advancements, chap. 1, p. 12; 1 Wms. Exrs. 844; *Gourley v. Linsenbiger*, 51 Pa. 845; 2 Kent, Com. 444; 2 Bl. Com. 514; *Hebb v. Hebb*, 5 Gill, 506; Schouler, Pers. Prop. § 185.

Were the notes and bank stock in controversy given under such circumstances? Both the pleadings and the proof settle conclusively that the gifts were in contemplation of the near approach of death from the illness then afflicting the donor, Hatcher, to wit, consumption. The gifts being made during the last illness, and when all hope of recovery was gone, the presumption is they were *causa mortis*. *Merchant v. Merchant*, 2 Bradf. 432; 3 Pom. Eq. Jur. § 1146, *supra*; *Lawson v. Lawson*, 1 P. Wms. 441; *Henschel v. Maurer*, 69 Wis. 576. The conditions inhering in a gift made under such circumstances do not have to be expressed. The law attaches them as a part of the essential nature of a gift *causa mortis*. 2 Beach, Eq. Jur. § 1063; *Williams v. Guile*, 117 N. Y. 848, 6 L. R. A. 366; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 318; *Emery v. Clough*, 63 N. H. 553, 56 Am. Rep. 548. But it must not be forgotten that an absolute gift— 27 L. R. A.

one *inter vivos*—may be made by one upon his deathbed, and who is aware of the near approach of death from his then ailment. Thornton, Gifts & Advancements, § 21, p. 24, and authorities cited. Is there anything in the proof to overcome the presumption of gifts *causa mortis*? As to the notes, the testimony shows that Hatcher was up and at his store on the day these were executed; that they were delivered on the same day; and that the donor was able to drive out after this transaction. It also shows that it was Hatcher's desire to give to his nephew Walter Buford an interest in the store, and that Walter declined to take it. The notes were executed for this interest, and immediately indorsed by the payee, the donor, to the donee, the mother of the maker of the notes. The gift to his nephew of an interest in his mercantile business seems to have been the real purpose of the donor. Such a gift, of course, would have been incompatible with the limitations which the law imposes upon the use and enjoyment of the subject-matter of gifts *causa mortis*, and the attribute of revocability attaching to such gifts. 2 Beach, Eq. Jur. § 1063; 3 Redf. Wills, pp. 322-343. We think the time and circumstances of the gift of the notes, as indicated by the proof, supports the chancellor's finding that this was a gift *inter vivos*. The same, however, cannot be said of the bank stock. Hatcher was upon his deathbed, and unable to attend to any business, when this was given. Four thousand was taken out about one month before his death, and one thousand only about ten days before. It was not delivered until a few nights before his death. We find nothing whatever in the proof to take the bank stock out of the presumption that it was a gift *causa mortis*, and nothing to support the chancellor's conclusion as to this.

3. Being a gift *causa mortis*, did it defeat the widow's dower? Section 2541, Sand. & H. Dig., provides: "A widow shall be entitled, as a part of her dower, absolutely and in her own right to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debt whereof the husband died seised or possessed." Was the donor seised or possessed of the bank stock at the time of his death? The terms "seised" or "possessed," as thus used with reference to personalty, mean simply ownership, which carries with it the actual possession, or a right to the immediate possession. The real inquiry, then, is as to when the title or property in the subject-matter of a *donatio causa mortis* passes. We are aware that there is conflict and confusion in the authorities upon this point, doubtless growing out of the modes of *donatio causa mortis* recognized originally by the Roman jurisprudence whence the doctrine is derived. Under one of these, the subject-matter of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. Under another, the gift was made upon condition that the thing given should become the property of the donee only in the event of the donor's death. Under

the former, delivery was essential; under the latter, it was not. Thornton, Gifts & Advancements, p. 44; *Ward v. Turner*, 2 Ves. Sr. 431; Abbott, Cases on Wills, 169. Mr. Roper, in his work on Legacies, tells us that, after the contest upon the subject had subsided, Justinian gives a definition of "*donatio causa mortis*," which alone is the proper one. 1 Roper on Legacies, 1. Mr. Pomeroy quotes this definition, and translates it as follows: "A *donatio causa mortis* is that which is made in expectation of death; as when anything is so given that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given." 3 Pom. Eq. Jur. § 1146. Judge Redfield, in his work on Wills, says: "The conclusion of Justinian's definition seems to embrace the essentials of the gift, viz., the gift is such that the donor prefers himself to retain dominion over it rather than have the donee acquire it. But he prefers the donee should have it rather than his heir." 3 Redf. Wills, 323. Those authorities which hold that the property in the thing given passes upon delivery and during the life of the donor have obviously followed the kind of *donatio causa mortis* referred to *supra*, existing under the Roman law prior to Justinian's definition, which recognized the subject-matter of the gift as becoming at once the property of the donee, defeasible upon a condition subsequent, and under which delivery was essential. This is a formidable position, and supported by high authority. *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500; *Chase v. Redding*, 13 Gray, 418; *Marshall v. Berry*, 18 Allen, 48; Thornton, Gifts & Advancements, § 46; *Nicholas v. Adams*, 2 Whart. 17; *Daniel v. Smith*, 64 Cal. 346; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 548; Schouler, Pers. Prop. § 187; *Dole v. Lincoln*, 81 Me. 423. Since the decision of Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sr., *supra*, it has been the settled law of England that delivery is essential in gifts *causa mortis*; and there has never been any controversy upon that point in this country. Since delivery is an essential element to complete the transfer of title or property in personalty (Schouler, Pers. Prop. § 87), the authorities holding to the view that the title passes and becomes vested in the subject-matter of a *donatio causa mortis* during the life of the donor are dominated by the idea of delivery. But, while delivery is a prerequisite to the transfer of title, it does not follow that there is always a transfer of title where there is a delivery, nor that the delivery of the chattel and the transfer of the title are coeval, in cases where the title is transferred. We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death; i. e., the donor's death is a condition precedent to the vesting of the title

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to the thing given in the donee. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text-writers. 1 Wms. Exrs. 782; 3 Pom. Eq. Jur. § 1146; *Baker v. Smith* (N. H.) 23 Atl. Rep. 82; *Merchant v. Merchant*, 2 Bradf. 432; *Gardner v. Parker*, 3 Madd. 184; *Edwards v. Jones*, 1 Myl. & C. 226; *Staniland v. Willott*, 3 Macn. & G. 664 *et seq.*; *Wells v. Tucker*, 3 Binn. 370.

This view is certainly more consonant with the conditions which all the authorities agree attach to gifts of this kind; viz., that the reclamation of the donor, or his recovery from existing illness or escape from peril apprehended, or the death of the donee before that of the donor, will each, *ipso facto*, revoke the gift. *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 868; *Merchant v. Merchant*, *supra*. This doctrine we have already approved in *Ammon v. Martin*, 59 Ark. 191, where, in speaking of *donatio causa mortis*, we said: "The title to the thing given remains in the donor, and the gift is subject to revocation at any time prior to his death." True, we also said in this case, with reference to the delivery of a note by the donor, while on her deathbed, to the agent of the donee, "that this was sufficient to make the gift complete, no matter what was its character." But this latter statement was made solely in regard to the delivery. It might be construed, however, as applying to the gift as a whole, and not simply to the element of delivery. In that view the language would be inaccurate. In *Ammon v. Martin*, *supra*, it was not necessary for us to distinguish between gifts *inter vivos* and *causa mortis*, the only question there being, Was there a gift? But it may be said that this view abolishes all distinction between gifts *causa mortis* and testamentary dispositions, since the *donatio causa mortis* is wholly inchoate and conditional, not passing title until the donor's death. Many authorities do speak of the *donatio causa mortis* as but another form of testamentary disposition, and liken it unto the testamentary disposition, for the reason that it is revocable during the donor's life, is subject to his debts if there be a deficiency of assets, and does not become an absolute gift until the donor's death. *Jones v. Brown*, 34 N. H. 439; *Baker v. Smith*, *supra*; 2 Kent, Com. 445; Schouler, Pers. Prop. 188. But while, in these particulars, it resembles a testamentary disposition, it differs from it, in that the subject matter of the gift is delivered to the donee during the life of the donor, and at his death does not pass into the hands of the executor or administrator, but remains with the donee. This is not because the property or title has passed to the donee during the life of the donor, or that the donor is not actually seized in law at the time of his death, but because it is one of the peculiar characteristics of this species of gift that, at the donor's death, the donee takes, instead of the heir, according to the intention of the donor, as manifested during his life by delivery to the donee. It should be observed in this connection that of the cases cited *supra*, holding to the view that title vested in the donee

during the life of the donor, *Chase v. Redding*, 18 Gray, 418, was the only one in which the widow was a party; but *Marshall v. Berry*, 18 Allen, 43, stands on a parity with it by analogy, and the supreme court of Massachusetts is undoubtedly committed to the doctrine that donations *causa mortis* are valid against the rights of the widow. But the dower rights of the widow rest on a different basis to that of a child or heir. *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 219, and authorities there cited. Hence it may be questioned as to whether any case is an authority against the dower rights of the widow where she is not a party, although holding that title vests in the donee during the life of the donor. For instance, in *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, *supra*, the supreme court of New Hampshire maintains as strongly as in any of the cases that title passes during the life of the donor to the subject-matter of a gift *causa mortis*. But in the case of *Baker v. Smith*, *supra* (a much later case), the question being whether a married woman could deprive her husband of his statutory distributive share of her personal estate by a gift *causa mortis*, the same court said: "What she cannot do in this respect by will she cannot do by another form of testamentary disposition, which is of the nature of a legacy, and becomes a valid gift only upon the decease of the donor." So, also, Mr. Schouler, who, in his work on Personal Property, contends that the better doctrine is the one which treats the title as vesting upon delivery during the donor's life, yet maintains, in his work on Wills, that "the same principles which regulate the wife's testamentary disposition of her personal property should likewise regulate her gift *causa mortis*." Schouler, Wills, § 63; Schouler, Pers. Prop. § 187. And the same author, in commenting upon *Marshall v. Berry*, *supra*, after saying, "This decision is to be regretted," continues: "The implied conditions of revocation which accompany such gifts make the disposition so nearly ambulatory, like that of a will, that the policy of the law should not differ in the two cases, except to discountenance such gifts as much as possible." Schouler, Wills, § 63. Judge Redfield, upon this subject, says: "It seems questionable whether a man of substance can be allowed to dispose of his whole estate, and leave his widow a beggar, by means of this species of gift, which is clearly of a testamentary character, where the statute expressly provides that the widow may waive the provisions of the will, and come in for her share of the personal estate under the statute by way of distribution." And he adds: "It is possible the American courts have felt too reluctant to recognize the difference in this respect between the widow and next of kin." 3 Redf. Wills, 324, note. Under our law, a man may deprive his children of their inheritance by his will if he names them. So, also, he may deprive them by a *donatio causa mortis*. But he cannot deprive the widow of her dower rights by either. And this for the reason,

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in both instances, that he dies "seised" of the property so conveyed. This, in our opinion, is the only consistent and logical conclusion; for if the title passes during the donor's life, and he has the absolute right to dispose of his personality as he pleases, which he has, how can it be said that the donee's rights are inferior to those of the widow, except upon the doctrine above enunciated? This conclusion makes it unnecessary for us to pass upon the question of fraud, though many courts of high authority announce that fraud may be predicated upon such a transaction as this record discloses. *Manske v. Beard*, 85 Ky. 20; *Davis v. Davis*, 5 Mo. 183; *Stone v. Stone*, 18 Mo. 389; *Tucker v. Tucker*, 29 Mo. 350; *Straat v. O'Neil*, 84 Mo. 68; *Thayer v. Thayer*, *supra*. However, the majority of us are not satisfied with their reasoning or their conclusions. *Lines v. Lines*, 142 Pa. 149; *Pringle v. Pringle*, 59 Pa. 281, *contra*.

4. The fourth and last question, Is the widow endowed according to the law at the time of marriage or at the death of her husband?—is easy of solution, especially in view of the comparatively recent deliverances of our own court. In *Smith v. Howell*, 53 Ark. 279, the court said: "The inchoate right of dower during the lifetime of the husband is not an estate in land; it is not even a vested right, but a mere intangible, inchoate, contingent expectancy. The law regards it as an incumbrance on the husband's title."

She joins with her husband, not to alienate any estate, but to release a future contingent right. See also *Hewitt v. Cox*, 55 Ark. 285, and 287, where same language is quoted. In *Littell v. Jones*, 56 Ark. 189, the court, through Judge Hemingway, again said: "Persons who may be entitled to inherit under existing laws may suffer detriment by changes in the law that change the course of devolution, but there is no such thing as a vested right in a prospective heirship, or in the maintenance of the laws of descent, and, though their charge disappoint reasonable expectations, it comes within no constitutional inhibition." See also *Greggley v. Jackson*, 38 Ark. 492. Nothing more need be said. It is not true, as contended by counsel, that the wife acquired a vested remainder in the real estate of which her husband was seised during coverture. The argument of counsel for residuary devisee, being founded upon a false premise, however plausible and strong, must inevitably lead to an erroneous conclusion. Those of our decisions which mention dower as a vested right only used the term "vested" in the sense of assuring whatever right the law gave, and not in the sense that dower rights could not be affected or changed by a change in the law itself. It follows that the devisee, Mrs. Buford, could only claim under the law as it was at the death of Hatcher.

The decrees of the chancellor is affirmed as to the notes and real estate. As to the bank stock, it is reversed, and the cause is remanded, with directions to enter a decree conforming to this opinion.

VERMONT SUPREME COURT.

L. W. CRAIG

v.

Eugene GUNN, President, etc., of the Delaware & Hudson Canal Co., Trustee.

(.....Vt.....)

A foreign corporation having its principal office and place of business and various lines of railroad in another state, although it operates a road extending into the state where garnishment proceedings are attempted, is not subject to garnishment there under a statute providing that no person shall be summoned as trustee unless he resides in the state.

(December 3, 1894.)

EXCEPTIONS by the trustee in a garnishment proceeding to a ruling of the Rutland County Court refusing to discharge the trustee for want of jurisdiction. *Reversed.*

The plaintiff resides in Colorado where the contract out of which the cause of action arose was made, and defendant in New York. The trustee is a New York corporation who operates a branch railroad into Vermont. The plaintiff sought to reach wages due by the trustee to defendant for services rendered in New York, under a New York contract.

Further facts appear in the opinion.

Messrs. Butler & Maloney, for the trustee:

The action cannot be maintained upon the facts agreed to, and should have been dismissed.

Tovle v. Wilder, 57 Vt. 622; 8 Am. & Eng. Encyclop. Law, p. 307; *Wells v. East Tennessee, V. & G. Railroad*, 74 Ga. 548; *Tingley v. Bateman*, 10 Mass. 348; *Ray v. Underwood*, 8 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Squair v. Shea*, 26 Ohio St. 645; *Baxter v. Vincent*, 6 Vt. 621; *Rindge v. Green*, 52 Vt. 204.

Mr. J. A. Merrill for plaintiff.

Tyler, J. delivered the opinion of the court:

The principal parties were nonresidents, and the trustee was a foreign corporation, having its principal office and place of business in the city of New York, but operating lines of railroad extending from points in the state of New York to the city of Rutland, in this state. It also owned and operated various lines of railroad situated wholly in the state of New York. The contract upon which the suit was brought was made in another state, and the sum due from the trustee to the defendant was wages for services rendered by the defendant for the trustee upon a line of railroad lying wholly in the state of New York, under contract of employment made in that state, and there payable. Corporations are amenable to the trustee process, like private persons, but this mode of attach-

ing the personal property of a debtor, in the hands of a third person, is conferred only by statute; and section 1073, Rev. Laws, provides that no person shall be summoned as a trustee, unless at the time of the service of the writ he resides in this state. Citizens of another state, and subject to its laws and jurisdiction, are not within the jurisdiction of the courts of this state, and the credits in their hands have no *situs* here, and are no more attachable by this process than are the goods of a debtor situated in another state. *Baxter v. Vincent*, 6 Vt. 614; *Peck v. Barnum*, 24 Vt. 75; *Rindge v. Green*, 52 Vt. 204. In *Nichols v. Hooper*, 61 Vt. 295, the plaintiff and defendant resided in New York; and the debt that the plaintiff sought to recover, and the one due the defendant from the trustee, were contracted, and in law were payable, in that state. The trustee resided in this state, and was held liable; so that case is decisive of every question that arises in the present one, excepting the question of jurisdiction over the trustee, upon the facts stated.

Gold v. Housatonic R. Co., 1 Gray, 424, arose under a statute like our Rev. Laws, § 1073. The opinion of Shaw, *Ch. J.*, is as follows: "It is agreed that the defendants have leases of railroads in this county, and this would make a strong case for charging them as trustees, if they could be chargeable as such under any circumstances. But the case of *Danforth v. Penny*, 3 Met. 564, is decisive, and shows that a foreign corporation cannot be so charged. By Rev. Stat., chap. 109, § 6, 'all corporations may be summoned as trustees.' But what corporations? The very generality of the terms requires some qualification. It cannot be construed, literally, all corporations, in whatever part of the world established and transacting business. The answer is to be found in the statutes *in pari materia* then existing. The statute in question was only an extension of an existing system. It was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another state, is not chargeable by the trustee process, although found in this commonwealth, and here served with process. *Tingley v. Bateman*, 10 Mass. 348; *Nye v. Liscombe*, 21 Pick. 263. In the case of corporations which have no local habitation, the principle is this: If established in this commonwealth, by the laws thereof, they are inhabitants of this commonwealth, within the meaning of the law; but, if established only by the laws of another state, they are foreign corporations, and cannot be charged by the trustee process." This was the construction given a statute which contained no provision like our section 1073, that nonresidents should not be subject to the trustee process. In 1870 the statute was amended so that nonresidents, and corporations established by the laws of another state, might be summoned as trustees, if they had a usual place of business in Massachusetts. In *Larkin v. Wilson*, 106

NOTE.—As to service on foreign corporations, see note to *Foster v. Charles Betcher Lumber Co.* (S. Dak.) 23 L. R. A. 490.
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Mass. 120, the writ was served before the amendment to the former act was in force; and the court, for that reason, refused to hold a foreign corporation liable to the trustee process, and cited *Danforth v. Penny* and *Gold v. Housatonic R. Co.*, *supra*, in support of the position that such a corporation was not liable to be summoned as a trustee, though it was the lessee of a railroad in that state, and its principal officers resided there, and agents were employed there to manage the road. In the later case of *National Bank of Commerce v. Huntington*, 129 Mass. 444, it was held that a railroad corporation created by the laws of another state, and having an office in Massachusetts for the convenience of its stockholders, and for the better management of its finances and other business, where its principal officers were to be found, and where it carried on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, had a usual place of business in that state, within the meaning of the Act of 1870, and might be summoned as trustee. We have no statute like the Massachusetts Act of 1870, and, even under that act, this trustee process could not be maintained; for, though it is presumable that the trustee had depots, freight houses, and agents in this state, it did not appear that it had any such office here as is described in the Massachusetts act.

Drake on Attachment (sec. 474) says: "In this country, the question has been repeatedly presented, and the uniform tenor of the adjudications establishes the doctrine that whether the defendant resides, or not, in the state in which the attachment is obtained, a nonresident cannot be subjected to garnish-

ment there, unless, when garnished, he have in that state property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that state.

It was said in *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen. 339: "A corporation, being a mere creature of local statutes, can, of right, have no existence nor recognition beyond the limits of the state wherein it is established. By comity, such artificial persons are permitted to contract and sue in other states. If they avail themselves of that comity, . . . they may become liable to its jurisdiction, to the extent to which they have thus voluntarily subjected themselves."

This court held in *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278, that the defendant corporation was to be treated as a citizen of the state in which it was incorporated, and, there being no attachment of property, jurisdiction could only be obtained by service of the writ upon the insurance commissioners of this state, and by a compliance by the defendant corporation with the statute which requires foreign insurance companies to agree that they may be sued in this state, which, as the court said in the case last cited, "is equivalent to an agreement that they may be found here for the service of process." The debt due from the trustee to the defendant, of course, had no *situs* in this state, unless the trustee resided here, within the meaning of our statute. It cannot be maintained that it did reside here. We find no occasion to depart from the decision in *Towle v. Wilder*, 57 Vt. 622, though no opinion was written in that case.

Judgment reversed, trustee discharged, and action dismissed.

RHODE ISLAND SUPREME COURT.

Henry R. BEEHLER

v.

DANIELS, CORNELL & CO.

(.....R.)

The owner of a building is not liable to members of a fire department for failure to guard an elevator well, or for so packing merchandise as to conduct them to such well when entering under a license conferred by law to extinguish a fire.

(May 1, 1894.)

ON demurrer to the declaration in an action brought to recover damages for personal injuries alleged to have resulted to plaintiff because defendant negligently left his premises in an unsafe condition. *Demurrer sustained.*

The facts are stated in the opinion.

Mr. W. G. Roelker, for defendants, in support of the demurrer:

The plaintiff was a mere licensee and was in the building by virtue of his employment.

NOTE.—See similar case of *Woodruff v. Bowen* (Ind.) 22 L. R. A. 198.

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The licensee assumes all risk of injury to which he may be exposed by reason of the condition of the premises, and actionable negligence exists only where the one whose act causes or occasions the injury, owes to the injured party a duty either created by contract or by operation of law, which he has failed to discharge.

Cooley, Torts, p. 318; *Woodruff v. Bowen* (Ind.) 22 L. R. A. 198; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.

Where the entry of the licensee is permissive only there can ordinarily be no recovery for a neglect properly to guard the premises by which such person may be injured.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Metcalf v. Cunard S. S. Co.* 147 Mass. 66; *Heinlein v. Boston & P. R. Co.* Id. 136; *Gordon v. Cummings*, 9 L. R. A. 640, 152 Mass. 513; *Bedell v. Berkey*, 76 Mich. 435; *Trask v. Shotwell*, 41 Minn. 66.

In *Gibson v. Leonard*, 37 Ill. App. 349, a case where a fireman who entered a building in the night-time was injured in the using an elevator which was defective, having a rotten rope, which broke and let the elevator fall upon him, the court held that he could not recover.

In *Mathews v. Bensel*, 51 N. J. L. 38, the court says: "The substantial ground is that the defendants did not properly construct their plant, and being a dangerous instrument, did not surround it with proper safeguards; but there is no principle which imposes such a duty upon the owner of property with respect to a mere licensee.

Reardon v. Thompson, 149 Mass. 237; *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 369; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 54 Am. Rep. 718; *Victory v. Baker*, 67 N. Y. 266; *Thiele v. McManus*, 3 Ind. App. 182; *Lary v. Cleveland, O. C. & I. R. Co.*, 78 Ind. 823, 41 Am. Rep. 572; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 788; *Indianapolis v. Emmelman*, 108 Ind. 580, 58 Am. Rep. 65; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399; *Faris v. Hoberg*, 134 Ind. 269.

Where a person is a mere licensee he has no cause of action on account of the dangers existing in the place he is permitted to enter.

Pollock, Torts, p. 426; *Boleh v. Smith*, 7 Hurlst. & N. 736; *Ray*, Negligence of Imposed Duties, p. 22; *Thiele v. McManus*, and *Reardon v. Thompson*, *supra*; *Plummer v. Dill*, 156 Mass. 426; *Trask v. Shotwell*, 41 Minn. 66; *Sweeney v. Old Colony & N. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Metcalfe v. Cunard S. S. Co.*, 147 Mass. 66; *Gordon v. Cummings*, 9 L. R. A. 640, 152 Mass. 518; *Armstrong v. Medbury*, 67 Mich. 254; *Bedell v. Berkey*, 76 Mich. 486.

Messrs. Walter B. Vincent and Amasa M. Eaton, for plaintiff, *contra*:

An entry upon land to save goods which are in jeopardy of being lost, or destroyed by water, fire or any like danger, is not trespass.

Proctor v. Adams, 118 Mass. 376, 18 Am. Rep. 500, citing 21 Hen. VII. 27, 28, pl. 5; *Bacon*, Abr. Trespass, 213; *Vin. Abr. Trespass*, H, a, 4, pl. 24, K, a, pl. 3.

An officer of the law who enters upon premises in the performance of his duty is not a mere licensee, and may maintain an action for their defective condition.

2 Shearm. & Redf. Neg. § 705, citing *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Learoyd v. Godfrey*, 138 Mass. 815.

If a person, being on the premises of another on lawful business without any fault or negligence of his own, falls through a hole on such premises, the occupant will be held responsible.

Addison, Torts, 8d ed. p. 163; *Gordon v. Cummings*, 9 L. R. A. 640, 152 Mass. 518; *Engel v. Smith*, 82 Mich. 1.

Stiness, J., delivered the opinion of the court:

The plaintiff seeks to recover for injuries caused by falling into an elevator well in the defendants' building, which he entered in the discharge of his duty as a member of the fire department of the city of Providence in answering a call to extinguish a fire. The negligence alleged in the first count is a failure to guard and protect the well; and, in the second count, such a packing of merchandise as to guide and conduct one to the unguarded and unprotected well. The defendants demur

to the declaration, alleging as grounds of demurrer that they owed no duty to the plaintiff; that he entered their premises in the discharge of a public duty, and assumed the risks of his employment; that he was in the premises without invitation from them; and that they are not liable for consequences which they could not and were not bound to foresee. The decisive question thus raised is, Did the defendants, under the circumstances, owe to the plaintiff a duty, for failure in which they are liable to him in damages? The question is not a new one, and we think it is safe to say that it has never been answered otherwise than in favor of the defendants. The plaintiff argues that it was his duty to enter the premises, and, consequently, since an owner may reasonably anticipate the liability of a fire, a duty arises from the owner to the fireman to keep his premises guarded and safe. An extension of this argument to its legitimate result, as a rule of law, is sufficiently startling to show its unsoundness. The liability to fire is common to all buildings and at all times; hence every owner of every building must at all times keep every part of his property in such condition that a fireman, unacquainted with the place, and groping about in darkness and smoke, shall come upon no obstacle, opening, machine, or anything whatever which may cause him injury. This argument was urged in *Woodruff v. Bowen* (Ind.) 23 L. R. A. 198, but the court said: "We are of the opinion that the owner of a building in a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who in a contingency may enter the same under a license conferred by law." Undoubtedly the plaintiff in this case had the right to enter the defendants' premises, and the character of his entry was that of a licensee. *Cooley*, Torts, 813. But no such duty as is averred in this declaration is due from an owner to a licensee. This question is discussed in the case just cited, as also in many others. For example, in *Reardon v. Thompson*, 149 Mass. 267, *Holmes, J.*, says: "But the general rule is that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of the night, is a danger which a licensee must avoid at his peril." So in *Mathews v. Bensel*, 51 N. J. L. 30, *Beasley, Ch. J.*, says: "The substantial ground of complaint laid in the count is that the defendants did not properly construct their planer, and, being a dangerous instrument, did not surround it with proper safeguards. But there is no legal principle that imposes such a duty as this on the owner of property with respect to a mere licensee. This is the recognized rule. In the case of *Holmes v. North Eastern R. Co.*, L. R. 4 Exch. 254, *Baron Channell* says that, 'where a person is a mere licensee, he has no cause of action on account of the danger existing in the place he is permitted to enter.'" In *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262, this question is fully examined, the court holding it to be well settled, if the

plaintiff was at the place where the injury was received by license merely, that the defendant would owe him no duty, and that he could not recover. See also *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 899; *Gibson v. Leonard*, 37 Ill. App. 844; *Bedell v. Berkey*, 76 Mich. 435. There is a clear distinction between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. The plaintiff's declaration does not set out a cause of action upon either of these grounds, and the cases cited and relied on by him fall within the two classes of cases described, and mark the line of duty very clearly. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, was the case of a police officer who had entered a building, the doors of which were found open in the night-time, to inspect it, according to the rules of the police department, and fell down an unguarded elevator well. A statute required such wells to be protected by railings and trap doors. Judgment having been given for the defendant at the trial, a new trial was ordered upon the ground of a violation of the statute. The court says: "The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls, and other dangers there existing, as, in the absence of any inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the right of others and the security of the public

health and welfare." Then, likening the plaintiff to a fireman, the court also says: "Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building." In *Learoyd v. Godfrey*, 138 Mass. 815, a police officer fell down an uncovered well in or near a passageway to a house where he was called to quell a disturbance of the peace. A verdict for the plaintiff was sustained upon the ground that the jury must have found that the officer was using the passageway by the defendant's invitation, and that the evidence warranted the finding. *Gordon v. Cummings*, 152 Mass. 518, 9 L. R. A. 640, was the case of a letter carrier who fell into an elevator well in a hallway where he was accustomed to leave letters in boxes put there for that purpose. The court held that there was an implied invitation to the carrier to enter the premises. In *Engel v. Smith*, 82 Mich. 1, the plaintiff fell through a trap door left open in a building where he was employed. The question of duty is not discussed in the case, but simply the fact of negligence. In *Bennett v. Louisville & N. R. Co.*, 103 U. S. 577, 26 L. ed. 235, the plaintiff, a passenger, fell through a hatch hole in the depot floor. The court construed the declaration as setting out facts which amounted to an invitation to the plaintiff to pass over the route which he took through the shed depot where the hatch hole was. In the present case the plaintiff sets out no violation of a statute, or facts which amount to an invitation, and, consequently, under the well-settled rule of law, the defendants were under no liability to him for the condition of their premises or the packing of their merchandise.

The demurrer to the declaration must therefore be sustained.

INDIANA SUPREME COURT.

City of INDIANAPOLIS, *Appl.*,

v.

CONSUMERS' GAS TRUST CO.

(.....Ind.....)

1. A reservation in an ordinance authorizing a gas company to lay pipes in streets, of the right to bind the company by future ordinances such as one to prohibit the streets to be cut without the consent of the aldermen and common council, is not made by a clause declaring the duty of the city attorney to compel compliance with existing and future ordinances.
2. The fact that a pavement was laid on a street after the acceptance by a gas company of an ordinance authorizing it to lay pipes

in the street and to take them up and repair them from time to time, does not restrict its rights.

3. An ordinance prohibiting streets to be cut without consent of the aldermen and common council is inoperative as to a gas company which, by acceptance of a prior ordinance has acquired the right to take up and repair its pipes in the streets from time to time as necessary.
4. Judicial knowledge is taken of the fact that leaks occur in gas pipes requiring immediate repair.

(January 16, 1906.)

APPEAL by a plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover the penalty prescribed by a city ordinance for digging into the pavement of a street without first obtaining permission of the city authorities. *Affirmed.*

NOTE.—As to franchise of gas company to use streets, see also note to Opinion of the Justices (*Re Manufacture of Gas, etc.*) (Mass.) 8 L. R. A. 497. 27 L. R. A.

The facts are stated in the opinion.

Meers, Bailey, Hawkins & Smith for appellant.

Meers, W. P. Fishback and W. P. Kappen, for appellee:

There was no compulsion on the city to grant its consent to any particular gas company to use and occupy the city streets.

Citizens Gas & Min. Co. v. Elwood, 114 Ind. 883; *Dill. Mun. Corp.* § 706; 2 *Wood, Railway Law*, p. 886; *Elliott, Roads & Streets*, p. 565; *Western Paving & Supply Co. v. Citizens Street R. Co.* 10 L. R. A. 770, 128 Ind. 581.

The city might have withheld its consent originally, but the consent once given, and that consent with its conditions accepted and acted upon by the appellee, the first ordinance became a contract, binding equally upon the city and the gas company; and the gas company acquired a vested right which was no longer in the power of the city to impair or alter.

Western Paving & Supply Co. v. Citizens Street R. Co. *supra*; 2 *Dill. Mun. Corp.* § 691; 8 *Am. & Eng. Encyclop. Law*, p. 748; *Indianapolis v. Indianapolis Gas Light & Coke Co.* 66 Ind. 896; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Ohio Life Ins. & T. Co. v. Dobolt*, 57 U. S. 16 How. 416, 14 L. ed. 997; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 683, 29 L. ed. 510.

Power to regulate does not imply the right to prohibit or destroy contract rights.

Elliott, Roads & Streets, p. 575; *New York v. Second Ave. R. Co.* 93 N. Y. 272.

Even if the second ordinance were professedly an exercise of police power, it should be held void because it is unreasonable.

Northern Liberties Comrs. v. Northern Liberties Gas Co. 12 Pa. 818.

Where there is a specific act followed by an act in general terms, the specific act remains in force, notwithstanding the general act.

Mattler v. Schaffner, 58 Ind. 245; *State v. Vanderburgh County Comrs.* 49 Ind. 457; *Tobacco & Pipe Makers Co. of London v. Woodroffe*, 7 Barn. & C. 838; *Johnstone v. Hudstone*, 4 Barn. & C. 921; *Com. v. Montrose*, 53 Pa. 391; *Reg. v. Rundle*, 24 L. J. M. O. 139.

Jordan, J., delivered the opinion of the court:

On the 14th day of November, 1890, the appellant, the city of Indianapolis, filed in the mayor's court its verified complaint against the Consumers' Gas Trust Company, appellee herein, whereby it charged said company with having violated section 1 of an ordinance of said city passed by the common council and board of aldermen on the 24th day of March, 1890, by cutting and digging into a certain macadam pavement upon the roadway of Madison avenue, a public street of said city, without first having secured the consent of said council and board of aldermen so to do, and without having filed a bond with the city clerk. A trial was had in the mayor's court upon a plea of not

guilty by the appellee, and resulted in the conviction of appellee, and a fine of \$10 was assessed and adjudged against it. An appeal to the circuit court was taken by the gas company, and in the latter court the company waived the general denial, and all rights to introduce evidence without a plea, and relied solely upon the defense set up in its answer filed in the circuit court. In the answer filed in that court the appellee alleged, substantially, the following facts: That on June 27, 1887, the city of Indianapolis passed a general ordinance, known as "No. 14," which ordinance was set out, and made a part of said answer. That in November, 1887, the appellee was organized as a corporation for the object of supplying gas to said city; that afterwards, same year, it duly accepted such ordinance, filed its bond, and in all things complied with the provisions and conditions thereof; that in 1888, and early in 1889, the said gas company, at great expense, and to the approval of the city, laid its mains in the streets thereof, and, among others, on Madison avenue, and is engaged in supplying over 10,000 consumers of natural gas; that later, in 1889, a macadam or broken-stone pavement was laid by the city on Madison avenue; that in March, 1890, the common council and board of aldermen of said city passed the ordinance referred to in the complaint, and alleged to have been violated by the defendant, and that the same was passed without the knowledge or consent of the defendant, and that defendant has never accepted the same or consented thereto. And the appellee further alleges in its answer that it admits that it cut into the macadam pavement, and that it did not procure the consent of the council and board of aldermen, other than the consent derived under the general ordinance No. 14, a copy of which is filed with the answer, and that it did not file any bond other than that provided for in said Ordinance 14. Said answer further alleged that the acts complained of as a violation of the ordinance mentioned in the complaint consisted only in the digging of a trench in the said street for the purpose of making and maintaining necessary repairs in the service and connections with the premises No. ——— Madison avenue, and in no other or different act; that said repairs were necessary in order to enable the consumer at No. ——— on said avenue to secure a sufficient supply of natural gas; that in order to make said repairs it was necessary for it to dig such trench, and to cut into the macadam pavement, and said repairs could not otherwise be made; that, in doing said work, defendant acted in all things under and according to said general ordinance No. 14, and did not act in violation thereof; that the work was done in a careful and prudent manner, according to the requirement of said ordinance No. 14; and that it restored the street and pavement, and left it in as good condition as it was before it was opened for making the repairs. The appellant demurred to the answer, which was overruled by the court, and an exception taken. The appellant declined to plead further, and elected to stand by its demurrer, and a judg-

ment was rendered against it for costs. In this court the appellant has assigned for error the overruling of its demurrer to the answer.

The Ordinance of 1890, upon which this prosecution was based, and a copy of which was made a part of the complaint, is as follows: "Be it ordained by the common council and board of aldermen of the city of Indianapolis, that it shall be unlawful for any person, firm or corporation, to cut or dig into any street or alley that shall have heretofore been paved with brick or any form of block, macadam or asphaltic pavement, until such person, firm or corporation, for whose benefit such proposed opening is to be made, shall have first secured the consent of the common council and board of aldermen so to do: and shall have filed in the office of the city clerk a bond with at least two freehold sureties, to the approval of the mayor, guaranteeing the speedy completion and proper execution of said work, and binding the principal and sureties to protect the city from all liability whatsoever on account of the injuries or accidents to persons or property, or both, occasioned by any such proposed opening: and further binding themselves to keep and maintain such part of such street or alley so cut into or opened in good condition during the period yet to run on the contract, under which said street or alley was originally paved." "Any person violating any provision of this ordinance shall upon conviction be fined in any sum not exceeding one hundred dollars." The ordinance No. 14, passed by the city of Indianapolis on the 27th day of June, 1887, a copy of which was set out in the answer of the appellee, and made a part thereof, and upon which it relies in justification of its acts, is substantially as follows: By section 1 it was provided that "any corporation may lay, extend and maintain mains, branches, pipes and conduits through the streets, avenues, lanes, alleys and public grounds of said city, and may take up for the purpose of altering, changing or repairing the same, from time to time, as the necessities of the case may require, for the purpose of supplying said city and its inhabitants with natural gas, under and subject to the restrictions and upon the conditions hereinafter set out." By section 2 a bond of \$50,000 was required to be first filed, conditioned, (1) not to molest other pipes or sewers; (2) to restore all streets, etc., "to as good condition as they were before, to maintain the same in such condition for one year," and where the city "shall have taken a bond or agreement from any contractor to keep and maintain the pavements in any street in good repair for a given time, the said corporation . . . shall keep that portion of any such street . . . in good condition and repair for the same period of time stipulated in such bond or agreement between the city and the contractor;" (3) to clear away dirt and rubbish; (4) to reimburse the city for expenses in repairing or clearing away rubbish; (5) to indemnify the city against all claims for damages; (6) to begin work within sixty days after the acceptance of ordinance, and lay twenty-five miles of mains the first year. 27 L. R. A.

By section 8, the mayor may require the renewal of the bond, if insufficient by reason of insolvency or death of sureties. Section 4 to section 10, inclusive, prescribe minutely the method and safeguards to be used in doing the work, and that the city may enforce observance. By section 11, the prices of gas are fixed. By section 12, the city reserves the right to require a license fee to be paid after five years. By section 13, the duty is imposed to supply gas and extend mains on certain conditions. By section 14, the corporation is required first to have a pipe line from the gas field. By section 15, the acceptance of the ordinance is required to be in writing, filed with the clerk. Section 16 imposes a penalty of \$100 for violations. Section 17 reserves the right to the city to grant privileges to other gas companies. By section 18, the city reserves the right to buy the plant of the company after 10 years.

The validity of an ordinance being called in question, the jurisdiction of the appeal is properly in this court. The contentions of appellant are "(1) that by the terms of the Ordinance of June 27, 1887, the city reserved the right to bind the appellee by the Ordinance of 1890; (2) that the macadamized pavement in question was laid after the adoption of the first ordinance, and hence the status was so altered as to change the right of appellee to make the cut or opening on Madison avenue; (3) that although the first ordinance, and the acceptance thereof upon the part of the gas company, constituted a contract, yet it is subject to the exercise of the police power upon the part of the city, which power cannot be bargained away, and that the Ordinance of 1890 is a valid exercise of that power." These propositions are controverted by the appellee, and it further contends that the second ordinance is not valid and binding upon it for the reason that it impairs the obligations of the legislative contract existing between the appellant and appellee by virtue of the Ordinance of 1887, and its acceptance thereunder, and that it has in no way, under the alleged facts in its answer, violated the penal ordinance in question.

At the time of the passage of the two ordinances mentioned, the city of Indianapolis was operating under the general statute of the state applying to cities, and the exclusive power to regulate and control the use of its streets was clearly granted to it by the legislature. Rev. Stat. 1881, § 8161 (Rev. Stat. 1894, § 8623). This power to regulate, however, must be held not to carry with it the additional right to prohibit, annul, or destroy rights arising out of contract. This, we think, must be accepted as a well-settled legal principle. Under an act of the legislature approved March 7, 1887, and in force on and after that date (Acts 1887, p. 86), cities were granted the power "to regulate the supply, distribution and consumption of natural gas . . . and to require persons or companies to whom the privilege of using the streets . . . is granted, for the supply and distribution of such gas, to pay a reasonable license for such franchise." This power the council and board of aldermen of appellant seemed to have exercised in the

passage of the Ordinance of June 27, 1887. It is not controverted by the appellant's learned counsel that this ordinance, when accepted by the gas company, constituted a contract, and was binding upon both the company and appellant. It was what is termed a "legislative contract," and, as such, came within the provisions of that clause of the Constitution of the United States which forbids the impairment of the obligations of a contract. It invested the appellee with the right of property in the franchise granted, which appellant—unless the right was reserved—could not take away or impair, without appellee's consent, by any subsequent act. *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *New York v. Second Ave. R. Co.* 32 N. Y. 261. This contract being within the scope of the power invested in appellant, and not in violation of public policy, nor tainted with fraud, must be as binding and enforceable as that of a private corporation or person. *Indianapolis v. Indianapolis Gas Light & Coke Co.* 66 Ind. 396. While it is true, as herein stated, that the exclusive power to regulate and control the use of its streets is vested in the city, this use, however, is not restricted to that of transit alone but it also extends to the laying of gas and water pipes, and to the promotion of the public health and convenience. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Angell, Highways*, § 216. Keeping in view these principles of law, as herein stated, we will consider the respective contentions of the parties to this action:

1. Did the appellant, by the terms of the Ordinance of 1887, reserve the right to bind the appellee by the provisions of that of 1890? The clause in the former ordinance relied on by the appellant as giving it the power is as follows: "It shall be, and is hereby made the duty of the city attorney to institute such legal proceedings as may be necessary to compel a compliance with the provisions of this ordinance and with all other ordinances now in force or hereafter passed, and all acts of the general assembly, affecting such natural gas companies." We do not think that this construction of this clause by the learned counsel for appellant can find any support to maintain it. Guided by a well-established rule, that the entire ordinance must be read and construed together, the meaning and object of this clause are obvious. In section 9 of the ordinance, it is provided that when work is being done in an improper manner the council and board of aldermen shall have the power to pass and enforce such ordinances as will remedy the defects. In other sections, it is provided that certain rights are to be exercised by means of the adoption of ordinances, and we think it is the enforcement of these that are contemplated and which are in harmony with the first ordinance. In fact, the clause does not partake of the character of a reservation, but more properly defines the duties of the city attorney.

2. Does the fact that the pavement in question was laid upon the street after the passage of the Ordinance of 1887, and its 27 L. R. A.

acceptance by appellee, restrict the rights granted to it to lay, extend, and maintain its gas mains through the streets of appellant in a prudent and lawful manner, and from time to time to take up the same, and repair and replace them? We think not. The appellee had been granted the right to use the streets for the purpose mentioned, and the mere fact that any particular street was thereafter paved with brick or macadam would not deprive appellee of exercising its rights under the ordinance upon which it relies. This is manifest when we recognize that the conditions of the bond required of the corporation availing itself of the franchise granted, were that all streets should be restored to as good a condition as they were before, and to maintain the pavement in good repair where the city had an agreement with a contractor to like effect. As said by the learned counsel for appellee: "If a macadamized pavement covers up the appellee's rights, so would one constructed of gravel, and so would even slight repairs, for the condition of the streets would be changed from what it was when the ordinance was accepted." It is evident, we think, that this contention has no support.

3. Is the Ordinance of 1890 a valid exercise of the police power, which the city did not surrender in granting to appellee the franchise in question? There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 332. It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. *Dill. Mun. Corp.* § 706; 2 *Wood, Railway Law*, p. 986. *Elliott, Roads & Streets*, p. 565. When these terms and conditions proposed by appellant were accepted by the appellee, and complied with, it became a binding contract. *Western Paving & Supply Co. v. Citizens Street R. Co.* 128 Ind. 531, and 540, 10 L. R. A. 770. But the appellant contends that such grants are but the exercise of police power, and may be changed or repealed by the granting power. It is true that, in grants to persons or corporations to supply gas and the like to the inhabitants of towns or cities, the municipality does not part with or bargain away its right, under the police power, to protect the public health, the public morals, and public safety, as the one or the other may be affected by the exercise of the franchise by the grantee. *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Beach, Pub. Corp.* §§ 718, 990, 1229, 1230. In the case of *Indianapolis v. Indianapolis Gas Light & Coke Co.*, *supra*, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets. But this court, in that case, draws the distinction between the legislative and contractual powers of municipal bodies as follows: "These two powers need not be confounded. The exercise of the

legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that, when the city of Indianapolis made the contract in question with the gaslight company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power." See also *Ohio L. Ins. & T. Co. v. Debolt*, 57 U. S. 16 How. 416, 14 L. ed. 997. The appellant cites *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, in support of its contention that the grant to appellee to use the streets was the exercise of its police power; but this law decides only that the abolition of a lottery was clearly within this power, as lotteries are contrary to public morals. The case has no bearing upon the rule which the appellant insists ought to be applied in the case now before us. *Chief Justice Waite*, in this case, speaking for the court, on page 818 of the opinion, said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals." This, we think, enunciates the true rule. We cannot agree and hold with the appellant that the second ordinance upon which this prosecution is based should be regarded as an exercise of the police power under discussion, so as to bind the appellee, under the facts alleged in this answer, 27 L. R. A.

and thereby compel it to comply with its terms and conditions in the exercise of the rights granted to it by the first ordinance. The ordinance in question is "imperative and sweeping," and for no purpose can a cut be made in the pavements mentioned therein without the consent of the board of aldermen and council first obtained, and the filing of the bond. No one is excepted from its provisions. We judicially know that by reason of changes occurring from extreme heat, cold, and pressure, leaks will and do occur in gas pipes, which require immediate repair. If, then, it should be held that in making these repairs, wherein it would be necessary to uncover the mains, the appellee must await the pleasure of the council and board of aldermen in giving its consent, it would be virtually in the same condition as though it had not secured the rights and franchise under the Ordinance of 1887. Penal ordinances, like penal statutes, are not always, nor ought they to be, construed literally, and courts will make the necessary exception. *Donnell v. State*, 2 Ind. 658; *Nixon v. State*, 76 Ind. 524. We are constrained to hold that the Ordinance of 1890 is inoperative and void, so far as it may be invoked to abridge or restrict appellee in the exercise of the rights and privileges acquired by it under the Ordinance of 1887. In consonance with reason, it cannot be held that the appellee, which had already obtained the consent of the city by virtue of the ordinance last mentioned, must be required to secure a new consent. The right on the part of the appellant to consent implies the right to refuse. Therefore it could, by refusing, work or effect a complete prohibition. This, evidently, is not the intent or the spirit of the Ordinance of 1890. The case of *Louisville Natural Gas Co. v. State*, 185 Ind. 49, 21 L. R. A. 784, favors and supports the conclusion reached by the court in this case. We have examined the cases cited by the appellant, but they do not sustain their contention, and we do not deem it necessary to refer to them all in this opinion, in detail. We therefore adjudge that the Ordinance of 1890, as against appellee, in view of the facts set forth in its answer, is inoperative, and so far void, and that the court did not err in overruling the demurrer.

Judgment affirmed, at the cost of appellant.
All concur.

TENNESSEE SUPREME COURT.

NASHVILLE LUMBER CO., *Appt.*,
v.
FOURTH NATIONAL BANK OF NASHVILLE.

(.....Tenn.....)

The transfer of a negotiable note by which an indorser is made liable to a bona fide holder for the ultimate benefit of the transferrer, who knew the indorsement was *ultra vires* and void, makes him liable to such indorser for the damages thereby sustained.

(February 4, 1895.)

APPEAL by complainant from a decree of the Circuit Court for Davidson County in favor of defendant in an action brought to recover the amount which complainant was compelled to pay upon a note indorsed by it, which was wrongfully negotiated by defend-

ant after it became aware of complainant's non liability on the note. *Reversed.*

The facts are stated in the opinion. *Messrs. Granberry & Marks* for appellant.

Mr. P. D. Maddin for appellee.

Wilkes, J., delivered the opinion of the court:

This is a suit for damages for wrongfully transferring negotiable paper to an innocent holder for the purpose of imposing upon the complainant as indorser a liability that would not have existed if the note had not been so transferred, and thereby securing an advantage for the transferrer of the paper. There was a demurrer to the declaration which was sustained by the court, and plaintiff appealed and has assigned errors.

The case, as made out by the declaration, is that certain notes made by the Bond Lumber Company had placed upon them the in-

NOTE.—*Liability for transferring negotiable note to bona fide holder so as to cut off defenses.*

- I. In general.
- II. Cutting off defense of indorser.
- III. Effect of rule as to parties in pari delicto.
- IV. Form of action.

I. In general.

The above case of NASHVILLE LUMBER CO. v. FOURTH NAT. BANK OF NASHVILLE, while not strictly one of first impression, is one having remarkably few precedents considering the magnitude of business done by the transfer of negotiable notes.

The liability of the holder of a note which was subject to a defense for transferring it to a bona fide holder who compelled the maker to pay it was sustained in an action by the maker in *Smith v. Cuff*, 6 Maule & S. 160.

And this was followed in *Horton v. Riley*, 11 Mees. & W. 422, 13 L. J. Exch. 81, in which case there was the additional element of a violated promise by the holder not to dispose of the note.

The same doctrine was asserted in this country in *Murray v. Burling*, 10 Johns. 172, in which a person receiving a note to raise money thereon for a specified purpose, which was to pay it over to another person who was to give it to the maker of the note to be applied on a certain debt, was held liable for the transfer of the note for a different purpose to a bona fide holder.

This case was followed in *Decker v. Mathews*, 12 N. Y. 313, to substantially the same effect, namely, that one who misappropriates an accommodation note by using it for an unauthorized purpose before it has any legal inception, whereby it came into the hands of a bona fide holder, is liable for the conversion of the note. In such a case it is held not to be necessary for the plaintiff to pay his note before bringing the action for conversion, and that the measure of damages recoverable is the face of the note.

So an action lies by the maker of a note for its conversion when it was delivered to the defendant for a particular use and diverted from its original purpose and transferred to third parties who compelled the maker to pay it. *Hynes v. Patterson*, 96 N. Y. 1.

This was an action against the executors of the person who transferred the note. The note was in substance an accommodation note although the 27 L. R. A.

maker received ten per cent of the proceeds as a commission for the use of his credit. It was held that he was not under any obligation to restore anything that he had received in this way before bringing his action for damages, since the holder of the note had paid for its use for a legitimate purpose and if he had failed to get the use of it because he attempted to appropriate it to a different use it was his own fault.

An unusually good illustration of the doctrine of the main case is found in *Richardson v. Richardson*, 26 L. R. A. 305, 143 Ill. 563, in which it is held that a widow who after her husband's death negotiates to a bona fide holder a promissory note made by him to her as a gift and which was therefore not valid in her hands, might be compelled to refund to his estate the amount which the estate was compelled to pay on the note.

Where a note was given for the purchase price of property on sale with warranty, which was afterwards rescinded for breach of warranty, and the payee, transferred the note to a bona fide purchaser, they were held liable to the makers for the amount of the note, especially after judgment had been recovered against the makers upon the note. *Baker v. Bram*, 4 L. R. A. 370, 108 N. C. 72.

But execution on a judgment in favor of the makers was stayed until the defendants were relieved of their liability as indorsers on the note. *Ibid.*

A case similar to this was that of *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576, where the holder of a note received on an exchange of horses which was subject to rescission and afterwards actually rescinded, fraudulently transferred the note to a bona fide holder. He was held liable to the maker for the amount of the note.

So the holder of a note who after receiving payment thereof but retaining possession of it sold it to a bona fide holder before maturity, was held liable to the maker for money had and received even before judgment against the maker on the note, because no defense could have been made in an action on the note. *Connecticut & P. Rivers R. Co. v. Newell*, 31 Vt. 384.

So where the holder of a note received from a surety of the purchaser of land under an agreement to return it in case a prospective sale by the purchaser to a third party should not be consummated transferred the note to a bona fide holder, he was held to have done so without right because his title was conditional until the consummation of

dorsement of the Nashville Lumber Company. This indorsement was made by the secretary of the Nashville Company, not only for accommodation, but without any legal authority and was *ultra vires* and void.

The defendant bank held the notes thus indorsed with legal notice of their infirmity when made and indorsed, and while so holding them the plaintiff company further notified it that the indorsement was without consideration, illegal and void and that the company would recognize no liability on account of the same.

Prior to maturity the defendant bank indorsed the notes to the Merchants' National Bank of Louisville, and had them rediscounted by that bank. The maker of the notes was insolvent when the notes were transferred to the Louisville bank and the declaration states that the Nashville bank fraudulently rediscounted the notes for the sole purpose of creating a liability against the plaintiff company which did not before exist, and because of the creation of this

liability, plaintiff claims the right to sue. Judgment has been rendered in favor of the Louisville bank against plaintiff company for the amount of the notes, it not being able to defend against the Louisville bank and a part of the same has been paid. Such is the case as made out in the bill. Several of the grounds of demurrer are not well laid, but we treat them together as raising the real question at issue in the cause which may be briefly stated as follows:

Can the holder of negotiable paper, upon which there is the void indorsement of a corporation, known to be such by the holder, transfer it to a third party with no knowledge of the infirmity and thus create a liability against the indorser, which did not exist in the hands of the holder before transfer? The gist of the action is the knowingly transferring the paper for the express purpose of creating such liability as did not exist before the transfer and by which the transferee is to be benefited.

While some special objections are raised

such sale and he was held liable for the conversion of the note. *Brown v. St. Charles*, 6 Mich. 71.

One holding a note which in his possession is subject to the defense of fraud is liable in accordance with the same general rule for transferring the note to a bona fide holder so as to cut off the defense. This was held in *Hess v. Culver*, 6 L. R. A. 498, 77 Mich. 598; *Pearl v. Walter*, 80 Mich. 817; *Knight v. Linzey*, 8 L. R. A. 476, 80 Mich. 306.

The gravamen in such a case is declared in *Metropolitan Elev. R. Co. v. Kneeland*, 8 L. R. A. 253, 120 N. Y. 184, to be the wrongful act of the defendant in causing a note without value except to a bona fide holder to become valuable by the sale thereof to such a purchaser as could enforce it against the plaintiff. It is further said that the cases relating to the subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a bona fide purchaser, is guilty of tort, and in the absence of special circumstances diminishing its value is presumptively liable to the injured party for the face value thereof.

In the case of *Metropolitan Elev. R. Co. v. Kneeland*, *supra*, directors of a corporation were charged with liability for the wrongful issue of the notes of the corporation. This case relies in part upon that of *Farnham v. Benedict*, 107 N. Y. 159, in which it was held that an action would lie for the transfer of invalid town bonds to a bona fide purchaser thereby depriving the town of a defense to the bonds.

A similar action by a town against commissioners who wrongfully issued bonds that went into the hands of bona fide holders was sustained in *Ontario v. Hill*, 38 Hun, 250, which was reversed entirely on other grounds in 99 N. Y. 324.

Of a similar character is the case of *Betz v. Daily*, 8 N. Y. S. R. 309, in which an action for fraud and conspiracy was sustained in favor of a partner against his co-partner and others in fraudulently issuing and negotiating notes of the partnership. He was held entitled to damages for the amount which he had necessarily paid out on such notes including payments made by him pending the action up to the time of trial, and to interest thereon.

II. Cutting off defense of indorser.

Closely similar to the main case of *NASHVILLE LUMBER CO. v. FOURTH NAT. BANK OF NASH-* 27 L. R. A.

VILLE is that of *Devellin v. Coleman*, 60 N. Y. 531, where a note was indorsed for accommodation in order that it might be used to settle certain claims and a pending suit against the maker when these had in fact been settled before the note was delivered but without the indorser's knowledge, and the person to whom it was delivered made the settlement and had a claim for indemnity against the maker to which he applied the proceeds of the note after transferring it to a bona fide holder. It was held that he was liable to the accommodation indorser for the misappropriation of the note.

So in *Badger v. Hatch*, 71 Me. 533, the bailee of an indorsed note with power to dispose of it in a particular manner and upon a certain condition, who disposed of it otherwise before the performance of such condition to a bona fide holder who collected it of the maker, was held liable to the indorser who had obtained the note by exchanging his own note with the maker for it.

A very strong case is that of *Comstock v. Hier*, 78 N. Y. 269, 29 Am. Rep. 143, in which it is held that a person who received a note with an indorsement thereon as collateral security for a debt of a maker and was thereby charged with notice or put upon inquiry as to the fact that the indorsement was for accommodation, is liable to the indorser for transferring the note to a bona fide holder even if it was done in good faith and in ignorance of the indorser's rights. The court plainly holds that the holder having possession of the note through the fraud of others under circumstances which made the indorsement of no binding force in his hands is liable for cutting off the indorser's defense by transferring the note.

The doctrine of the above cases is by no means denied or impaired by *Freeman v. Venner*, 120 Mass. 424, which denies any right of action to an indorser against a transferee who fraudulently obtains his unrestricted indorsement and thereafter refuses to let him qualify it but instead negotiates the note to a bona fide holder. The ground of the decision, however, was simply the failure to prove any damage whatever as the indorser had not yet been called upon to pay the note and perhaps never would be since the maker might pay it or the amount due upon it might be collected by foreclosure of a mortgage which secured it.

III. Effect of rule as to parties in pari delicto.

There is some disagreement among the decisions

by the demurrer to the form of the declaration and the statements contained in it, these objections are more technical than real and the effect of the demurrer is virtually to concede that the defendant bank had no defense to the paper when it made the transfer, and that it was transferred to the Louisville bank, apparently in due course of trade, for the express purpose of enabling that bank to collect the note despite the infirmity in it, the proceeds to be held for the use and benefit of the Nashville bank, and thus imposing a liability on the indorser that did not exist while the Nashville bank held the note.

On the other hand, plaintiff concedes that the Nashville bank might, if holding in good faith, have transferred the note in due course of trade and made plaintiff liable to the transferee without liability against it, for such transfer, but the gravamen of the charge is that the transfer was made not in due course of trade, so far as the Nashville bank

was concerned, but fraudulently to enable the Louisville bank as an apparently innocent holder to collect the proceeds and hold them for the use and benefit of the Nashville bank, thus enabling the Nashville bank, through the Louisville bank, to collect the note from plaintiff as indorser which it could not do if it retained the note in its own possession.

The plaintiff insists that while the notes affected by this infirmity, so far as the Nashville bank is concerned, were in the hands of that bank, it had two remedies to protect itself, one to enjoin the transfer of the notes till the indorsement was erased and the other to notify the holder of the illegality of the indorsement and of its non-liability on account of it.

It is said the former course was doubtful and embarrassed, as the plaintiff company could not allege insolvency of the Nashville bank, nor that it was about to make the trans-

as to the right to recover for the transfer of a note cutting off a defense where the plaintiff was in any degree a participant in the fraud or illegality which constituted the defense that was cut off by the transfer.

The case of *Smith v. Cuff*, 6 Maule & S. 160, sustained a right of action by the maker of a note which was given to induce the payee to unite in a composition with creditors and which was such an unauthorized preference as to make the note invalid in his hands, where he transferred the note to a bona fide holder. The court held the payee liable to reimburse the maker and said it was "not a case of *par delictum*. It is oppression on one side and submission on the other."

This case was followed in *Horton v. Riley*, 11 Mees. & W. 422, 13 L. J. Exch. 81, where the creditor who took the note for the balance due on such composition and then transferred it to a bona fide holder had expressly agreed to retain the note in his own hands but violated his agreement.

But in *Solinger v. Earle*, 82 N. Y. 393, it was held that the maker of a note in such a case was in *par delicto* and could not recover against his creditor who transferred the note to a bona fide holder thus cutting off the defense of fraud in the consideration.

This case (as decided in the lower court) is followed in *Solinger v. Egelston*, 13 Jones & S. 605.

So in *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 515, reversing 17 Hun, 477, an action by the maker against the payee of a note which was obtained by duress and was given to compound a felony and transferred to a bona fide holder who collected it, was held to be unsustainable since the maker was in *par delicto*.

On the other hand, the maker of a note given for Bohemian oats who was induced to give it by persistent acts and misrepresentations was not denied relief on the ground that he was in *par delicto*, against the payee who transferred the note to a bona fide holder. *Hess v. Culver*, 6 L. R. A. 498, 77 Mich. 598. Followed in *Pearl v. Walter*, 80 Mich. 317; *Knight v. Linzey*, 8 L. R. A. 476, 80 Mich. 325.

These cases held that the maker of a note which is void as against public policy may be less guilty than the other party and even not consciously guilty at all.

As the court expresses it in *Hess v. Culver*, *supra*, "where a man is defrauded, as often happens, by the misrepresentations of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy is not a bar to his recovery."

loy in law will not necessarily compel the victim to submit to the fraud of the actual villain."

It is also decided in *Knight v. Linzey*, *supra*, that if an innocent party has been defrauded into giving notes he is not obliged to contest them in the hands of a stranger on any information short of the certainty that the latter is not a bona fide holder before bringing an action against the party defrauding him.

IV. Form of action.

In states where modern systems of practice have been adopted the question as to the form of action for wrongfully transferring a note to a bona fide holder to cut off a defense thereto is free from difficulty as a statement of the facts and a demand for damages will be sufficient.

Thus in the Michigan cases above cited, *Hess v. Culver*, 6 L. R. A. 498, 77 Mich. 598; *Pearl v. Walter*, 80 Mich. 317; *Knight v. Linzey*, 8 L. R. A. 476, 80 Mich. 325,—the actions seem to have been simple actions for damages on account of fraud.

So in *Baker v. Brem*, 4 L. R. A. 370, 103 N. C. 72, the form of the action seems to be that of a simple action for damages for the amount of the note transferred.

In *Richardson v. Richardson*, 26 L. R. A. 305, 145 Ill. 563, the suit was by a bill charging the defendant with holding the proceeds of a note transferred by her in trust for the estate of the maker of the note on the ground that the defendant held the note by an invalid gift.

In *Metropolitan Elev. R. Co. v. Kneeland*, 8 L. R. A. 253, 120 N. Y. 134, the court says the essential injury common to all cases is the fraudulent imposition of liability. Hence there should be a common remedy whether it is called an action in conversion or in the nature of conversion, or a special action on the case.

In *Comstock v. Hier*, 73 N. Y. 269, 20 Am. Rep. 142, it is also held that a wrongful transfer of a note to a bona fide holder cutting off a defense makes one liable either in trover or for money had and received.

The action of trover or an action of that nature is sustained in *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576; *Brown v. St. Charles*, 66 Mich. 71; *Decker v. Matthews*, 12 N. Y. 513; *Murray v. Burling*, 10 Johns. 172; *Hynes v. Patterson*, 95 N. Y. 1.

A right of action for money had and received is sustained in *Smith v. Cuff*, 6 Maule & S. 160; *Connecticut & P. Rivers R. Co. v. Newell*, 81 Vt. 364.

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fer. Hence the latter course was pursued and the claim now is for damages for making the transfer under the circumstances.

We have been cited to no case directly in point and perhaps there is none to be found, though we think the principles involved have been settled upon a somewhat different state of facts in several cases.

The case of the *Metropolitan Elev. R. Co. v. Knesland*, 120 N. Y. 184, 8 L. R. A. 352, is relied on. That was an action for damages by the corporation against its directors, first, for illegally voting a salary to the president of the company and, second, authorizing the issuance of negotiable notes therefor, which went into the hands of an innocent holder.

The court held that no liability attached to the directors for voting the salary for that being illegal created no liability, but that such of the directors as voted to issue the negotiable notes were liable because such notes did create a liability when they came into the hands of an innocent holder. The court said: "We think that the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a bona fide purchaser, is guilty of a tort and . . . liable for the value of the note. The essential injury common to all cases of this character is the fraudulent imposition of liability. Hence there should be a common remedy, whether it is called an action in conversion or in the nature of conversion or a special action on the case."

The case proceeds: "In what respect do these wrongful acts of the directors who negotiated the notes differ from these cases which were held to authorize an action for conversion or an action in the nature of conversion of negotiable paper?"

"Is there not in each the same presumption of damage springing from a liability wrongfully imposed? Were not all of these actions founded on the fact that the maker, real or apparent, of a negotiable instrument had, through the wrongful acts of another, become chargeable so that he could be compelled to pay such instrument, which would not have ripened into a valid obligation against him but for such wrongful act?"

There are numerous cases holding a party liable for the unauthorized conversion of negotiable paper. In *Decker v. Mathews*, 12 N. Y. 318, it is said in substance that the gravamen of such action is the wrongful act of the defendant in causing a note without value except to a bona fide holder to become valuable by a sale thereof to such a purchaser as could enforce it against the plaintiff, and the right of action accrues as soon as the transfer is made and before payment enforced.

In *Thayer v. Manley*, 78 N. Y. 805, defendant fraudulently induced plaintiff to execute and deliver to him certain notes, but before they matured plaintiff demanded their return to him, which was refused. It was held that as defendant had it in his power 27 L. R. A.

when suit began to dispose of the notes to a bona fide holder, in whose hands they would have been valid, plaintiff was entitled to recover their full value, which might be discharged by a return of the notes.

In *Farnham v. Benedict*, 107 N. Y. 159, defendant being in possession without title of certain town bonds that had been fraudulently issued through his procurement and which were void in fact but apparently valid, sold them to bona fide purchasers and thus rendered them valid and binding on the town which was compelled to pay them. It was held that he was liable to the town for the amount of the bonds and that an action lay either in the nature of trover for the face of the bonds or for money had and received for the money realized therefrom according to the rule laid down in *Comstock v. Hier*, 78 N. Y. 269, 29 Am. Rep. 142.

In *Bets v. Daily*, 8 N. Y. S. R. 809, it was held that in an action by a partner against his copartner and others for fraudulently making notes in the name of the firm and negotiating them to innocent holders, the cause of action was complete when the wrong was done and that payment of the notes was not essential to recovery, the court holding that the injury was done when the notes were first negotiated.

In *Ontario v. Hill*, 38 Hun, 250, the defendants were held liable for wrongfully issuing the negotiable notes of a town, some of which had gone into the hands of innocent holders. This case was afterwards reversed but not on this point. See *Ontario v. Hill*, 99 N. Y. 824. See also *Haas v. Sackett*, 40 Minn. 58, 2 L. R. A. 449, and cases there cited.

In the case at bar, it is proper to remember that the Nashville bank had title to this paper as against the maker and so far as the maker is concerned its transfer was in no sense a conversion of the paper, but it did not have the legal right to the plaintiff's indorsement nor any right to pass it to another. Nevertheless, the transfer put the legal title to the paper and its indorsement in the Louisville bank, which had no notice of the infirmity of the paper, and hence the plaintiff could not defend against its suit. It must be borne in mind that the case at bar is not the case of an indorser who has received value for his name and credit and who then seeks to avoid the contract, in which case he must refund the money or be denied relief, and hence many of the cases cited for the bank do not apply and need not be commented on.

The case of *Freeman v. Vanner*, 120 Mass. 424, is especially relied on by defendant bank, but in that case the plaintiff upon his own showing could not impeach the defendant's title to the note nor his right to transfer that title to another, and it is not, therefore, analogous to this.

The case of *Solinger v. Earle*, 82 N. Y. 396-400, is also relied on, but in that case the party who sought damages for the unauthorized use of his note was denied relief because he was guilty of a legal wrong in putting the note into existence, and the court repelled him because of this wrong.

In the case at bar, however, the plaintiff

company did not put its indorsement into circulation, but it was made without consideration for accommodation and without authority by its secretary and without knowledge of the directory.

The case as presented to us by the declaration and demurrer is that of a holder of paper upon which it cannot legally recover against an indorser, transferring that paper to a third person so as to enable such person to collect the paper from the indorser, not for the transferee's benefit and in due course of trade, but for the use and benefit of the transferring bank, and thus indirectly holding the indorser liable when the transferring bank

could not regularly so hold it. The principle would be the same if the bank at Nashville had held the note of the plaintiff on which it was maker and which for any reason was void and had before maturity transferred it to the Louisville bank in order to enable it to collect it for account of the Nashville bank. In each case it is an appropriation to its own use by forms of law of the credit and money of the indorser or maker to which the Nashville bank had no right, and we think the case falls within the reason of the cases here cited. We are of opinion *there is error in the ruling of the court below and it is reversed and cause remanded for trial.*

INDIANA SUPREME COURT.

Fianna STROUP, *Appt.*,
v.
Daniel N. STROUP *et al.*

(.....Ind.....)

1. A conveyance in trust made to another subject to the life use of the purchaser of premises, and his right to direct a sale of the property for his own benefit at any time, creates only a naked or nominal title in the trustee which is invalid under Rev. Stat. 1894, § 8408.
2. The equitable interest of a purchaser in land, which by his direction is conveyed to a third person under an invalid naked trust which by provision of statute "is deemed a direct conveyance" to himself, is subject to the right of dower.

(February 19, 1895.)

APPEAL by complainant from a judgment of the Circuit Court for St. Joseph County in favor of defendants in a proceeding to enforce a dower interest in land which had been purchased with money belonging to complainant's husband, the title to which had been taken in the name of a third person where it remained at the husband's death. *Reversed.*

The facts are stated in the opinion.

Messrs. A. L. Brick and Walter Funk, for appellant:

By one line of authorities a man may, bona fide, dispose of his personal property during life, even though it be done to defeat his wife's rights; but not when the transaction is merely colorable, a mere device, or testamentary in character, or in view of death.

Padfield v. Padfield, 78 Ill. 16; *Kerr, Fraud & Mistake*, 220; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 219, *note*; *McGee v. McGee*, 26 N. C. 105; *Littleton v. Littleton*, 18 N. C. 827; *Davis v. Davis*, 5 Mo. 188; *Stone v. Stone*, 18 Mo. 889; *Hays v. Henry*, 1 Md. Ch. 387; *Dunnock v. Dunnock*, 8 Md. Ch. 140; *Feigley v.*

NOTE.—The power of a man to defeat his wife's dower rights is the subject of a note to *Flowers v. Flowers* (Ga.) 18 L. R. A. 75.

Closely similar to the present case, but on the other side and differing from it in the want of any trust in the title to the property, is *Phelps v. Phelps* (N. Y.) 25 L. R. A. 625.
27 L. R. A.

Feigley, 7 Md. 587, 61 Am. Dec. 875; *Sanborn v. Lang*, 41 Md. 107; *Rabbitt v. Gaither*, 67 Md. 94; *Thornton, Gifts & Advancements*, § 516; 14 Cent. L. J. 102.

By another line of authorities a conveyance of personal property to defeat a wife's claim at his death is void.

Thornton, Gifts & Advancements, §§ 490, 516; *Goddard v. Snow*, 1 Russ. 485; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501.

The general rule as to real estate is that any conveyance made, or procured to be made, by a husband during coverture of any property in which the wife by law has a wifely interest, the purpose of which being to defeat that interest, is voidable by the wife at her husband's death in so far as her interest appears.

14 Cent. L. J. 102.

A remainder to a child bought with the husband's money, will be treated in equity as the husband's conveyance, and in respect of the widow's dower right it will be regarded that the husband was, during coverture, seised of an estate of inheritance in the land which he had conveyed away. His directing the mode of conveyance with the special intent to defraud his wife of her dower raises a use in him to which the dower would attach.

To the same effect is the case of *Orecelius v. Horst*, 4 Mo. App. 419, and again is our case stronger than the one we cite.

Davis v. Davis, 5 Mo. 188; *Tucker v. Tucker*, 29 Mo. 350, 32 Mo. 464; *Stone v. Stone*, 18 Mo. 889. See also *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Jenny v. Jenny*, 24 Vt. 324; *Petty v. Petty*, *supra*; *Killinger v. Reidenhauer*, 6 Serg. & R. 584; *Gilson v. Hutchinson*, 120 Mass. 27; *Swaine v. Perine*, 5 Johns. Ch. 462, 1 L. ed. 1148, 9 Am. Dec. 818; *Jiggitts v. Jiggitts*, 40 Miss. 725; *Littleton v. Littleton*, 18 N. C. 827; *McGee v. McGee*, 26 N. C. 105; *Rabbitt v. Gaither*, 67 Md. 94; *Brewer v. Connell*, 11 Humph. 500; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Dearmond v. Dearmond*, 10 Ind. 191; *Hays v. Henry*, 1 Md. Ch. 387; *Feigley v. Feigley*, 7 Md. 587, 61 Am. Dec. 875; *Sanborn v. Lang*, 41 Md. 107; *Youngs v. Carter*, 10 Hun, 194.

Messrs. Andrew Anderson and Lucius Hubbard, for appellees:

In pleading fraud facts must be pleaded, not merely epithets.

Bodkin v. Merit, 102 Ind. 298; *Curry v. Keyser*, 80 Ind. 214; *Shirk v. Mitchell* (Ind.) March 15, 1894; *Stephens*, Pl. 384, 385; *Conant v. National State Bank of Terre Haute*, 121 Ind. 328.

The husband bought the land in question and caused it to be conveyed to himself for life, remainder in fee to a son in trust, to sell, pay to the widow \$1,000, and divide the residue among his children.

The husband could in 1881 with the intent to prevent his wife from obtaining a statutory right of one third of his property, use his money and notes in the purchase of land and cause it to be conveyed as stated.

Beck v. Beck, 64 Iowa, 155; *Lines v. Lines*, 142 Pa. 149; *Dickerson's App.* 115 Pa. 198; *Pringle v. Pringle*, 59 Pa. 281; *Ellmaker v. Ellmaker*, 4 Watts, 91; *Cameron v. Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *Stewart v. Stewart*, 5 Conn. 317; *Holmes v. Holmes*, 3 Paige, 363, 3 L. ed. 186; *Thornton, Gifts & Advancements*, § 488.

To sustain a charge of fraud there must be an intention to affect an existing right. It cannot be alleged where the intention is to do what a man has a perfect right to do.

Stewart v. Stewart, and *Holmes v. Holmes*, *supra*.

The interest of a wife in personal property is a mere expectancy like that of an heir; even where the husband could not deprive her of it by will.

Greiner v. Greiner, 58 Cal. 115.

Such a transfer is valid if actually made, and only in cases where the husband has made a merely colorable assignment, while in fact he has retained absolute control during his life, can it be attacked by the widow.

Padfield v. Padfield, 78 Ill. 18; *Tayer v. Tayer*, 14 Vt. 107, 39 Am. Dec. 211; *Hays v. Henry*, 1 Md. Ch. 337; *Fanborn v. Lang*, 41 Md. 109; *Smith v. Hines*, 10 Fla. 258; *Stewart, Mar. & Div.* § 462.

Before the widow can have dower or inherit, it must appear that the husband was seised in fee during the marriage, or that he had an equitable estate in land at his death.

Rev. Stat. 1881, § 2491; *Miller v. Wilson*, 15 Ohio, 108; *Durando v. Durando*, 23 N. Y. 381.

A power not exercised is not an estate either legal or equitable.

Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694; *Holmes v. Coghill*, 7 Ves. Jr. 499; *Collins v. Carlisle*, 7 B. Mon. 14; *McGaughey v. Henry*, 15 B. Mon. 388; *Thompson v. Vance*, 1 Met. (Ky.) 670.

Such a provision as is contained in this deed does not give the instrument a testamentary character.

Lines v. Lines, 142 Pa. 149; *Dickerson's App.* 115 Pa. 198; *Stone v. Hackett*, 12 Gray, 227.

Hackney, J., delivered the opinion of the court:

In the year 1881, Daniel B. Stroup and the appellant were husband and wife, and that relation continued until he died, intestate, in the year 1892, leaving, him surviving, the appellant and the appellees, as his

widow and only heirs at law. In January, 1881, he owned in fee simple a tract of land in St. Joseph county, which he sold for \$6,400, his wife, the appellant, joining in the conveyance. Later, and in the same month, he purchased another tract of land, in said county, for the consideration of \$12,948.73, which sum was paid by him, though \$3,940.73 was paid of the said purchase price from the earnings of said tract. The deed conveying the tract so purchased was, at his direction, so made as to convey the fee to the appellee Daniel F. Stroup, subject to a life estate in said Daniel B. Stroup, and "to have and to hold the same unto the said Daniel F. Stroup, and his executors, to his and their issue, forever, upon the trust following, that is to say: The said Daniel F. Stroup and his heirs and executors in trust are, on the commencement of said trust estate, to enter on and take possession of and rent or farm said land to the best possible advantage, and, as soon as can be consistently done, shall sell and convey said land to such person or persons, and on such terms, and for such price or prices, as to him and them shall seem meet, either at public or private sale, with or without notice thereof; and the net proceeds of such sale shall first pay the widow of said Daniel B. Stroup, if he leaves one surviving him, the sum of one thousand (\$1,000) dollars, and the residue of said net proceeds he or they shall divide equally among such children of said Daniel B. Stroup (including said Daniel F. Stroup, if he be then living) as may be living at the time of such distribution: provided that if either be dead, leaving them issue surviving them, the issue of such deceased child shall take such decedent's share: provided, however, that if, at any time during the life of Daniel B. Stroup, he, the said Daniel B. Stroup, shall request the said trustee and shall join in a deed therefor, the said trustee shall sell and convey said land in fee to such person or persons and upon such terms and uses as the said Daniel B. Stroup shall direct, and shall render and pay over and deliver to such Daniel B. Stroup all money and securities received on such sale." The appellant, claiming as widow the one third, in fee, of the lands so purchased, sued the appellees in three paragraphs of complaint, seeking to quiet title against the claim of the appellees as to said interest. Each paragraph alleges the foregoing facts and the additional facts that the said Daniel B. Stroup, in causing said lands so purchased to be conveyed to Daniel F. Stroup, desired and intended to cut off any claim of the appellant to an interest in said lands as his wife and as his widow, and that said lands, at the death of her husband, were of the value of \$15,000. The first paragraph alleged that, with this purpose in view, the decedent fraudulently sold said tract, so first owned by him, and enticed the appellant to join in the conveyance thereof and with the same purpose, and, intending to defraud the appellant of an inchoate interest in said lands so purchased, caused the same to be conveyed as aforesaid, without her knowledge or consent. The second paragraph differs from the

first in that it does not charge a fraudulent intent in selling said tract so first owned by the decedent. The third paragraph differs from the second only in its allegation that she signed the deed to the land conveyed by her husband "with the understanding and expectation from her husband, through his representation at the time, that he would buy other real estate with the . . . proceeds of the sale of the same, in which she would have her one-third interest." To these several paragraphs of complaint the circuit court sustained the appellees' demurrer for want of sufficient facts, and this ruling is the question for review.

In support of the ruling of the lower court, appellees' learned counsel insist that there are no allegations of actual or positive fraud, without which the complaint should be held insufficient; that the suit does not attack the conveyance in which the appellant joined, and alleges no active fraud in procuring her to so join, and, in consequence, the act of purchasing other lands, and causing them to be conveyed as alleged, was but the disposition of personal property, upon which there was no legal restraint by an interest of the appellant in lieu of dower; and that, the husband never having been seised of the lands in suit, the wife could have no inchoate interest therein, and would take nothing therefrom as widow. It is true that, ordinarily, the facts constituting the alleged fraud must be pleaded, and are not supplied by epithets. *Curry v. Keyser*, 80 Ind. 214; *Bodkin v. Meritt*, 102 Ind. 293. This rule would defeat the allegation of fraudulent enticement to the appellant to join in the conveyance, but if it can be maintained that an investment of personal assets in lands, the title to which is taken in the name of another, but colorably and is in fact held to the use and benefit of the husband, with intent to defeat any claim of the wife to an interest by virtue of her marital relation or as widow, is fraudulent as against such wife or widow, then the complaint is sufficient in pleading such facts. Indeed, it would be difficult to conceive acts more positive than those alleged at the same time consistent with the design alleged. It would require no sharp practice in making the purchase and no stratagem to induce the son to take a trust which was for his possible future benefit. But, if either or both were alleged, we are unable to see how they would add to the fraudulent character of the imposition upon the wife. In North Carolina and in Tennessee there are statutes forbidding and rendering fraudulent the transfers of property with intent to defeat dower. In those states it has been held that if the disposition is not meant to be simply what it purports to be, but if the donor intended that it should not interfere with his own enjoyment, but should hinder that of his wife, it would amount to the fraud contemplated by the statutes. *Littleton v. Littleton*, 18 N. C. 327; *Brewer v. Connell*, 11 Humph. 500; 14 Cent. L. J. 102.

If the same disposition may be held fraudulent in the absence of a statute which, under the statutes referred to, is fraudulent, there is no reason supporting the proposition

that more positive acts are essential to the working of the fraud. In 14 Cent. L. J., *supra*, Judge Thompson states the rule as follows: "The books furnish a conclusive test by which to determine whether such a disposition is or is not good as against the wife's claim for dower. Was the disposition such as to cut off the seisin of the husband, and at the same time reserve to him the use of the property during his life, and to dispose of it absolutely to the exclusion of the rights of his wife upon his death? In other words, was it testamentary in its nature,—did it operate substantially as a will would have operated? Where this appears, I apprehend that all speculations about the motives or intent of the husband are idle. The law will conclusively fix to his act a fraudulent intent." We have no doubt that the facts are sufficiently pleaded to present the question as to the validity of the transaction as affecting the interests of the appellant in the lands purchased. It is probably true that at the time of the purchase there was no restriction upon the right of the husband to make complete disposition of his personal property by gift, destruction, or other means, and that such disposition would not affect any vested or inchoate interest of the wife in such property. It is sufficient to say, however, that the question is not so much one of the disposition of personal property as it is one of the fraudulent covering of an ownership of real estate. Here the husband purchased and paid the full consideration for the lands in question. He reserved to himself not only a life estate, under which he enjoyed the full uses of the lands, but he reserved such absolute dominion over the fee as to stay the operation of the colorable trust until after his death, and to control, without limitation or restriction, the sale of the fee; and the proceeds of the sale, it was carefully provided, should return to him. A mere statement of the transaction discloses more than a life estate in the husband, more than a mere equity in the fee, and at least a legal fee, charged only with a trust which, during the life of the husband, was executed fully by the signing of a deed to a purchaser from the *cestui que trust*, the husband and father. Such a trust has no validity, and the trustee possesses only a naked or nominal title, which does not impair the full ownership of the *cestui que trust* or beneficiary. This conclusion is sustained by the statute, and needs no resort to the adjudications. Rev. Stat. 1894, § 8403 (Rev. Stat. 1881, § 2981), provides that "a conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." Leaving out of view, for the moment, the element of the deed directing disposition of the property after the death of Daniel B. Stroup, we have no doubt that he was the only beneficiary, and possessed full power of disposition and management, and that the named trustee had no such power, and possessed but a nominal title. *Gaylord v. Dodge*, 31 Ind. 41, was a suit by a widow to enforce

her claim as widow to one third of certain lands purchased by her husband, and conveyed by his vendor, without condition or limitation, to her stepson. By independent express trust, the grantee agreed to hold the lands in trust for and to convey absolutely to certain other children of the husband, upon request of the donor. The claim was defeated, upon the ground that there was no trust created in favor of the donor; that the children took the fee under the deed coupled with said trust; and that, therefore, the husband was not at any time seised in fee, and had no equitable interest at the date of his death, the conveyance by the trustee to the children having been executed. If the converse of this holding can be maintained,—and we have no doubt that it can,—the presence of a trust in favor of the donor under which no estate was vested in another and the absolute power of disposition and management were reserved to him,—the statute would operate on the conveyance itself, and execute the use, by declaring the conveyance void as to the trustee, and as directly vesting title in the beneficiary. The trust, as created, gave no present interest or title to the appellees, no right enforceable against Daniel B. Stroup in his lifetime, no property right that was the subject of sale and conveyance, no interest not completely subject to the control, even to the extent of revocation by him in case he should desire to sell the property. As to the appellees, by the expressed condition of the trust, the trust interest did not commence or arise until the death of their father, he not having then sold the land. The deed in question differs from those in *Spencer v. Robbins*, 106 Ind. 580, and *Cates v. Cates*, 135 Ind. 372, where the deeds directly and unequivocally conveyed a fee to the grantee, and followed the language of the grant with words held simply to postpone the enjoyment of the fee until after the death of the grantor. Here we have no grant to the appellees upon a condition postponing the enjoyment of the estate granted, but we have a grant to a trustee whose primary *cestui que trust* is the father, and the condition is a part of the trust, and postpones ownership and title until after the death of the father, he not then having sold the land. "An instrument, having otherwise the formalities of a deed, will be construed to operate as a deed whenever it appears therefrom that it was the intent of the maker to convey any estate or interest whatever, to vest upon the execution of the paper. If, however, it appears that all the estate which it was the purpose to convey was reserved to the grantor during his life, and the deed was only to take effect upon the death of the grantor, it will be construed to be testamentary in its character." *Spencer v. Robbins*, *supra*; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; 19 Cent. L. J. 46; *Leaver v. Gauss*, 62 Iowa, 814; *Turner v. Scott*, 51 Pa. 126. In 19 Cent. L. J. 46, will be found an extended collection of the cases upon the subject of deeds of a testamentary character; and there, as in the cases we have cited, it is clearly and firmly settled that the pivotal question is the intention of the grantor. If to postpone title

and enjoyment until after his death, it is testamentary; if to confer title and postpone the enjoyment thereof, it is a deed.

Under the allegations of the complaint before us, and upon the face of the deed, it was manifest that the intention of Daniel B. Stroup was to reserve all title, power of disposition, and management to himself, and to provide for a disposition of the property upon his death. The conveyance was what some of the judges have called "a will in disguise." It is unnecessary to decide whether, as a will, it is valid and effective to devise any part of the lands to the appellees. When we have found that, as a deed, it conveyed no interest to them, and that, under the statute of trusts and uses, the deed is "deemed a direct conveyance" to Daniel B. Stroup, we have met the most serious objection to the complaint; namely, that he never became seised, and no interest existed to which the widow's marital rights could attach. Absolute seisin during coverture is not always necessary to the enforcement of the widow's interest. The statute creating the interest (Rev. Stat. 1894, § 2652; Rev. Stat. 1861, § 2491) provides that "a surviving wife is entitled . . . to one third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death." If the reservations of the deed in question did not, by the aid of the statute of trusts and uses, arise to the force of an estate in fee simple, he certainly held, by virtue of such reservations, an equitable interest at the time of his death. As we have shown, he paid the purchase money, and held by the express provisions of the trust, the uncontrolled power of sale to his own use and benefit; and, if the fee had been nominally in the trustee, that power of sale to his exclusive use was enforceable in a court of chancery, to the utter destruction of such nominal fee, and its full result would inure to the benefit of Daniel B. Stroup. If, however, this equitable interest, held by him at the time of his death, was not of that character contemplated by the statute last cited, it at least illustrates the proposition that an absolute seisin is not in all cases indispensable. Another illustration of this proposition is found in those cases which hold that conveyances in anticipation of marriage and intended to defeat dower are void. *Dearmond v. Dearmond*, 10 Ind. 191; *Swaine v. Perine*, 5 Johns. Ch. 482, 1 L. ed. 1148, 9 Am. Dec. 818; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Petty v. Petty*, 4 B. Mon. 219; *Jones v. Jones*, 64 Wis. 301; *Lake v. Nolan*, 81 Mich. 112; *Youngs v. Carter*, 10 Hun, 194; 14 Cent. L. J. 102; *Boone*, Real Prop. § 56; *Tiedeman*, Real Prop. § 126. The last-named author (sec. 131) says: "In order that dower can attach, the husband must be seised of an estate of inheritance during coverture. But for this purpose it is not necessary that the husband should have the actual corporal seisin. Seisin in law, with a present right to actual seisin, would be suffi-

cient." *Mann v. Edison*, 39 Me. 25; *Atwood v. Atwood*, 22 Pick. 283; *Dunham v. Osborn*, 1 Paige, 635, 2 L. ed. 780; *Thomas v. Thomas*, 33 N. C. 123; *McIntyre v. Costello*, 47 Hun, 289.

What we have said as to the effect of the statute of trusts in its operation upon the deed in question would be sufficient for the purpose of this case, and would secure the claim of the plaintiff; but we may add that, while the authorities are in conflict, the weight of authority is certainly in support of the conclusion that where the husband, intending to defeat the claim of his wife to dower, secures a conveyance of lands purchased by him to be made but colorably to another, and securing to himself the full use, control, and disposition of the property, such conveyance is fraudulent as against the wife, and she may, before or after his death, recover that part of the lands which, under the law, would have fallen to her in case the convey-

ance had been to her husband, instead of by the colorable device which held the actual seisin from him. *McGee v. McGee*, 26 N. C. 105; *Dunnock v. Dunnock*, 8 Md. Ch. 140; *Hays v. Henry*, 1 Md. Ch. 337; *Crecelius v. Horst*, 4 Mo. App. 419; *Buzick v. Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Sandborn v. Lang*, 41 Md. 107; *Gilson v. Hutchinson*, 120 Mass. 29; *Rabbitt v. Gaither*, 67 Md. 94; *Tucker v. Tucker*, 29 Mo. 350; *Stone v. Stone*, 18 Mo. 389; *Jenny v. Jenny*, 24 Vt. 324.

In our judgment, the facts stated in each paragraph of the complaint stated a cause of action, and, if proven, would entitle the appellant to the relief prayed.

The judgment of the Circuit Court is therefore reversed, with instructions to overrule the demurrer to said complaint.

Howard, J., did not participate.

MISSISSIPPI SUPREME COURT.

D. D. JACKSON, *Appt.*,
v.
City of GREENVILLE.

(.....Miss.....)

A man of full age playing with a dog on a sidewalk and not going anywhere is not so using the walk as to entitle him to recover for injuries caused by defects therein.

(October 22, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Washington County, in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence in permitting its sidewalk to get out of repair. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jayne & Watson and S. Akin, for appellant:

As a general rule in suits for damages growing out of negligence, it is not necessary for plaintiff to do more than make out a prima facie case.

Hickman v. Kansas City, M. & B. R. Co. 66 Miss. 156.

The trend of modern authorities, in their efforts to keep pace with the demands of an ever advancing civilization, is toward placing a more liberal construction upon the use to which streets and highways may be put.

The city owes substantially the same duty to children properly upon the streets, although engaged in play, as it does to travelers on business.

Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65.

NOTE.—For similar questions as to use of highway for play, see *note* to *Gibson v. Huntington* (W. Va.) 22 L. R. A. 561.
27 L. R. A.

A town was held liable for injuries to an elephant caused by a defect in the way.

Gregory v. Adams, 14 Gray, 242.

So where a person stopped to see a procession pass.

Varney v. Manchester, 58 N. H. 480, 40 Am. Rep. 592.

In *Britton v. Cummington*, 107 Mass. 347, where a traveler stopped to pick berries.

So where a pedestrian stopped to tie his shoes on a door-step.

Murray v. McShane, 52 Md. 517, 36 Am. Rep. 387; *Elliott, Roads & Streets*, p. 474.

At the moment of the accident appellant was in effect and to all intents and purposes a pedestrian on the sidewalk. At the time of the accident he had started in pursuit of his pup.

The evidence does not show how far the puppy was removed from appellant. Had he not sustained his injury, there is nothing to show how far it would have been necessary for him to have journeyed before overtaking his property.

One step in the pursuit of a lawful enterprise entitles appellant to just as much protection as if he had made a hundred steps.

Varney v. Manchester, *supra*; *Bliss v. South Hadley*, 145 Mass. 91; *Lockett v. State*, 47 Ala. 45.

Mr. J. H. Wynn for appellee.

Woods, J., delivered the opinion of the court:

This action was brought by the appellant for the recovery of damages for injuries sustained by him in consequence of defects in a sidewalk in the city of Greenville, negligently suffered to exist. To the declaration filed, appellee interposed the plea of the general issue, and gave notice thereunder (1) that the injury complained of was the result of plaintiff's own negligence; and (2) that at the time of the injury, and for a reasonable time before, the defendant city had exercised and exhausted all its powers, under the law, to raise money for the repair of its

streets, and that all its funds were, at the time mentioned, exhausted. After all the evidence on both sides had been introduced, at the request of the appellee, the court instructed the jury peremptorily to find for the defendant city; and from the judgment of the court, following such instruction, this appeal is prosecuted. We shall disincumber our consideration of the appeal by omitting any reference to the notice of exhaustion of power and funds on the part of the municipality, as no evidence to support it was offered, and by omitting any discussion of the question of the contributory negligence of the appellant, and confine ourselves to this single question, viz.: Was the appellant, at the time of receiving the injury, making such use of the street and sidewalk as will entitle him to a recovery for hurt suffered by reason of defects in the sidewalk?

It is elementary law that streets are primarily designed to be used for purposes of transportation and travel; and the authorities are uniform to the effect that, in the absence of any express statute creating liability, municipal corporations, clothed with plenary and exclusive control over their streets, are yet liable, by implication, for injuries resulting to persons properly using such streets, for failure to maintain the same in a reasonably safe condition for travel. That the rule as stated is substantially recognized and applied by the courts in cases of statutory and of implied liability will appear by examination of the adjudications of courts of last resort in both classes, and any seeming want of harmony will, in most instances, appear to have arisen from failure to confine the language of the several courts to the facts of the particular case. What are the facts as shown in the evidence introduced on trial below by the appellant, which are supposed by counsel for appellee to bar any recovery herein? We quote from the testimony of the appellant: "The accident occurred in this way: I had a puppy there, and I took the puppy out on the sidewalk, and was playing with him; and he jerked loose from me, and I made a step to catch it, and my foot slipped into one of those cracks, and jerked me down, and, before I could recover, the plank flew up, and struck me on my leg. My foot was fastened in the crack. It was my right foot in the crack. I had my left foot on the ground, and I jerked my right foot up, and the plank flew up, and struck me on the left leg. It produced a compound fracture of my leg." On cross-examination the appellant said: "I was playing with a dog when the accident happened. I went out to the sidewalk. I had a pointer puppy there, and was playing with it. It tried to get away from me, and my foot slipped off the plank, and went into the crack; and in reaching over, I tried to pull my foot out, and the plank flew up, and struck me on the leg. My leg was broken. . . . The plank ran on the sidewalk crosswise. My foot was caught crosswise. Was standing rather crosswise. Was walking along when the accident occurred. Was playing with the dog. Was going nowhere. . . . My face was turned towards the fence; turned south. The dog

was running between me and the paling, and I stooped to catch him, and my foot slipped." The case thus presented is that of a man of full age using the sidewalk, not for the purpose of travel, either for business or exercise or pleasure, but for the sole purpose of playing with a dog. The appellant had come out of his boarding house to the sidewalk. He was standing, and was not going anywhere. He was playing with the dog, and was standing with his back to the roadway, and his face turned towards the palings, when, in an effort to catch the dog, running between him and the fence, he stepped and received his injury. Can it be satisfactorily gathered from the above statement that the appellant, when hurt, was making such reasonable use of the street or its sidewalk, at the time of receiving the injury complained of, as will bring him within the category of those for whom streets and sidewalks are designed? Was he a traveler on or along the street, who, incidentally halting or turning aside upon his way, received his hurt? Was the municipality under any duty to the appellant to keep in repair the sidewalk so that he might safely use it for the purpose of his play with the dog? Streets, we repeat, are designed for travel, primarily; and though it must be conceded that one using the street for travel may incidentally cease to move on continuously, and yet not lose his right as a traveler on the highway, yet it cannot be deduced from this concession that one not using the street for travel may, nevertheless, convert it or part of it, into a playground, and in so using it, if injury occur while so using or misusing the street, by reason of defects in it, hold the negligent municipality liable. To recover, the injured party must fix liability upon the municipality; and, to fix liability, the sufferer must show failure on its part to discharge a duty to him. But the duty to repair and keep in reasonably safe condition streets and sidewalks is due only to those using the highways for the purposes of their creation. If a football team appropriate a street to its uses in playing a game, and one of the players fall into a hole in the roadway, and injury result, would any one be found to say that he could rightfully complain and recover? In such case the injured player clearly would be frustrating the very end for which highways are ordained, viz., the convenient and safe transportation and travel of property and persons. It seems to us indisputable that one contravening the law of the creation, and the ends for which it was created, cannot be heard to complain if ill befall him because of his own wrongdoing.

Many cases have been examined by us where liability was imposed and recovery had for injuries to children, not of the age of discretion, when playing on the streets or highways; but all such cases, on well-understood legal principles, are readily distinguishable from the case at bar. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, and *Indianapolis v. Emmelman*, 108 Ind. 580, 58 Am. Rep. 65, cited in the brief of appellant's counsel, are of this character. Our

own adjudications are along the same line, in like cases. *Mackey v. Vicksburg*, 64 Miss. 777; *Vicksburg v. McLain*, 67 Miss. 4. When we come to consider the cases referred to by the counsel wherein adults received injuries in streets, we shall discover that none of them, on their facts, at all resemble the case at bar. The shrewd, lucid, and caustically humorous opinion in *Varney v. Manchester*, 58 N. H. 430, 40 Am. Rep. 592, was upon these facts, in a word, viz.: Varney, the plaintiff, went to a certain street in Manchester for the purpose of seeing a procession form on Decoration Day. He went down one side of the street to the place where the procession was forming, and crossed over the street to get a better view. He stood looking at the forming of the procession, near a pile of lumber; and, after so standing and looking from three to five minutes, the lumber fell, and crushed his foot. Held, that a person is "traveling upon a highway" when he is making a reasonable use of a highway as a way, and that the law does not prescribe how long one may stand on a street without ceasing to use the way as a way; but that the question was one of reasonable use, and this was for a jury's determination, if there is any evidence on which they could properly find the use was reasonable. The case of *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367, is that of an adult lawfully passing along a street, and stopping for an instant on a doorstep of a house fronting the street, for the purpose of adjusting his shoe, and suffering injury in consequence of a brick falling from a dilapidated wall, negligently permitted to remain there. Held, that travelers on a street have not only the right to pass, but to stop on necessary and reasonable occasions, so they do not obstruct the street or doorway. In *Duffy v. Dubuque*, 68 Iowa, 171, 50 Am. Rep. 743, the facts were that Duffy, who was a workman, went to the corner of the two intersecting streets for the purpose of doing some work on a house there situated. After he had unloaded some stuff from a wagon, he went along the sidewalk to a hydrant eight feet in rear of the house and a foot or two from the line of the sidewalk. While in the act of drawing water from the hydrant, with one foot on the ground, and the other on the sidewalk, a section of a roof, negligently left standing near, was blown over by a gust of wind, fell on Duffy, and inflicted the injuries of which he complained. Held, that Duffy's stopping to draw water as stated was the exercise of a privilege which he might lawfully enjoy, and was a mere incident to the general use of the street which he was making.

The opinions of the New England courts, where liability in the character of cases which we are considering is of statutory creation, and in which, as is sometimes charged, extreme and antiquated views are announced, it will be found, on careful analysis, are not out of general accordance with the spirit of the most, not to say all, of the decisions elsewhere which we have examined. In the case of *Blodgett v. Boston*, 8 Allen, 237, while the court deny the liability of the city for injuries received by a boy eleven years old, who was using the plank sidewalk on the street with another boy for purpose of play only, yet the opinion is careful to limit the effect of the decision by saying: "We do not certainly think any narrow or restricted signification should be given to the word 'traveler,' as used in the statute. It may well embrace within its meaning, as applied to the subject-matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. . . . We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist in such case the important element that the person injured was actually traveling over the way. But this element is wholly wanting in the case at bar." Here, as in the case just quoted from, the important element of actual use of the way for the purpose of travel is wholly absent. Here, as there, the case shows an appropriation of a sidewalk to a use other than, and inconsistent with, that for which the highway was established. Here, however, the offender against the rights of the public was an adult, and not a child of debatable discretion. Here, in addition, the play with the dog was not a mere incident to the general and proper use of the sidewalk by the appellant in passing along or over it. The city owed him no duty in his situation, and using the street as he was doing. The duty was on the municipality to keep and maintain the street in reasonably safe repair for travel, and liability ensues, upon injury befalling one going along or over it, whether for purposes of business or pleasure, by reason of failure to keep and perform this duty. But to one simply using the street or sidewalk as a playground the city owed no duty to keep its streets for him so engaged in any repair.

Affirmed.

CALIFORNIA SUPREME COURT.

Re John FLAHERTY.

(.....Cal.....)

1. An ordinance making it unlawful to

NOTE.—As to ordinances regulating street parades, see *Re Garrabed (Wis.)* 19 L. R. A. 863, and note.

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beat a drum upon any traveled street without special permit from the president of the board of trustees, which he may grant whenever in his judgment it shall not conflict with the purposes

As to ordinances prohibiting public address on city common or other public grounds, see *Com. v. Davis (Mass.)* 25 L. R. A. 712.

of the ordinance, is not an unconstitutional denial of individual rights.

- 2. Giving an officer power to grant permission to beat a drum in a street when in his judgment it will not violate the purpose of an ordinance prohibiting such acts, does not make the ordinance void.**

(January 6, 1895.)

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he has been committed for alleged violation of a city ordinance. *Denied.*

The facts are stated in the opinion.

Measrs. H. V. Morehouse, Hiram D. Tuttle, and J. E. Richards for petitioner.
Mr. C. C. Bennett for respondent.

McFarland, J., delivered the opinion of the court:

The petitioner is under sentence of imprisonment for a violation of an ordinance of the city of Redlands, and seeks to be discharged on habeas corpus upon the ground that said ordinance is wholly invalid and void. The ordinance is entitled, "An ordinance to promote safety and security to public travel by prohibiting the beating of drums and certain other noises on the traveled streets or avenues of the city of Redlands without special permission therefor, and authorizing such permission in certain cases;" and in the body of the ordinance it is made an offense, punishable by fine or imprisonment, for any person to, among other things, "beat a drum" upon any traveled street of the city "without special permit in writing so to do first had and obtained from the president of the board of trustees of said city, which permit the president of said board may grant whenever, in his judgment, the issuance of the same shall not conflict with the aforesaid purposes of this ordinance, and not otherwise, provided that such permit shall specify the time when and the street or avenue where any of said instruments shall be so used as aforesaid." Petitioner was convicted of beating a drum on the traveled streets of said city without a permit, contrary to the said provisions of said ordinance. It appears from the petition that petitioner had been in the habit of beating a drum on the streets daily, and that, upon his application to the president of the board for a permit "to engage in beating a drum as he had been heretofore doing," the permit was refused; although, as appears from the petition, he was given a permit to beat his drum upon a certain occasion. He claims the right to beat his drum,—not on special occasions only, as other people, but every day, without a permit, and despite the ordinance.

There is no need of discussing the general power and right of a city to prohibit such noises on the streets as those made by the beating of drums. We do not understand counsel for petitioner as contesting such power. At all events, it certainly exists. But the point urged by petitioner is that the ordinance is void because it gives a certain officer authority to give permits to beat drums on special occasions; and this position is the only one which needs examination. It is

contended that the clause authorizing a permit is partial and oppressive, because it gives too much power to the president of the board, and is violative of general constitutional principles against abridging the privileges of citizens, depriving a person of his rights without due process of law, denying him the equal protection of the law, etc. The continuous or daily beating of drums on the streets of a city would be an intolerable nuisance,—endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways, and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few special occasions,—either when there are patriotic celebrations, generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few, and usually well known, so that people are prepared for them; and the processions and drums are generally preceded by policemen, who give notice of the approaching uproar. But how can these occasions be provided for? By an ordinance which shall anticipate and state in detail beforehand every occasion on which the noises may be made? Such a thing is practically impossible. No human foresight could conjure up all the circumstances under which the people might want a band (with a drum) on the streets. It would not do to name legal holidays alone; that, for obvious reasons, would be too narrow a provision. Neither would it do to single out, in addition to legal holidays, certain other enumerated days, as for instance, the first Monday of every month; the president of the United States, or some other distinguished man whose advent should be celebrated with drums, might come on Tuesday. Neither would it be possible to schedule the kinds or characters of occasions of which drum-beats would be a necessary part. And so the practical result of petitioner's contention is that all persons must be allowed to beat drums on all occasions as they may choose, or no person must be allowed to beat a drum on any occasion whatever.

In dealing with this and similar questions,—such as repairs of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, etc., singing or playing on musical instruments on the streets, and the like,—our federal, state, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes

of oppression and mischief. Of course, it is impossible to state in terms the extent or the limitation of what is known as the "police power;" and courts have not attempted to do it. Whether or not that power has been exceeded in particular cases must be determined as the cases arise; and to find the law applicable to a particular case we must look to see what courts have held in similar cases. And we find that statutes and ordinances similar in character to the one in question in the case at bar have been sustained in most of the cases to which our attention has been called. We will notice a few of them. Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick v. Bailey*, 13 Gray, 161); forbidding orations, harangues, etc., in a park, without the prior consent of the park commissioners (*Com. v. Abrahams*, 156 Mass. 57); or upon the common or other grounds, except by the permission of the city government committee (*Com. v. Davis*, 140 Mass. 485); "beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village" on any street or sidewalk (*Vance v. Hadfield*, 22 N. Y. S. R. 858); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer v. Davis*, 186 Mass. 289, 49 Am. Rep. 27); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (*Hins v. New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels, and to assign to each its place (*Vanderbilt v. Adams*, 7 Cow. 849); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall market (*Nightingale, Petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy v. Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Easton Comrs. v. Cooley*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy. *Com. v. Brooks*, 109 Mass. 355. In *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923, the Supreme Court of the United States had under consideration an ordinance which, among other things, prohibited the carrying on of the business of a laundry without certificates from the health officer and the board of fire wardens; and, while that part of the ordinance was not directly involved, the court says as follows: "In the case before us, the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome; but, as we have seen, this is a matter for the determination of the municipality in the execution of its police powers, and not the violation of any substantial right

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of the individual." Many other authorities to the same point as those above noticed might be collected outside of the decisions in our own state. In this state it was held in *Ex parte Casinello*, 62 Cal. 533, that an ordinance giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any person could deposit "any glass, broken ware, dirt, rubbish, garbage or filth," was a salutary and valid "police regulation." In the *Case of Guerrero*, 89 Cal. 88, it was held that the city council had authority to make the issuance of a license for the sale of liquors conditional upon the appellant's obtaining a permit from the board of police commissioners. In *Ex parte Tuttle*, 91 Cal. 589, an ordinance prohibiting the selling of pools on horse races, except within the inclosure of a race track where the race is to be run, was upheld, and it was declared not to be void because its effect might be "to confer a special privilege or benefit upon those who own or control the race courses." In *Ex parte Fiske*, 73 Cal. 125, an ordinance was upheld which prohibited the repair of a wooden building within certain fire limits without permission in writing signed by a majority of the fire wardens and approved by a majority of the committee on fire department and the mayor. In that case we said as follows: "It is clear, however, that a literal compliance with the regulation prohibiting the repairing of a wooden building might work in some instances useless hardships. The repair of a leaking roof or a broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression." In *Ex parte Christensen*, 85 Cal. 208, this court upheld an ordinance prohibiting the business of a retail liquor dealer unless he procured the permission of a majority of the board of police commissioners, or, upon their refusal, the permission of twelve property owners in the block. The foregoing authorities, in our opinion, clearly establish the validity of the ordinance here in question.

Counsel for petitioner rely on some cases—particularly *State v. Dering*, 84 Wis. 585, 19 L. R. A. 588, and *Frazer's Case*, 63 Mich. 396, which, at first blush, seem to conflict with the general current of authorities as above presented. But upon closer examination they will be found to go upon a distinction or principle—whether sound or not—that is not applicable to the case at bar. They are based upon the theory that the lawful inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be regulated; and that all reg-

ulations of such rights must be uniform, etc. The cases cited all deal with ordinances regulating the right of the people to have processions or parades in the streets; and it is this right that is discussed, although the accompaniment of music is mentioned in some of the ordinances. In the Wisconsin case, *supra*, the petitioner "was convicted of parading the streets." Now, the public have an undoubted right to travel on the street; that is what a street is for. And to march along a street in a procession is merely to exercise the right to travel on it. Therefore, if the cases under review be sound, this right can only be regulated, and cannot entirely be suppressed; and the regulation must be uniform, "although it is difficult to understand how the crowded streets of a city could be practically regulated in this respect without vesting some discretion in the police authorities. At all events, the cases referred to deal with a right. But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority. As, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the law-making power may determine. In *Ex parte Tuttle*, *supra*, it was held that, as betting on horse races was demoralizing in its tendencies, and an evil, it could be suppressed by ordinance; and that, as it could be suppressed, no one could be heard to complain of an ordinance regulating it because thereby special privileges accrued to particular persons. And in *Ex parte Christensen* this court distinctly declared that such is the rule. The court said: "The objection is that this makes the license depend upon the arbitrary will and pleasure of the board of fire commissioners. . . . But, whatever force this objection might have in reference to licenses to carry on the ordinary vocations of life, which are not supposed to have any injurious tendencies, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only it does not interfere with interstate commerce. And, if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases. . . . Even if it be conceded that the conditions were arbitrary, they were within the power of the board." In the ordinance involved in the case at bar, there is no attempt to suppress processions or parades. It does not interfere with travel, but seeks to promote the comfort, convenience, and safety of travelers by preventing that which makes traveling uncomfortable and dangerous. Its provisions do not affect private premises, but refer solely to public traveled streets. It prohibits no business which every one has a right to pursue. As the wants and comfort and pleasure of the public require that the thing prohibited, although in the abstract injuriously annoying, should on special occasions be allowed, the ordinance provides for permitting the thing to be done on such occasions; and the granting of such privileges is not taking away the right to do the

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thing from others, because they have no such right. When the public welfare requires it, a nuisance may, for special purposes, be permitted. *Pittsburgh, C. & St. L. R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73; *Sauryer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27. As all such occasions cannot be foreseen and provided for by special enactment, some small discretion in the premises is granted to a certain officer; and that discretion to grant a permit is limited to instances where "the issuance of the same shall not conflict with the aforesaid purposes of this ordinance," viz., "to promote safety and security to public travel." The validity of such an ordinance is clearly established by the current of authorities, some of which are hereinbefore cited. It is entirely within the reasoning of the Supreme Court of the United States in *Crowley v. Christensen*, 137 U. S. 86, 84 L. ed. 620, which case also furnishes an answer to petitioner's claim of support from *Yick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 227.

In our opinion, the ordinance here involved is valid, and the petitioner should be remanded.

The writ is dismissed, and the petitioner remanded to the custody of the marshal.

We concur: *Garoutte, J.; Van Fleet, J.; Beatty, Ch. J.*

Harrison, J., dissenting:

The authority of the city to make police regulations is given by the constitution, and, although it is derived directly from the people, instead of mediately through the legislature, through the municipal government act, yet it is a legislative power, and, like any other legislative power, is to be exercised by the body to which the power has been intrusted. The power to make laws is a sovereign power, and its exercise by the legislative body of a municipality, being a delegated power, cannot be delegated to any other body or individual. Mr. Dillon says (*Mun. Corp.* 96): "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." Mr. Cooley says (*Const. Lim.* p. 248): "So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority." This inhibition includes, not only the ordinance itself which is to be adopted, but also the individuals upon whom it is to operate, as well as the times and places in which it is to be in operation. The legislative body of the municipality cannot delegate to one of its members, or to any executive officer of the city, the power to determine whether an ordinance shall be operative upon certain individuals, or at certain times, any more than it can delegate to him the power to determine whether the ordinance shall be adopted, or shall have any operation; nor can it confer upon such officer

the power to exempt any individual that he may choose from the operation of the ordinance. "No man's rights can be submitted, under a constitutional government, to the discretion of anybody." *Robison v. Miner*, 68 Mich. 556. Whenever the question has been presented for determination, it has been uniformly held that an ordinance which confers upon an executive officer of the city the right to determine by his own will whether it shall be in operation or not in the particular cases to which it is directed is invalid. If the act covered by the ordinance is one which the individual has no inherent right to perform, or which the municipality may prohibit altogether, a privilege to perform the act may be made to depend upon the compliance with certain conditions or the previous approval of another officer. If, however, the act is lawful or proper in itself, and improper only as it may affect the public, the power of the municipality is limited to a regulation of its exercise, and such regulation must be indicated by fixed and definite rules, and cannot be left to the arbitrament of any officer. This rule is not to be confounded with the execution of the ordinance by the officers intrusted therewith. The enforcement of the ordinance by the executive officer of the city is entirely distinct from determining whether the ordinance, when adopted, shall be in force. The policeman may have a discretion to determine whether an obstruction of the streets by an individual is such a violation of an ordinance forbidding the obstruction as will warrant his arrest, but neither he nor any other officer can have the power to determine whether the ordinance itself shall be suspended for the benefit of that individual, or can give to such individual the right to disregard the ordinance. The right of the harbor master to station vessels at different points in the harbor, or of the policeman to prescribe the order of carriages at a theater, or of the superintendent of streets to designate a place for dumping garbage, is not the exercise of a legislative power, but rather the act of an executive officer to enforce the ordinance. Accordingly, it has been held that an ordinance conferring upon the mayor the right to determine whether a stationary steam engine should be removed was void, as conferring upon him a power which could only be exercised by the city council (*Baltimore v. Radecke*, 49 Md. 217, 88 Am. Rep. 289); that an ordinance providing that no person should erect any building within the city limits without having obtained permission from the board of aldermen is void, since it does not prescribe a uniform rule of action for governing the exercise of their discretion (*State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423); that an ordinance forbidding the erection of livery stables in any block without the consent of the owners of land in the block is invalid (*St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721); that an ordinance making it unlawful for persons to parade a public street, singing or beating drums, or playing upon musical instruments, without having obtained the consent of the mayor, is void upon the ground that it does not fix the con-

ditions uniformly and impartially, and is unreasonable (*Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *Re Frazee*, 63 Mich. 896; *Rich v. Naperville*, 42 Ill. App. 222; *State v. Dering*, 84 Wis. 585, 19 L. R. A. 858); that an ordinance that no parades or processions shall be allowed upon the streets without a permit from the police department is invalid, because it leaves the power of restraining processions to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially. *Chicago v. Trotter*, 136 Ill. 480.

There are many cases in which ordinances containing such a provision have been upheld, but in these cases the effect of such a provision upon the ordinance was not considered by the court; the only question presented to it for its consideration being the validity or invalidity of the ordinance upon other grounds. In these cases the act of the court in sustaining the ordinance cannot be regarded as an affirmation of the power to include this provision. Ordinances relating to health and security from fire, which prohibit certain acts without a permit from officers in charge of those departments, have been sustained upon the ground that the safety of the citizen from disease and fire were of a peculiar character, demanding the supervision of officers particularly skilled in reference thereto, and to whose judgment the matter could be more appropriately referred. The principles applicable to these ordinances, and under which they may be upheld, have, however, no application to the ordinance under discussion. There is another line of cases in which ordinances have been upheld which reserved to the city council or to the legislative body itself the power to exempt individuals from their operation. This is, however, entirely consistent with the principle above laid down. It is not a delegation of legislative authority, but is an exercise of that authority by the legislative body itself. In the absence of any restrictions upon its exercise of the legislative power intrusted to it, the city council has the same power to enact ordinances applicable only to special portions of the city, or to designated classes or individuals, as would the legislature of the state in the absence of constitutional restrictions; and it may equally enact an ordinance exempting individuals or classes from the operation of an ordinance, or suspending the operation of the ordinance entirely. This rule also includes another class of cases in which an exemption from the ordinance is made by some particular branch of the city government. The entire legislative power which is delegated to a municipality is not always conferred upon the city council. It may be portioned out to the different departments of the city, and authority conferred upon those departments to legislate upon the matters peculiarly intrusted to their care. The park commissioners may have exclusive authority to determine the manner and times in which the parks shall be used. The health department may have the authority to enact sanitary

regulations for the entire city. Similar powers may be intrusted to the school department, the harbor commissioners, the police commissioners, for the enactment of ordinances relating to certain subjects. The ordinance under consideration falls within the rule hereinbefore referred to, and should be declared invalid. It confers upon the president of the board of trustees the power to suspend its operation in favor of any individual, whenever he may elect, and to deny the same favor to another who may be equally entitled to its suspension. It, in fact, confers upon him the power to determine the extent to which the ordinance shall be operative, which is in reality the power to determine whether there shall be such an ordinance. The only limitation upon the exercise of this power is his own judgment that the permit will not conflict with the purposes of the ordinance. This is a pure and simple delegation to him of the legislative power which has been conferred upon the trustees themselves. It is not enough to say that it must be presumed that this officer

will act properly. The question is not whether a power that has been conferred will be properly exercised, but whether there has been any authority given to confer the power. If there has not, it is no answer to say that it will not be abused. In a country under the government of laws, the conduct of its citizens cannot be subjected to the arbitrary will of any individual. The mildest despotism has no place in a constitutional government. Beating a drum is not a nuisance *per se*, or in violation of the rights of others, and it does not of necessity interfere with the usual and proper use of the public streets. The authority of the trustees of the city to regulate the use of the streets, or the beating of drums thereon, is not denied, but the "regulation" must be made by the city, and cannot be delegated by it to the president of the board of trustees.

In my opinion, the ordinance is invalid, and the prisoner should be discharged.

We concur: **De Haven, J.; Fitzgerald, J.**

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* Ross W. FUNCK,

Thomas T. McCARTY, Judge.

(51 Ohio St.—.)

***The guaranty contained in section ten of the Bill of Rights, that an accused person shall have a "trial by an impartial jury of the county or district in which the offense is alleged to have been committed," does not require that the trial shall take place within the judicial district where the indictment is found; and under section 7263, Revised Statutes, the court in which an indictment is returned may, on motion of the accused, if an impartial jury cannot be had there, order that he be tried in any adjoining county.**

(March 12, 1895.)

APPPLICATION for a writ of mandamus to compel respondent to proceed with a trial of an indictment which had been transferred to his court from Wayne County. *Granted.*

Statement by **Shauck, J.:**

On the 8th day of March, 1894, one Sarah Snell was indicted for a felony in Wayne county.

She moved in the court of common pleas for a change of venue, and the court, finding that she could not have a fair and impartial trial in Wayne county, sustained her motion and ordered that she be tried in the county of Stark which adjoins Wayne but is not in the same judicial district. The original indictment, and certified transcript of the pro-

***Headnote by the Court.**

NORM.—The above decision is a novel one in respect to the place of jury trial, and we believe has no very near precedent.
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ceedings were sent to the clerk of the court of common pleas of Stark county. The defendant, Hon. Thomas T. McCarty, who is a judge of the court of common pleas holding the term of said court in Stark county, being of the opinion that his court is without jurisdiction to try the accused, refuses to proceed.

The relator prays for a writ of mandamus commanding him as such judge to proceed with the trial of the said cause.

Messrs. J. K. Richards, Atty.-Gen., Ross W. Funck, Aguila Wiley, and A. D. Mets for relator.

Mr. A. A. Thayer for respondent:

Counties and judicial districts for the trial of crimes existed in the northwest territory at the time of the adoption of the Constitution of 1802.

The phrase "county or district," found in that instrument, will be held to have reference to such existing counties and districts.

Ordinance of 1787.

The same word used more than once in the same act shall be presumed to have been used each time in the same sense, unless a different intention appears therein.

Rhodes v. Weldy, 46 Ohio St. 284; *Sutherland, Stat. Constr.* § 255.

The term "district," as used in the bill of rights, contemplated a greater district than a county.

The terms "county" or "district," as used in the clause, must both be held to have meaning and a use.

Re Eldred and Re Ford, 46 Wis. 548; *Wheeler v. State*, 24 Wis. 58; *State v. Knapp*, 40 Kan. 149; *Oliver v. State*, 11 Neb. 1.

The term "district" here undoubtedly means judicial district, for the Constitution creates these districts; and when it says that

certain trials shall be in a "district" it cannot but mean that district in which the court exists and has its jurisdiction.

State v. McGehan, 27 Ohio St. 280; *State v. Myers*, 21 Ohio L. J. 61.

Common pleas judges are only officers of their judicial districts, and have no extrajudicial powers.

Const. art. 4, §§ 8, 10, 12, 15; *Ex parte Judges* (Dist. Court Case) 84 Ohio St. 431; *Cincinnati, S. & O. R. Co. v. Sloan*, 81 Ohio St. 2.

Shauck, J., delivered the opinion of the court:

The order of the court of common pleas of Wayne county, as counsel agree, is within the terms of section 7263, Revised Statutes: "All criminal cases shall be tried in the county where the offense was committed, unless it appear to the court, by affidavits, that a fair and impartial trial cannot be had therein; in which case the court shall direct that the person accused be tried in some adjoining county."

But the contention of counsel for the defendant is that the natural import of the terms of the statute must be restricted, to the end that it may not conflict with section 10, article 1, of the Constitution which guarantees to "the party accused . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The rule of interpretation suggested is familiar; and its application here is said to require that the statute be so read that the place of trial shall be changed to an adjoining county of the judicial district. The argument is that as the word "district" is used in this section of the bill of rights with reference to the place where a judicial inquiry shall be conducted, it should be understood as meaning one of the judicial districts for whose creation the constitution makes provision. The force and aptness of this reasoning are apparent; and it seems to have controlled the decisions in some of the cases cited from other states. Although the question is, so far as we know, not settled by any adjudication in this state, we are aware that in, at least, some of the districts, the practice has been in such cases to order that the accused be tried in an adjoining county of the same district; though this course may have been prompted by a desire to avoid the question which we are now required to determine.

Whether the considerations stated are entitled to controlling effect must be determined by opposing considerations suggested by other provisions of the constitution the purpose for which this guaranty was inserted in the bill of rights and the generally understood meaning of its terms at the time of its adoption.

Section three of article four ordains that "the state shall be divided into nine common pleas districts, of which the county of Hamilton shall constitute one; and section twelve of article eleven, making the apportionment for judicial purposes that: "The county of Hamilton shall constitute the first district, which shall not be subdivided."

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We cannot adopt the view of counsel for the defendant, unless we are prepared also to adopt the view, which these provisions would make inevitable, that the trial of one accused in Hamilton county cannot be changed to any other county. In this connection, and in the view that the law providing for a change of venue is of a general nature, the provision of section 76, article 2, is significant: "All laws of a general nature shall have a uniform operation throughout the state." A law of this nature can have no operation anywhere, unless there be such interpretation of this cause in the bill of rights as will permit it to operate everywhere.

The source of jurisdiction to try an accused person is found in other provisions of the constitution. This clause guarantees to him the personal right indicated. The substance of that right is a trial before an impartial jury of the county in which the offense is alleged to have been committed, or so near thereto that he may have the legitimate benefit of his own reputation and that of his witnesses, and that he may, with as much certainty and as little expense and inconvenience as are practicable, secure the attendance of his witnesses. For the preservation of that right the accessibility of the place of trial is highly important. Whether the boundary of a judicial district intervenes, is of no importance whatever. *Weyrich v. People*, 89 Ill. 90.

That the term "district" is not used in the sense of judicial district is indicated by other provisions of the instrument. Although section twelve, article eleven, apportions the state for judicial purposes, the general assembly is authorized to erect new counties and attach them to a convenient district, and by section 15, article 4, it is vested with continuing power to change the districts, or to increase or diminish the number of the districts. It is not, therefore, by irrevocable provision of the constitution, but by the acquiescence of the legislature, that the counties of Wayne and Stark are indifferent judicial districts. If the general assembly should so exercise the powers thus expressly granted as to place these counties in the same judicial district, the ground of the defendant's contention would disappear. The insubstantial character of the objection to the jurisdiction of the court of common pleas of Stark county appears when we remember that there can be no denial of the authority of the general assembly to provide for the trial there, and there is really nothing more than a doubt as to the form in which the undoubted power has been exercised.

There is no constitutional right to a trial in an adjoining county, unless it is implied in the use of the word, "district." If that should be construed to mean the judicial district, it would result that the place of trial might be changed to a remote county of the district, whereby the right guaranteed would be seriously impaired. The provision of the statute, that, in the case contemplated, the place of trial shall be changed to an adjoining county, is a legislative interpretation of the constitutional guaranty. That interpretation regards the district as the vicinity; and

it is to be commended unless inflexible rules forbid the preservation of the guaranteed right with its highest value.

It would perhaps be unprofitable, if it were practicable, to seek the meaning of this term beyond the bill of rights in the Constitution of 1802, whence it was immediately derived, when incorporated into the present constitution. In the former constitution the term could not have had the meaning now claimed for it by counsel for the defendant, since the judicial district, *eo nomine*, was unknown in that instrument. When the language was so derived from the former constitution, it had for thirty-five years received the same practical interpretation which is now questioned. By the seventeenth section of the Act entitled, "An Act pointing out the mode of trying criminals," passed February 26, 1816, the general assembly provided for the enforcement of the constitutional guaranty, by a change of the place of trial to an "adjoining county," if a proper jury could not be had in that in which the offense was committed. We adopt a familiar and salutary rule of interpretation when we hold that these words were adopted into the present constitution, with the same meaning they were known to have in that from which they were derived.

To myself this conclusion, reached after a careful consideration of the reasons involved, is not less satisfactory because at variance with tentative views previously entertained.

Peremptory writ allowed.

City of CINCINNATI *et al.*, *Plffs. in Err.*,
v.

Henry BATSCHE *et al.*

(61 Ohio St.—)

***Where a city appropriates land for the purpose of widening a part of a street, and provides by ordinance that the costs and expenses of the appropriation shall be assessed by the foot front, upon the lots and lands abutting upon the part widened, and upon other lots and lands abutting upon the line of such street between certain designated points, such abutting lots and lands being declared by the council to be those which, in its opinion, will be specially benefited by the appropriation.—Held:**

1. The assessment will be deemed to be on the foot front plan, as distinct from an

***Headnotes by the Court.**

NOTE.—The above case makes a novel application of the rule as to abutting or fronting lots, by the decision that lots on a street abut on an improvement made by widening the street on the other side. As to the validity of the rule as to

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assessment in proportion to the benefits that may result from the improvement, or according to the value of the property assessed, as provided by section 2204 of the Revised Statutes.

2. The assessment will be held valid and binding only as to such lots and lands as bound and abut on the improvement.

3. The improvement, within the statutory meaning, has reference to the specific thing, of definite location, which is done or added to the street whereby it is improved. The term is not to be applied indiscriminately to any part of the street because it may have been improved, in the sense of having been benefited, by a change or addition made elsewhere on the street.

4. Where a strip of ground from one side of a street is appropriated for the purpose of widening such street, the lots and lands fronting on the opposite side of the street at the part widened will be held to abut on the improvement, although the street may intervene between the abutting lots and lands and the strip of ground appropriated.

(February 5, 1896.)

ERROR to the General Term of the Superior Court of the City of Cincinnati to review a judgment in favor of complainants in a proceeding to enjoin the collection of certain assessments. *Modified and affirmed.*

Statement by **Dickman, Ch. J.**:

The original action was begun in the superior court of Cincinnati by Henry Batsche, one of the defendants in error, on behalf of himself and other persons named in his petition, to wit: Margaret Wilmer, the Walton Architectural Iron Company, the American Cotton Oil Company, Clifford Perin, Johanna Kirkpatrick, the Queen City Spring Company, Charles Harkness, F. A. Sudbeck Heirs and H. W. Schorffelde, to enjoin the collection of a special assessment levied by the city of Cincinnati, one of the plaintiffs in error, on their property abutting on Culvert street, between Fifth and Sixth streets, in said city, to pay the cost of condemning property to widen and open Culvert street to its full width between said points.

Prior to July 23, 1887, Culvert street, between Fifth and Sixth streets, was partly opened to the width of forty-three feet, but at the corner of Fifth street was only open about twenty feet, a lot belonging to the said Clifford Perin extending out into the street for about twenty-three feet at Fifth street, and running back about 166 or 167 feet and extending about fourteen feet into the street at the rear, as shown by the plat attached to the original petition of which the following is a copy:

frontage assessments, see note to *Raleigh v. Peace* (N. C.) 17 L. R. A. 330. But see *Mauldin v. Greenville* (S. C.) ante, 284, denying the validity of such assessments in South Carolina.

SIXTH

STREET.

Joanna Kirkpatrick.	
Wm. D. Kirkpatrick.	
The American Cotton Oil Company.	
Do.	
13 Do.	
12 The Walton Architect Iron Company.	
11 Do.	
10 Do.	
9 Do.	

HARRISON STREET.

7 Margaret Wilmer.
6 Henry Batscher.
5 Do.
4 Do.

FIFTH

STREET.

The American Cotton Oil Company.	
Do.	
F. A. Sudbeck.	
H. W. Schorfheide.	
Geo. C. A. Greyer.	
Charles Harkness.	
14	
166.43	Clifford Perin.
23	

STREET.

This lot, so projecting into the lines of the street and shown by crossed lines on the plat, was condemned and appropriated by ordinance of the city of Cincinnati duly passed July 22, 1887. Said ordinance directed the city solicitor of said city to institute the necessary proceedings in a proper court to ascertain the compensation to be paid the owners of said ground so condemned, and also provided for a special assessment in the following words:

Section 2. The amount so found, together with the costs and expenses of said appropriation and the interest on bonds issued, shall be assessed per front foot upon the lots and lands bounding and abutting upon said Culvert street, as opened between the north line of Fifth street and the south line of Sixth street; the said lots and lands so bounding and abutting Culvert street, between the points aforesaid being, and the same are hereby declared to be the lots and lands which, in the opinion of common council, will be specially benefited by said appropriation according to the laws and ordinances on the subject of assessments; the assessment therefore to be payable in ten annual installments, and the same collected as provided by law and the assessing ordinance hereafter to be passed, and bonds shall be issued in anticipation of such assessment."

In pursuance of said ordinance, the city solicitor instituted proceedings for the purpose of ascertaining the value of the property appropriated, and such value was found to be \$4840. The bonds of the city were issued in anticipation of the collection of the assessment, and the compensation for the property taken and costs paid. Thereafter, on February 2, 1889, the city passed an assessing ordinance to assess a special tax on the real estate bounding and abutting on Culvert street between Fifth and Sixth streets, on each front foot at the rate of \$52.337.67 per foot, payable in ten equal annual payments, with interest at five per cent per annum on the deferred payments, and in default of payment when due to be certified forthwith to the county auditor, to be by him placed on the tax duplicate and collected according to law.

The cause to enjoin the collection of such special assessment was heard in the superior court at special term, upon the original papers and pleadings on file, but the court finding that important questions of law and fact were raised by the parties, it was ordered that the cause be, and the same was reserved to the superior court in general term upon the certified bill of evidence filed in the case.

The superior court in general term found, that the said lot of Clifford Perin, 166.43 feet front and a part of which was the condemned strip, is the only lot bounding and abutting on the strip of ground condemned; and also, that the lot of Henry Batsche, 150 feet front, and 16.43 feet of the lot of Margaret Wilmer bound and abut upon the part of Culvert street where it was widened under the condemnation proceedings; but further found that none of the property owned by any of the other complainants in the petition either

bounds or abuts upon the condemned strip, or lies opposite the condemned strip, but all of it abuts upon Culvert street where no change in width was made by said condemnation proceedings.

The court thereupon ordered, adjudged, and decreed that the assessments for the opening and widening of Culvert street be, and the same were, declared null and void as against all the parties complaining and named in the petition, except Johanna Kirkpatrick and Margaret Wilmer (as to whom the cause was not taken from the special term on reservation), and except the assessment upon the said lot of Clifford Perin, which was held to be valid and binding. It was further ordered and adjudged, that the defendants, the city of Cincinnati, Edwin Stevens, city comptroller, Fred Raine, county auditor, and John Zumstein, county treasurer, be, and they were perpetually enjoined from demanding, collecting, or certifying any of said assessment, as against any of said parties named in the petition, as to whom said assessments were found null and void; and that the cause be dismissed as to Clifford Perin, and that the defendants pay the cost of the action. Clifford Perin excepted to the judgment as to him, but authorized no petition in error to be filed, and the defendants excepted to that part of the judgment finding said assessments void, and enjoining the collection of the same.

To reverse the judgment of the superior court in general term, this proceeding in error is instituted.

Messrs. Theodore Horstman and John Galvin for plaintiffs in error.

Mr. W. M. Ampt, for defendants in error: Where legal and illegal assessments for benefits are so blended that they cannot be separated, the whole assessment will be set aside.

State v. Plainfield, 38 N. J. L. 93.

Where a principle of apportionment is adopted different from that prescribed, the assessment is void.

State v. Passaic, 38 N. J. L. 169.

In *Kelly v. Cleveland*, 84 Ohio St. 469, where the plan of assessment adopted commingled the benefit and the frontage plan, the assessment was not only held void but non-curative under the curative section.

Equality is necessary.

Jaeger v. Burr, 86 Ohio St. 164.

Dickman, Ch. J., delivered the opinion of the court:

The special assessment, the validity of which is in controversy, was on the front foot plan, one of the modes of assessment designated in the revised statutes. The only question in this case which we deem it necessary to consider is, whether the costs and expenses of appropriating property to open Culvert street should have been assessed per front foot upon the lots and lands bounding and abutting upon Culvert street, as opened between the north line of Fifth street and the south line of Sixth street, or should have been assessed only on the lots and lands bounding and abutting upon that section of the street which embraced the improvement

or property appropriated. And the same question, in principle, it may be here stated, was not, as suggested in argument of counsel, considered or passed upon by this court in the *Anderson v. Rademacher Cases*, decided in *Caldwell v. Carthage*, 49 Ohio St. 334.

It is provided by section 2264 of the Revised Statutes, that when the corporation appropriates lots or lands for the purpose of opening or widening a street, the council may decline to assess the costs and expenses of such appropriation on the general tax list, in which event, such costs and expenses "shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained." The statute thus provides three forms of special assessment: (1) in proportion to benefits resulting from the improvement; (2) according to the value of the property assessed; and (3) by the foot front of the property bounding and abutting upon the improvement, three statutory modes of apportioning by special assessment, the costs and expenses of the improvement upon the lots and lands deemed to be especially benefited thereby.

The earliest law in this state authorizing municipal corporations to levy special assessments, to pay for land appropriated for opening or widening streets, on the property benefited thereby, independently of frontage or the value of the abutting property assessed, is found in section 539 of the Municipal Code of 1869, as amended April 12, 1873. 70 Ohio Laws, 126. By that section, the council had power to assess the costs and expense of such appropriation upon the lots or lands benefited thereby—including not only the lots and lands abutting upon the street, but also those contiguous and adjacent. By subsequent section 579, it was provided, that if in the opinion of the council or board of improvements, the same would be equitable, a proportion of the cost of making the improvement might be assessed upon such other lots or lands within the corporation, not bounding or abutting upon the improvement, as would, in the opinion of the council or board, be specially accommodated and benefited thereby. And by section 584, in all cases in which it might be determined to assess the whole or any part of the cost of any improvement upon the lots or lands bounding or abutting upon the same, or upon other lots or lands benefited thereby, the council might require the board of improvements, or might appoint three disinterested freeholders of the corporation, or vicinity, to report to the council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as might be, to the benefits which might result from the improvement to the several lots or parcels of

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lands so assessed. The foregoing provisions of sections 539 and 579 are substantially embodied in section 2264 of the Revised Statutes; and section 584, without diminution, has been carried into section 2277 of the Revised Statutes.

A plan of assessment in proportion to resulting benefits, distinct from that according to valuation, and that by the foot front, is therefore provided by statute, which is not limited to lots and lands bounding and abutting upon the improvement, but may be extended to lots and lands contiguous and adjacent, though situated on streets other than that of the improvement.

Special assessments according to valuation are characterized by distinctive features, and are regulated by a separate statutory plan under section 2269 of the Revised Statutes.

It must be evident that the assessment under consideration in the case at bar can be referred neither to the class according to valuation, nor to that in proportion to benefits, and must be regarded as an assessment by the foot front solely.

It is true that in the condemnation ordinance the lots and lands to be assessed, "bounding and abutting upon said Culvert street" between the given points, are declared "to be the lots and lands which, in the opinion of common council, will be specially benefited by said appropriation." But as properly said in argument of counsel, such declaration of benefits to accrue was only the finding and recital usual in ordinances providing for assessments, whether by benefits, by valuation, or by foot front, that the property to be assessed is the property benefited. Such declaration by the council, that the property specially assessed will derive a special benefit, is only the statement of a legal presumption that accompanies every special assessment to pay for a street improvement. Whatever may be the plan adopted, whether by the foot front, according to valuation, or in proportion to benefits, the underlying principle is, that those who are to make a special contribution to bear the cost of a public improvement, are at the same time to suffer no pecuniary loss thereby—their property being increased in value to an amount at least equal to the sum they are required to pay. Cooley, Taxn. 2d ed. 606.

The assessment in controversy being by the foot front, the assessing district established by the council, instead of including only lots and lands bounding and abutting upon the improvement, embraced non-abutting property as well, lying between the north line of Fifth street and the south line of Sixth street. Recognizing the authority of the council to create an assessing district, it must be exercised in accordance with the requirement of the statute. The statute—section 2264, Revised Statutes—requires the council to set forth by ordinance "specifically the lots and lands to be assessed;" but when the assessment is by the foot front, it must be "of the property bounding and abutting upon the improvement." In such case, the legislature has prescribed the assessing district, which excludes property not bounding and abutting upon the improvement.

The improvement upon which the property must abut has reference to the specific thing which is done or added to the street whereby it is improved. The improvement is the beneficial or valuable change or addition, and of definite location on the line of the street. In the present case, the improvement was embraced in that part of Culvert street, which was evidenced by appropriating the land of Clifford Perin. But it cannot be properly said, that all the lots and lands abutting on Culvert street, between Fifth and Sixth streets, abutted on the improvement, within the meaning of the statute, because the street between those points might be improved, in the sense of being benefited, by the widening of the part at Fifth street.

The record discloses that the assessment was held by the circuit court to be valid and binding as to the property of Perin, because it abutted on the strip of ground condemned. But the property of Henry Batsche, bounding upon the part of Culvert street where it was widened under the condemnation proceedings, and lying opposite the condemned strip was relieved from the assessment, as land not abutting upon the improvement. It is true a portion of the street intervened, and the land of Batsche did not come in actual contact with the ground appropriated; but we do not think that the words of the statute, "bounding and abutting upon the improvement," are to be so restricted in their application, as to exclude property in the same situation as that of Batsche in reference to the improvement. As soon as the appropriation was made, the ground became incorporated as part and parcel of the widened portion of the street, and the property on both sides of the street abutted then on the improvement. Thereafter, the proprietors of lots fronting on both sides of the street might enjoy the free and lawful use of the condemned land; and the easement in the street, appendant to the abutting lots, extended as well to the newly appropriated ground as to the remaining portion of the street in front of the lots.

In *Richards v. Cincinnati*, 31 Ohio St. 506, it was held that, where a strip of land ninety-one feet in width was dedicated for a street, and the municipal authorities improved a street thereon, of the width of ninety feet, leaving one foot on one side thereof unused, except in sloping the embankments and excavations, the owners of property abutting on such foot of land became liable to be assessed as owners of property abutting on the improvement. It was said by McIlvaine, J.: "It seems to us that, in order to exempt these proprietors from assessment as abutters on the improvement, it must appear that this intervening foot of land deprives them of full, free, and lawful access to the street improved. . . . If the public right to its use still continues, . . . their liability to assessment is certain. That this foot of land, before the improvement of the avenue, was subject to the use of the public, as part of a highway, is not disputed; and we are unable to find any ground upon which it can be held that such right in the public has terminated."

The principle thus announced by this court was applied in *Chicago, B. & Q. R. Co. v. Quincy*, 186 Ill. 563, where the sidewalks, instead of the street, as in the case at bar, intervened between the street improvement and the lots bounding on the sidewalks. It was there held that, where a street is required to be improved between the sidewalks on either side, land or lots extending up to the sidewalk will be subject to special taxation to defray the expenses of the improvement, as property contiguous to such street, the sidewalks, for this purpose, being a part of the street, though not ordered to be improved.

In accordance with the foregoing views, the assessment by the foot front should be held valid and binding as to the property of Henry Batsche—as bounding and abutting upon the improvement—and with a modification of the judgment of the Circuit Court in that respect, the judgment of that court should be affirmed.

Minshall, J., dissents from the modification. Spear, J., did not sit in this case.

NEBRASKA SUPREME COURT.

George D. SMILEY

v.

Alexander MACDONALD, Appt.

(.....Neb.....)

*1. Section 15, article 3, of the Constitution, which provides that "the legisla-

*Headnotes by POSEY, J.

ture shall not pass local or special laws . . . granting to any corporation, association, or individual, any special or exclusive privileges, immunity, or franchise whatever,"—Held, not a restriction upon the power of the legislature over the subject involved, but rather as a limitation with respect to the manner of the exercise of such power.

2. The constitutional provision above cited does not prohibit cities of the metro-

NOTE.—*Monopoly in contract for removal of garbage.*

SMILEY v. MACDONALD appears to represent the rule upon the subject so far as it has been established by the reported decisions, while *Re Lowry*, post, 545, seems to stand alone in so far as it holds that the regulations for the removal of garbage and filth from a city must leave a way open to every person who will comply with the ordinance 27 L. R. A.

to engage at least in so much of the business of scavengers as relates to entering on private property and removing filth and garbage therefrom.

In *State v. Lowry*, 49 N. J. L. 361, the court says the proper control of the time and mode of cleaning sinks, cess-pools, and vaults and the removal of their contents, is not only a proper subject for municipal concern, but is imperatively demanded by a just regard for the comfort and health of the

politan class from contracting for the removal therefrom of dead animals, garbage, and other noxious and unwholesome matter.

3. Nor will such a contract be held void by reason of a stipulation therein that the privilege thereby conferred upon the contractor is exclusive.
4. The legislature cannot under the guise of police regulation arbitrarily invade private property or personal rights. The test when such regulations are called in question, is whether they have some relation to the public health or public welfare, and whether such is in fact the end sought to be attained.

(October 2, 1894.)

APPEAL by defendant from a judgment of the District Court for Douglas County in favor of plaintiff in a suit to enjoin performance by defendant of a contract by which he had undertaken to collect and remove the garbage, etc., from the city of Omaha. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Saunders, Macfarland & Diekey*, for appellant:

It is not the province of the courts to decide that any particular act passed by the legislature in the exercise of its police power, and as a health law, is unconstitutional, unless it plainly appears to be so on the face of the act.

Re New York Elec. R. Co. 70 N. Y. 351; *People v. Albertson*, 55 N. Y. 50; *People v. Draper*, 15 N. Y. 532; *Laws 1867*, chap. 908, 1-18; *Re Townsend*, 39 N. Y. 171; *People v.*

Smith, 21 N. Y. 595; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorf v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *Stuyvesant v. New York*, 7 Cow. 588; *Martin v. Mott*, 25 U. S. 19 Wheat. 19, 6 L. ed. 587.

The court will not declare a law unconstitutional unless upon its face it is plainly and clearly in derogation of constitutional limitations.

People v. Orange County Supra, 17 N. Y. 235; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Re Blomfield & R. Natural Gas Light Co. v. Richardson*, 68 Barb. 487; *Mills*, Em. Dom. 10; *Edgewood R. Co's App.* 79 Pa. 257; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147; *Pittsburgh v. Scott*, 1 Pa. 309; *Ex parte Smith and Ex parte Keating*, 38 Cal. 702; *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278; *St. Louis v. Weber*, 44 Mo. 547; *Parson v. Sweet*, 13 N. J. L. 196; *Brooklyn v. Breslin*, 57 N. Y. 591; *People v. New York*, 32 Barb. 102; *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill, 209; *People v. New York*, 11 Abb. Pr. 289; *New York & H. R. Co. v. New York*, 1 Hill, 563; *Schanck v. New York*, 10 Hun, 124, affirmed 69 N. Y. 444; *Brinkmeyer v. Evansville*, 29 Ind. 189; *Breuster v. Davenport*, 51 Iowa, 428; *Iron R. Co. v. Ironton*, 19 Ohio St. 290; *Charleston v. Goldsmith*, 2 Speers, L. 428; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Fisher v. Harrisburg*, 2 Grant, Cas. 291; *Baker v. Boston*, 12 Pick. 184, 23 Am. Dec. 421; *Com. v. Robertson*, 5 Cush. 488; *Re Wright*, 29 Hun, 357.

A municipal corporation has the right and power to grant, if it deems best, the exclusive

community. But the court decided that in order to sustain a conviction there must be facts shown which plainly establish a deleterious practice, and it is not sufficient to allege that plaintiff brought a load of prohibited material into the corporate limits.

In *Walker v. Jameson* (Ind.) May 2, 1894, the validity of an ordinance and contract by which the exclusive right to remove garbage was given to one person and the removal was to be at the expense of the one for whom the services are performed, was considered and held valid.

In *Re Vandine*, Petitioner, 6 Pick. 187, 17 Am. Dec. 351, a by-law of the city of Boston which prohibited any person not duly licensed by the mayor and aldermen to remove house dirt and offal from houses in the city, was held to be valid and not in restraint of trade or creating a monopoly, although the question of contract did not arise in that case. The court said the city prefers to employ men over whom it has an entire control by night and by day, whose services may always be had and who will be able from habit to do this work in the best possible way and time; and the correctness of that decision was apparently recognized in *Com. v. Stodder*, 2 Cush. 533, 48 Am. Dec. 676.

In passing upon the validity of an ordinance which gave a certain person the exclusive right to purchase and remove the carcasses of dead animals, the court in *State v. Fisher*, 33 Mo. 177, said if the privilege of purchasing such animals was unrestricted and depended on the mere volition of the persons, then no absolute arrangement could be effected by which the sanitary or police regulations could be carried out. Before they were sold or the price was agreed upon between the parties, they would lie and putrify and produce infection and disease. Therefore the only safe and practical mode of arresting and destroying the evil is to

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confine the removal to persons who have a license or contract and who are bound to remove the carcasses promptly and dispose of them in a way and at a place, where the health of the inhabitants will not be interfered with.

In *People v. Gordon*, 31 Mich. 306, the ordinance required that no one but the city contractor should remove garbage from the city except in a certain kind of vehicle and under permit of the health officer. It was contended that this ordinance was void as granting a monopoly, but the court refused to consider that branch of the case on the ground that the person complained against had not a proper vehicle to carry on the business and was therefore properly convicted.

In *Gregory v. New York*, 40 N. Y. 273, it was held that the board of health of the city of New York had no power to enter into a contract for the removal of the contents of sinks and vaults in the city which were not at the time nuisances.

In *River Bending Co. v. Behr*, 7 Mo. App. 345, the court upheld an ordinance giving a certain corporation the exclusive privilege of removing dead animals from the streets of the city, saying: "The city authorities would be grossly derelict if they left the chances of the removal to be determined by the owners of the animals, or by the enterprise of public contractors. They are in duty bound to appoint special agencies for the purpose and to render performance certain by whatever means their best judgment may suggest. If they find that this certainty can be secured only by confining the agencies to a single person or corporation upon terms of responsibility for the failure to conform, it is their duty and their privilege to so secure it. The agencies are appointed as rather the instrument in the hands of the municipal authorities for the fulfillment of the public duty, than the beneficiary of an exclusive privilege.

duty of removing the garbage to one person or to one corporation.

Butchers Benev. Assn. of New Orleans v. Crescent City L. S. L. & S. H. Co. 88 U. S. 16 Wall. 86, 21 L. ed. 894; 2 Kent, Com. 340; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 203, 6 L. ed. 71; *New York v. Miln*, 86 U. S. 11 Pet. 102, 9 L. ed. 648; *Le Claire v. Davenport*, 13 Iowa, 210; *Tiedeman*, Pol. Powers, 816.

If the city can say that everybody who may desire cannot remove its garbage, it can say that everybody except one man cannot remove it.

River Rendering Co. v. Behr, 7 Mo. App. 845.

A by-law of a city prohibiting any person not duly licensed by its authorities from removing the garbage, house dirt, and offal from the city is not in restraint of trade but reasonable and valid on the ground that it is in the interest of the public health.

Beach, Pub. Corp. § 995.

Municipal corporations are usually given authority to pass ordinances providing for the preservation of the public health.

15 Am. & Eng. Encyclop. Law, § 8, p. 1172; *Summerville v. Pressley*, 8 L. R. A. 854, 88 S. C. 56; *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 806; *State v.*

Charleston, 10 Rich. L. 502; *Zylstra v. Charleston*, 1 Bay, 889; *Harrison v. Baltimore*, 1 Gill, 264; *Boehm v. Baltimore*, 61 Md. 259; *State v. Mott*, Id. 297, 48 Am. Rep. 105; *Huesing v. Rock Island*, 128 Ill. 465; *State v. Lowery*, 49 N. J. L. 391; *Weil v. Ricord*, 24 N. J. Eq. 169; *Gregory v. New York*, 40 N. Y. 273; *Cronin v. People*, 82 N. Y. 818, 87 Am. Rep. 564; *People v. Mulholland*, 82 N. Y. 854, 87 Am. Rep. 568; *Metropolitan Board of Health v. Heister*, 87 N. Y. 661; *Johnson v. Simon-ton*, 48 Cal. 242; *Re Linehan*, 72 Cal. 114; *Ex parte Schrader*, 83 Cal. 279; *Bliss v. Kraus*, 16 Ohio St. 55; *State v. Cowan*, 29 Mo. 330; *Monroe v. Gersbach*, 88 La. Ann. 1011; *Kennedy v. Phelps*, 10 La. Ann. 227; *Wreford v. People*, 14 Mich. 41; *Dubois v. Augusta*, Dudgey (Ga.) 80; *St. Louis v. McCoy*, 18 Mo. 238; *Metcalfe v. St. Louis*, 11 Mo. 108; *Train v. Boston Disinfecting Co.* 144 Mass. 528, 59 Am. Rep. 118; *Ex parte O'Donovan*, 24 Fla. 281; *Polinsky v. People*, 73 N. Y. 65; *Health Department of New York v. Knoll*, 70 N. Y. 580; *People v. Special Session Court Justices*, 7 Hun, 214.

A city has the right to make an exclusive contract with a person or corporation to remove the garbage and offal.

Vandine, Petitioner, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259; *State v. Lowery*, 49 N. J. L. 391; *Walker v. Jameson* (Ind.) May 9, 1894; *People v. Gordon*,

... The mere removal of offensive matter or matter likely to become offensive pertains strictly to the municipal police authority. It is not properly a calling open to all, any more than the inspection of sewers or the guarding of public streets." But that ordinance was held unconstitutional by the supreme court on the ground that it permitted the person having the contract to convert the property to his own use to the exclusion of the rights which the owner might have to dispose of it at any time before it became a nuisance. *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6.

In *Morgan v. Cincinnati*, 12 Cin. L. Bull. 41, under authority to make all needful regulations to promote the public welfare and to prevent the prevalence of disease the court held that the city could ordain what substances should be taken in charge by the superintendent of street cleaning and the board of public health, and could accomplish this by such instrumentality as is proper and convenient and not interfering with private rights. The city treasury must bear the expense, and if offal found on the streets may be regarded as without owner, the city authorities are bound to clean the highways, can dispose of such substances, and if they are valuable for tillage such price can be demanded as can be obtained without assuming power not delegated, and this does not create a monopoly interfering with any private right.

One Thompson had contracted with the city for \$3000 per annum to remove all garbage and offal. Complainants sought to enjoin the contract because it interfered with their business of removing dead hogs from droves and rendering them. The court held that since the ordinance provided for a permit to the owner to remove his dead animals himself it was valid and could not be questioned by strangers.

An ordinance requiring persons who wish to engage in the business of cleaning vaults and removing garbage and offal within the city, to procure a

license and be subject to the orders of the board of health, is valid. *Boehn v. Baltimore*, 61 Md. 259. In that case the court says, such powers have been universally granted to municipalities in this country.

In *Louisville v. Wible*, 84 Ky. 230, the court enforced as against the city a contract giving complainant the exclusive right to remove from the city the carcasses of dead animals.

In *Swift v. New York*, 88 N. Y. 526, a contract for the removal of garbage from the city was treated as valid as between the contractor and the city.

In *Alpers v. San Francisco City and County*, 32 Fed. Rep. 508, which was an action brought to enjoin the violation of a contract permitting complainant to remove all dead animals from the city, the court says: "There is no doubt that the contract between the plaintiff and the city is one within the competency of the municipality to make. . . . And provisions for such removal may be made by contract as well as the performance of any other duty touching the health and comfort of the city." And it is further said: "The contract in question does not appear to be open to any serious objection," although the question of the granting of a monopoly was not considered, but in the subsequent case of *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 453, the question of the validity of such ordinance on the ground that it created a monopoly was distinctly raised, and the contract was held valid. It appearing that the ordinance gave the owner a right to remove the animals himself if he chose to do so.

An ordinance which provides that all animals dying within the city shall be disposed of within twenty-four hours or they will be removed by a person with whom the city had contracted to do the work, does not prevent the owner from disposing of the animals within the twenty-four hours in any way he chooses by contract or otherwise. *Alpers v. Brown*, 60 Cal. 447.

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81 Mich. 306; *Newport v. Newport Light Co.* 84 Ky. 166; *Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co.* 78 Iowa, 513; *Kilvington v. Superior*, 18 L. R. A. 45, 83 Wia. 232.

A city is authorized to remove or confine persons having infectious diseases, and they have the power to hire buildings in which to confine such persons.

Anderson v. O'Conner, 98 Ind. 168; *Boom v. Utica*, 2 Barb. 104.

Messrs. Breckenridge & Breckenridge, for appellee:

A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied, or incident to the powers expressly granted; third, those essential to the declared object and purposes of the corporation, not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Dill, Mun. Corp. 4th ed. § 89; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529.

Section 15, article 8, of the Constitution of this state contains the following provision: "The legislature shall not pass local or special laws in any of the following cases, that is to say:

... Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

Will it be claimed that what the legislature cannot do under the constitution, the common council of a municipality created by the legislature can do?

See *Saginaw Gas-Light Co. v. Saginaw*, *supra*; Dill, Mun. Corp. 4th ed. § 862, and cases cited in note; *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

Post, J., delivered the opinion of the court:

This is an appeal from a decree of the district court for Douglas county restraining the defendant from proceeding under a contract with the city of Omaha providing for the removal of the garbage, offal, dead animals, etc., from said city. In view of the importance of the question at issue it is deemed proper to copy at length from the petition, to wit: "The plaintiff states to the court that he is a citizen and resident of the city of Omaha, Nebraska, and a tax-payer therein and has been such resident of the city of Omaha and tax-payer therein for, to wit, the period of eight (8) years, and he brings this action in said capacity, as a tax-payer and citizen of said city, against this defendant, Alexander MacDonald, and states to the court the following facts:

"That on the 31st day of July, 1893, said Alexander MacDonald, the defendant herein, made and entered into a pretended contract or agreement with the city of Omaha, under and by the terms of which for a period of ten years from and after January 1, 1894, said Alexander MacDonald, in consideration of being allowed the right to remove dead animals, garbage, offal, night soil, etc., within the city of Omaha, for the period of ten years

from and after January 1, 1894, under the terms and stipulations contained in said pretended contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof as though incorporated at length in the body of this petition, agreed to pay the said city of Omaha, annually, for such privilege, at the end of each year, during the existence of said contract, the sum of two hundred and fifty dollars (\$250).

"Plaintiff alleges that under and by virtue of the terms of said pretended contract the defendant is given an exclusive privilege and right, which is illegal and contrary to law, and is permitted thereunder to make large profits in the transaction of the business therein specified, and that the compensation fixed by said contract or agreement is burdensome upon the tax-payers of said city and is in excess of the reasonable value of the services to be so rendered.

"The plaintiff further says that the contract as aforesaid is unlawful in this, to wit, that the privilege of removing garbage, dead animals, offal, night soil, etc., necessary to be removed, under the requirements of the board of health, as set out in said pretended contract or agreement with said city and the defendant is a franchise, and that no authority to grant said franchise to said defendant, Alexander MacDonald, was ever voted by the citizens and legal voters within and for said city of Omaha, Nebraska, and that the city council and the municipal authorities of said city of Omaha had no right or authority whatever to make and enter into any such contract.

"Plaintiff says that he is informed and believes that the said defendant is about to enter upon the execution of his said pretended contract with the said city, and if permitted to do so will, under color of authority as shown by said pretended contract, levy and assess upon said tax-payers of the city of Omaha and this plaintiff unlawful dues for the removal of garbage, dead animals, offal, night soil, etc.

"Plaintiff alleges that he is without remedy at law.

"Wherefore plaintiff prays that said pretended contract between the said city of Omaha and said Alexander MacDonald be declared null and void and set at naught, and that the defendant, his agents, employes, and servants be perpetually enjoined from proceeding under said pretended contract to remove dead animals, garbage, offal, night soil, etc., or any other filth required to be removed by board of health or the ordinances of said city of Omaha, and for such other relief as to the court may seem meet."

The contract to which reference is therein made is as follows:

"This agreement, made and entered into this 21st day of July, 1893, by and between the city of Omaha, party of the first part, and Alexander MacDonald, party of the second part,

"Witnesseth: that the party of the second part, in consideration of being allowed to remove and make use of all the dead animals, garbage, offal, night soil, etc., necessary to be removed, as may be required by the board

of health or ordinances of said city of Omaha, during the period of ten years commencing January 1, 1894, or from such time prior to said date as may be required by the mayor and council, hereby agrees, in accordance with the ordinances of said city now existing or hereafter passed, and in accordance with the rules and regulations of the board of health of said city, and as may be required by the commissioners of health upon payment of the charges herein authorized, to remove to some place or places at least two and one half miles outside of the corporate limits of said city, and if within three miles of the corporate limits of said city to such place or places as may be designated by said board of health, and dispose of the same in such manner as not to cause or create a nuisance, all dead animals, garbage, manure, ashes, filth, offal, night soil, etc., as may now or hereafter during the existence of this contract be required to be removed by said ordinances, rules, or regulations at not exceeding the prices following, to wit:

"Each dead animal weighing over 500 pounds, \$2.00."

"Whenever the owner of any dead animals found in the public streets or at any public place is unknown, the said party of the first part agrees to pay to said party of the second part the sum above specified for removing such animals upon satisfactory proof being furnished of the removal of any such animals and that the owner thereof is unknown."

"It is further understood and expressly agreed that for the privileges herein granted the party of the second part shall annually pay to said party of the first part at the end of each year the sum of two hundred and fifty (\$250) dollars. It is further understood and expressly agreed by said party of the second part that at all times during the existence of this contract he shall be subject to the orders of said board of health and to the ordinances of said city, and that he will promptly and faithfully comply with the same."

"It is further understood and agreed that said party of the second part for the purpose of removing said dead animals, garbage, manure, ashes, filth, offal, night soil, etc., shall be permitted to load the same upon cars at five places as near equally distant from each other as is practical, such places for loading cars to be approved by the board of health of said city, and to be subject to change from time to time as said board of health may require."

To the foregoing petition a general demurrer was interposed which was overruled and the defendant refusing to plead further

a decree was allowed as prayed and which is the decree involved in this appeal.

The issue involved is thus tersely stated by counsel for plaintiff: "There is one question only presented to the demurrer and that is whether the contract is an exclusive franchise." The plaintiff has assumed the affirmative of that position and asserts that said contract is in contemplation of law a franchise, and therefore within the prohibition contained in section 15 of article 8 of the Constitution. The provision of said section which is invoked in this action is as follows: "The legislature shall not pass local or special laws in any of the following cases, that is to say, . . . granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable no special law shall be enacted."

From a careful analysis of that provision it would seem that it was intended, not as a restriction upon the power of the legislature over the subject involved, but rather as a limitation in respect to the manner of the exercise of that power. The precise limitation of the legislative power to confer by general law privileges in their nature exclusive is foreign to our present inquiry. It is sufficient for the purpose of this controversy that according to recognized rules of construction, the people of the state must be understood to have conferred upon the legislature all of the sovereign power resting in them, subject only to the limitations of the state and national constitutions. For, as said by Judge Redfield in *Thorpe v. Rutland & E. O. R. Co.*, 27 Vt. 140, 62 Am. Dec. 635: "The American legislatures have the same unlimited power except when restrained by written constitutions, as the British parliament." We might safely rest our conclusion upon the reasons stated, but there are other considerations suggested by the record which it is deemed proper to notice.

It will be observed that no claim is made to the effect that the contract complained of is unauthorized by the ordinances of the city of Omaha. The inference therefore, is that it was executed in pursuance of an ordinance having at least the form of law.

The question is thus presented whether the contracting for the removal of the garbage, offal, and other unwholesome substance by contract for a term of years is an assumption of power by the city in excess of that conferred by chapter 12a, Comp. Stat., entitled *Metropolitan cities*, and which for convenience will be referred to as its charter. By section

"The following portion of the agreement may be of sufficient interest to warrant its publication here although it was omitted by the court:

"Each dead animal weighing less than 500 pounds, except as otherwise herein provided, \$1.00.

"Dead dogs, each, 75 cents.

"Dead cats, each, 25 cents.

"Each load of manure, ashes, or other refuse matter, 50 cents.

"The standard of a load of manure shall be sixty-four cubic feet, and for ashes and other solid refuse shall be 27 cents per cubic foot.

"Each barrel of garbage or refuse matter, thirty gallons or more in size, 20 cents.

"Barrels, boxes, or other receptacles of less than

thirty gallons of garbage or other refuse matter, for each ten gallons, 10 cents.

"For removing the contents of any water closet, vault, cess-pool, or privy, 10 cents per cubic foot for the contents actually removed.

"It is further understood and agreed that the rates above specified are the rates not exceeding which the said party of the second part shall be authorized to charge and collect from the party or parties respectively having any of said dead animals, garbage, manure, ashes, refuse, or other matter referred to removed.

"The dead animals referred to above as weighing over or less than 500 pounds are animals such as horses, mules, cattle, calves, goats and the like."

23 thereof it is provided that "the mayor and council shall have power to make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof in addition to the police powers expressly granted herein, and in the exercise of the police powers may pass all needful and proper ordinances."

By section 27 it is provided that "the mayor and council shall have power to prevent any person or persons from bringing, depositing, or having or leaving upon or near his premises or elsewhere within the city, any putrid or diseased carcass or any putrid or diseased or unsound beef, pork, poultry, fish, hides or skins of any kind, or any other unwholesome substance, and to compel the removal of the same at the expense of such person or persons."

It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter.

The boundary line which divides the police power of the state from the other functions of government is often difficult to discern. As said by Shaw, *Ch. J.*, in *Com. v. Alger*, 7 Cush. 53: "It is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise." It may, however, with safety be asserted that the legislature cannot under the guise of police regulations arbitrarily invade personal rights and private property. On the other hand it should appear to the court, when such regulations are called in question, that they have in fact some relation to the public health or public welfare and that such is the end sought to be attained thereby. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Millet v. People*, 117 Ill. 303, 57 Am. Rep. 869. But the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare and is therefore a proper exercise of the police power; nor is the fact that in this instance the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies

best adapted to the end in view. The means adopted appear to be not only a reasonable and necessary regulation but a judicious exercise of the discretion conferred upon the city.

That the object of all such regulations can be best attained by entrusting the work in hand to a responsible contractor who possesses the facilities for carrying it on with dispatch and with the least possible inconvenience to the public is apparent to all. In the case of *Vandina, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351, Putnam, *J.*, referring to a similar regulation of the city of Boston, said: "It seems to us the city authorities have judged well in the matter. They prefer to employ men over whom they have an entire control by night and by day whose services may be always had and who will be able from habit to do the work in the best possible way and time. Practically we think the main object of city government will be better accomplished by the arrangement adopted than by relying upon the labor of others over whom the government would have no control."

"We are satisfied that the by-law is reasonable and not only within the power of the government to prescribe but well adapted to preserve the health of the city."

See also *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Walker v. Jameson* (Ind.) 87 N. E. Rep. 402; *Tiedeman, Pol. Powers*, p. 816, and also, as applicable in principle, *Boehm v. Baltimore*, 61 Md. 259; *State v. Lowery*, 49 N. J. L. 891; *People v. Gordon*, 81 Mich. 806; *Kilvington v. Superior*, 83 Wis. 222, 18 L. R. A. 45.

The alleged excess of power is a mere sanitary measure as obviously so as the familiar and necessary quarantine for the detention of persons exposed to contagious diseases. In either case the privilege, although exclusive, is but an incident to the proper exercise of the general police power of the state.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings therein.

Reversed.

KANSAS SUPREME COURT.

Re M. E. LOWE.

(.....Kan.....)

*Ordinance No. 1718 of the city of Topeka, entitled, "An ordinance providing for city scavengers, prescribing the duties and regulations governing the same, providing a license therefor, fixing the fees to be charged, penalties for violating rules and regulations thereof, and repealing Ordinance No. 694, published June 2d, 1887, and Ordinance No. 963, published July 19th, 1889," as amended by Ordinance No. 1744, attempts to authorize the creation of a monopoly of a lawful calling, is in restraint of trade, and void.

*Headnote by ALLEN, J.

NOTE.—As to monopoly in contract for removal of garbage, see note to case preceding this one. 37 L. R. A.

(March 9, 1895.)

PETITION for a writ of habeas corpus to procure the release of defendant from the custody of the chief of police and jailer of the city of Topeka to which he had been committed for alleged violation of a city ordinance. *Petitioner discharged.*

Statement by ALLEN, J.:

On the 12th day of September, 1894, there was filed in the police court in the city of Topeka a duly verified complaint against M. E. Lowe, charging that on the 11th day of September, 1894, and prior thereto, he did then and there unlawfully engage in the business of a city scavenger, contrary to the ordinances of the city of Topeka, and especially

in violation of Ordinance No. 1718, being an ordinance entitled "An ordinance providing for scavengers," etc., and of ordinances amendatory thereto. On the 13th of September, 1894, upon the written complaint filed against him, a warrant was issued by the police judge of the city to the chief of police, directing him to arrest M. E. Lowe, and bring him before the police judge, to be dealt with according to law. On the 20th of September, 1894, M. E. Lowe presented his petition to one of the justices of this court for a writ of habeas corpus. His petition, omitting caption, exhibits, and verification, was as follows: "The petition of M. E. Lowe respectfully shows: That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by H. C. Lindsey, chief of police of the city of Topeka, and Ed. Woodruff, keeper and jailer of the city prison of said city, in Shawnee county, in this state, at the city jail in the city of Topeka, in the county of Shawnee, Kansas. That the imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit: That the only pretext or cause of such arrest and detention is by virtue of a warrant of arrest issued out of the police court of the said city, upon a complaint charging the petitioner with the alleged violation of a pretended ordinance of the city of Topeka, No. 1718, copies of which warrant, complaint, and ordinance are hereto attached, marked Exhibits 'A,' 'B,' & 'C,' respectively; and that the said pretended ordinance is null and void, in this, to wit: In attempting to create the office of city scavenger, for which there is no authority of law, and in giving the mayor authority to appoint a city scavenger, which is not provided for by law; in attempting to absolutely prohibit any person or persons from engaging in the business of a scavenger unless appointed by the mayor and approved by the council; in attempting to break up the business of this petitioner, in which he has invested a large sum of money, and has been engaged in for several years; and for the further reason the ordinance is in derogation of the vested rights of this petitioner, under a contract entered into between himself and the city of Topeka in May of 1893, and which is now existing in full force and effect, a copy of which contract is hereto attached, marked Exhibit 'D,' and made a part of this petition. Wherefore your petitioner prays that a writ of habeas corpus may be granted, directed to the said H. C. Lindsey and Ed. Woodruff, commanding them to have the body of this petitioner before the supreme court, at a time and place therein to be specified, to do and receive what shall then and there be considered by your honors concerning him, together with the time and cause of this detention and said writ; and that your petitioner may be restored to his liberty. M. E. Lowe. J. S. Ensminger, Atty. for Petitioner."

Section 1 of Ordinance No. 1718, as amended by ordinance 1744, referred to in the petition as Exhibit "C," reads:

"Section 1. That section one of Ordinance number 1718 be, and the same is hereby,

amended so as to read: 'Section one. The mayor shall at the regular meeting in May of each year, by and with the consent of the council, appoint two or more suitable persons, corporations, or firms to act as city scavengers for the ensuing year, or who shall hold said position during the pleasure of the mayor and council. A license shall be issued to such persons, corporation, or firm in which shall be written or printed the name of the person to whom issued, the date thereof and the time when the same shall expire; and all licenses issued to city scavengers shall expire on the first day of May next after the same are issued unless sooner canceled by order of the mayor and council, and all licenses to city scavengers shall be signed by the city clerk, and attested with the seal of the city. No license shall be issued to scavengers until all the requirements of this ordinance shall have been complied with: provided, however, that it shall be the duty of the mayor, by and with the consent of the council, to appoint two or more suitable persons, corporations, or firms to act as city scavenger until the regular meeting in May, 1895, or to fill a vacancy or vacancies whenever the same shall occur before or after time, in the same manner as appointing for a full term.'"

Section 4 provides, among other things: "It shall be the duty of the city scavenger to remove the contents of privy vaults and cess-pools, dead animals, garbage, and offal, when directed by the city board of health or the mayor and council, and the contents of privy vaults and cess-pools, when notified by citizens in the manner hereinafter specified. Citizens may notify said city scavenger, verbally or in writing, of any cess-pool or privy vault he or they may desire to have emptied, and shall tender therewith to said city scavenger the fee for such services as herein specified."

Section 6 contains the following provisions: "It shall be unlawful for any person to engage in the business of a scavenger in the city of Topeka without procuring a license therefor in the manner herein provided, and any person, corporation, or firm who shall so engage in such business shall be deemed guilty of a misdemeanor, and upon being found guilty of said offense shall be fined in any sum not less than five dollars or more than fifty dollars for each offense."

Subsequently a writ of habeas corpus was issued, and a return made attempting to justify the arrest and imprisonment of the petitioner under the provisions of the city ordinance No. 1718, providing for city scavengers. The case was heard before the court at the October sitting for 1894.

Mr. J. S. Ensminger for petitioner.

Mr. D. C. Tillotson for respondent.

Allen, J., delivered the opinion of the court:

The only question in this case requiring consideration is as to the validity of Ordinance No. 1718, providing for the appointment of city scavengers. By the terms of the ordinance as amended by Ordinance 1744,

It is made the duty of the mayor, with the consent of the council, to appoint two or more suitable persons to act as city scavengers. The duties of the scavengers are prescribed at some length, and include a removal of the contents of privy vaults and cess-pools, dead animals, garbage, and offal. The ordinance fixes the compensation to be paid by private persons for the cleaning of privy vaults and cess-pools, and for the removal of dead animals, but not for any other scavenger work. By section 6 it is rendered unlawful for any person to engage in the business of a scavenger without having a license as prescribed by the ordinance, and a penalty is imposed for a violation of the ordinance. The right of the city council to pass this ordinance is claimed under subdivision 11 of section 11 of the Act to incorporate and regulate cities of the first class, being chapter 18 of the General Statutes of 1889, which provides that the mayor and council shall have power "(11) to make regulations to secure the general health of the city, to prevent and remove nuisances, to regulate or prohibit the construction of privy vaults and cess-pools, and to regulate or suppress those already constructed, to compel and regulate the connection of all property with sewers, to suppress hog-pens, slaughter-houses and stock-yards, or to regulate the same, and prescribe and enforce regulations for cleaning and keeping the same in order, and the cleaning and keeping in order all warehouses, stables, alleys, yards, private ways, out-houses and other places where offensive matter is kept, or permitted to accumulate, and to compel and regulate the removal of garbage and filth beyond the limits of the city."

It is said that the ordinance is a reasonable regulation, enacted for the preservation of the health of the people of the city; that, of necessity, a large measure of discretion is reposed in the mayor and council in selecting the means necessary to preserve the health of the inhabitants; and that in enacting this ordinance the mayor and council have kept within the limits of their powers. That accumulations of filth, decaying carcasses, fermenting garbage, are not only offensive to the senses, but endanger the health of the community, must be conceded. It must also be admitted that the legislature may properly delegate to the mayor and council the power to make all necessary regulations for preserving the cleanliness of the city, and to prevent the accumulation of nuisances. This was the subject under consideration when the provision last quoted was incorporated in the statute. Have the mayor and council exceeded the limits of their authority? In support of the validity of the ordinance, *Slaughter-House Cases*, 88 U. S. 16 Wall. 86, 21 L. ed. 894, are cited. In these cases the act of the legislature of Louisiana granting a corporation the exclusive right to maintain slaughter-houses in the parishes of Orleans, Jefferson, and St. Bernard, and prohibiting all other persons from maintaining and using slaughter-houses within those limits, was upheld, the chief justice and three of the associate justices

dissenting. In the case of *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. ed. 585, it was held that the exclusive privilege given to the slaughter-house company for the term of twenty-five years by the act under consideration in the case first cited was not binding on the law-making power for that period, but that, under the provisions of the new constitution, the legislature, in the exercise of its police power on subjects affecting public health, might make other and different provisions and regulations, which would have the effect to deprive the company of its monopoly under the charter. The decision was placed on the ground that the power of a state legislature to make a contract of such a character that, under the provisions of the Constitution of the United States, it cannot be modified or abrogated, does not extend to subjects affecting public health or public morals, so as to limit the future exercise of legislative power on those subjects, to the prejudice of the general welfare. In the cases of *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Alpers v. San Francisco, City & County*, 82 Fed. Rep. 508; and *Louisville v. Wible*, 84 Ky. 290,—the power of a city to make a contract with a person or corporation for the removal of dead animals, not slaughtered for food, from the city, and granting to such person or corporation the exclusive privilege of using the streets of the city for such purposes, was upheld as a proper police regulation. The cases of *Boehm v. Baltimore*, 81 Md. 259, and *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 851, merely uphold city ordinances requiring licenses and regulating the business of scavengers.

It will be observed that the ordinance under consideration authorizes the appointment of two or more persons as scavengers. It therefore places it in the power of the mayor to grant to two persons a monopoly of the scavengers' business within the limits of the city. While monopolies of any ordinary legitimate business are odious, we have seen that monopolies are upheld when deemed necessary in executing a duty incumbent on the city authorities or the legislature for the protection of the public health. It is sometimes a matter of great nicety and difficulty to determine whether a particular business or calling is in its nature so directly connected with the public welfare that the performance can only be safely intrusted to some one acting under public authority. So much of the business of the scavenger as consists in removing dead animals, it would seem, under the authorities, may properly be regarded as a public function, for the discharge of which a monopoly may be created. But this ordinance goes further, and gives to the scavengers the exclusive privilege, also, of cleaning privy vaults and cess-pools, and of removing garbage, not only from the streets, but from the private premises of the citizens. By its terms, it would prohibit the owners from performing these services for themselves, or from employing any one else than the persons appointed. It not only makes a monopoly of

the cleaning of vaults and cess-pools, which are necessarily offensive to the senses, but it also includes the removal of garbage. It would be somewhat difficult to say just what is included in the term "garbage." Webster defines it as "properly that which is purged, or cleansed away; the bowels of an animal; refuse parts of flesh; offal; hence the refuse animal and vegetable matter from a kitchen." It will be observed that the monopoly under consideration is not one granted directly by the legislature, as in the case first cited, but by a city council, claiming to act under legislative authority.

Section 2 of the Bill of Rights in the constitution of this state reads as follows:

"Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked, or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

This section of the bill of rights clearly prohibits the legislature from delegating the power to a city to grant to any individual the special privilege of carrying on any ordinary business or calling.

The eleventh subdivision of section 11 of the Act concerning cities of the first class, above quoted, it will be observed, authorizes the city council to regulate or prohibit the construction of privy vaults and cess-pools, and to regulate and enforce the cleaning of all places where offensive matter is permitted to accumulate. By the third subdivision of the same section, the mayor and council are authorized to levy and collect license taxes on and regulate a great number of businesses and callings, including that of scavengers. In other parts of the same section, power is given to regulate and order the cleaning of chimneys, to regulate the storage of powder and other combustible and explosive substances, as well as to regulate many other things deemed by the law-makers proper subjects of supervision by the city authorities. The business of a scavenger may not be nice or attractive, but the removal of garbage and filth is a necessary work, which has been ordinarily performed through any agency the party interested might select. If the term "garbage" includes all refuse from the kitchen, then the waste which ordinarily is used, when practicable, to feed swine, can only be removed from the premises by the person appointed under this ordinance. Privies and cess-pools are not ordinarily deemed nuisances *per se*. They are not so regarded by the statute under consideration. They may be permitted or not by the city authorities, according as the circumstances and surroundings of the particular place or portion of the city render it more or less dangerous to the health of the inhabitants. When constructed, they are on private property; and, in order to remove their contents or to remove garbage not deposited in the streets or alleys, it would be necessary to enter private premises. We are not cited to

any case holding that a monopoly of this business may be created.

In *Gregory v. New York*, 40 N. Y. 278, it was held that the board of health have not power to assume in advance that all the sinks and privies in the city of New York are or will become nuisances, or dangerous to the public health, and contract for the removal of their contents indefinitely, until they or the common council order otherwise, and bind the defendant to pay for them. In the case of *State v. Lowery*, 49 N. J. L. 891, the defendant was charged with having in the night-time carted, carried, and taken into the township a load of night soil, in violation of an ordinance duly passed by the township committee. It was held that, in the absence of any further showing, the act was not punishable, and in the opinion the court says: "The scavenger, with the use of improved methods of protection, may use the public streets without injury or offense to others; and, cautious as courts are in declaring an ordinance void as being unreasonable, they would hold this ordinance to be so when its penalties were sought to be enforced against any one making a use of the public streets which was harmless in fact. The town cannot deny to citizens the use of its streets to cross the township on any business that is inoffensive. It cannot, by merely declaring an act to be a nuisance, make it such." In *Richmond v. Dudley*, 129 Ind. 112, 18 L. R. A. 587, it was held: "A city ordinance placing restrictions upon the keeping and storing of inflammable or explosive oils is invalid which fails to specify the rules and conditions to be observed in such business, and which does not admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions, but which does admit of the exercise of an arbitrary discrimination by the municipal authorities between citizens who will so comply." In *Re Nash*, 88 U. C. Q. B. 181, it was held that a by-law that "no person shall keep a slaughter-house within the city without the special resolution of the council" was void, because it permitted favoritism, and might be used to grant a monopoly. In *Reg. v. Johnston*, 88 U. C. Q. B. 549, it was held that a city by-law providing that no person other than chimney inspectors appointed by the municipal council (of whom there were to be three) should sweep, or cause to be swept, for hire or gain, any chimney or flue in the city, was beyond the power of the corporation under the authority given to them to enforce the proper cleaning of chimneys, and a conviction under it was quashed. The case of *Richmond v. Dudley*, *supra*, and the one last cited are, in principle, much like the case under consideration for the power of the city authorities to prevent fires is everywhere regarded as of prime importance, and admits no delay in its execution. *Horr & B. Mun. Ord. § 221*.

The power of the city council to license and regulate the business of scavengers is not now questioned, nor, in view of the express authority contained in the statute above quoted, can there be any question of their

power to make and enforce all reasonable rules and regulations for the conduct of this disagreeable business. Under the authorities, and especially in view of the constitutional provision quoted, these regulations must leave a way open to every person who will comply with the requirements of the ordinance to engage, at least, in so much of the business of scavengers as relates to entering on private property, and removing

filth and garbage therefrom. This ordinance clearly authorizes the restriction of this business to two persons, to be selected by the mayor, thereby providing for a monopoly. This the mayor and council had no power to do.

The ordinance under consideration is therefore void, and the petitioner is discharged.

All the Justices concur.

TENNESSEE SUPREME COURT.

LOUISVILLE & N. R. CO., *Plff. in Err.*,
v.

John G. HAILEY.

(.....Tenn.....)

A passenger on a freight train with the conductor's permission but knowing that he is violating the rules of the road assumes the risk of accidents.

(February 7, 1895.)

ERROR to the Circuit Court for Davidson County, to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries received by plaintiff while a passenger on one of defendant's freight trains, which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Baxter Smith, for plaintiff in error:

If plaintiff was knowingly violating the company's rule he would not have been lawfully on the train, and consequently would have been an intruder, which is tantamount to being a trespasser, and in such case defendant's liability would have been only for wanton or intentional injury.

Illinois Cent. R. Co. v. Meacham, 91 Tenn. 480; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174; *Houston & T. O. R. Co. v. Moore*, 49 Tex. 81, 30 Am. Rep. 98.

The conductor had no power to change or relax the rule.

International & G. N. R. Co. v. Prince, 77 Tex. 560; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 250; *McVeety v. St. Paul, M. & M. R. Co.* 11 L. R. A. 174, 45 Minn. 268.

The presumption was that the conductor did not have authority to allow plaintiff to ride.

Waterbury v. New York Cent. & H. R. R. Co. 17 Fed. Rep. 671.

A person riding on the wrong train, in willful violation of the rules of the company, is a trespasser.

Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519; *Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 82; *Great Western R. Co. v. Bunch*, 18 App. Cas. 81; *Virginia Midland R. Co. v. Roach*, 88 Va. 875; 19 Am. & Eng. Encyclop. Law, p. 983.

The presumption of the law is that a party riding on a freight train is not a passenger, and

that the conductor had no authority to take him as a passenger.

Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 889, 15 Am. Rep. 518; *Waterbury v. New York Cent. & H. R. R. Co. supra.*

Conductors of railroad trains are but agents, authorized, and only authorized, to run trains according to prescribed rules, and persons dealing with them are bound to take notice or inquire and inform themselves of the extent of their powers.

Alabama G. S. R. Co. v. Carmichael, 9 L. R. A. 868, 90 Ala. 19.

The responsibility of the railroad where one is riding on a freight train is being subject to the implied condition that he will incur the additional risk and inconvenience incident to that mode of transportation.

Lucas v. Milwaukee & St. P. R. Co. 83 Wis. 55, 41 Am. Rep. 735; *Shoemaker v. Kingsbury*, 79 U. S. 13 Wall. 869, 20 L. ed. 432; *Reber v. Bond*, 38 Fed. Rep. 822.

Mr. J. D. Wade, for defendant in error:

Whatever may have been the rules of the Louisville & Nashville Railroad with regard to persons riding on freight trains, the conductor of the train was the agent of the appellant, present on the train for the purpose of enforcing its rules.

He had charge of the train, and any act of his within the scope of running the train would bind the appellant.

The conductor suspended the rules and received appellee as a passenger.

Washburn v. Nashville & C. R. Co. 8 Head, 688, 75 Am. Dec. 784; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296; 1 Redf. Railways, 511-515, and notes; *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. 887, 91 Am. Dec. 168; *Oreed v. Pennsylvania R. Co.* 86 Pa. 189, 27 Am. Rep. 698; Angell, Car. § 575, note.

As a general rule, the company as carrier of freight and passengers is liable for all the acts of its servants.

Nashville & C. R. Co. v. Starnes, 9 Heisk. 55, 24 Am. Rep. 296.

Messrs. E. E. Thurman, J. W. Moore, and J. P. Hickman also for defendant in error.

Snodgrass, Ch. J., delivered the opinion of the court:

This is a suit for damages for injuries sustained on a freight train in Florida. There was a recovery of \$1,000, and the defendant appealed in error.

NOTE.—For note on the assumption of risks by passengers on freight trains, see *Ohio Valley R. Co. v. Watson* (Ky.) 19 L. R. A. 310.

27 L. R. A.

The plaintiff, with others, applied, through one of the party, for passage on a freight train, and was informed by the conductor that it was against the rules of the company to take passengers on that train without they had a permit from the superintendent, but nevertheless, after so advising them, he took them on the train, and received fare from them as passengers, and they, being so advised, took passage in the caboose. This, with six other cars preceding it, was thrown from the track by a broken wheel, and the injury thus inflicted.

The circuit judge charged the jury that, if the plaintiff obtained passage under these circumstances, he was not entitled to all the rights of a passenger; but he did not tell them just what relation the plaintiff would occupy. He also refused to charge that the defendant owed plaintiff no other duty, under these circumstances, than not to willfully or intentionally injure him. In both respects there was error: The judge should have said to the jury that the regulation disallowing passengers on a freight train was a reasonable one, and the conductor of such a train, in the absence of assumed or proven authority, was not to be presumed as authorized to disregard it; and, if it appeared in evidence that instead of assuming such authority the conductor in fact told plaintiff or his representative making the contract that he did not have it, and the plaintiff then induced him to take plaintiff on the train in violation of such rule and disregard of his obligations to the company, he did not thereby become a passenger, or entitled to the rights of a passenger, but was a trespasser, and took the risk of injury as such. This is the law according to the great weight of authority, and manifestly as a matter of reason and justice. There is no evidence in the record as to what the law of Florida is, and therefore it is presumed to be the same as our own. The rule in this, as in many other states, is that, if one take passage on a train or in a car not provided for passengers, without being advised that he is not permitted to ride on such train or car, he may recover for injuries sustained as a passenger while so riding. *Washburn v. Nashville & O. R. Co.* 8 Head, 688, 75 Am. Dec. 784. But the rule is different if he has no right so to believe, or is informed to the contrary. *Illinois Cent. R. Co. v. Meacham*, 91 Tenn. 428; *Trottinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 533; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; 97 L. R. A.

Gulf, O. & S. F. R. Co. v. Campbell, 76 Tex. 174; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 268, 11 L. R. A. 174.

There are cases apparently holding the contrary. The first one is a Pennsylvania decision, under which a shipper was allowed to recover damages for injuries sustained while his freight car was attached to a passenger train, though the freight agent who made the arrangement with him for such shipment told the shipper when the application was made that a rule of the company forbade it. The passenger train to which the car of the shipper was subsequently attached was not then present. When it arrived, however, the freight car was attached, and it thus appears that this action was sanctioned by the freight agent of the company, and all the company's representatives on the passenger train. Under such circumstances, the shipper might well have been assumed to have participated in no wrong and no violation of the rules of the company. He had the right to ask the freight agent to attach his car to the passenger train, and when the agent told him that the rules of the company forbade it he could not know that, before the arrival of the passenger train, the agent might not have obtained the requisite authority to attach it, especially as he subsequently, with the assent of the company's representatives on the passenger train did do so. *Lackawanna & B. R. Co. v. Chenoweth*, 52 Pa. 383, 91 Am. Dec. 168.

Two other cases cite this one with approval.—*Oreed v. Pennsylvania R. Co.* 86 Pa. 139, 26 Am. Rep. 693; *Dunn v. Grand Trunk R. Co. of Canada*, 58 Me. 187, 4 Am. Rep. 267,—but they are both cases in which the passenger does not appear (as in the case before us) to have been told that he was riding in violation of any rule of the company, and therefore do not fall within the rule attempted to be deduced from the first Pennsylvania case, but are properly decided, under all the cases, and are in strict accord with that herein laid down. If the case in 52 Pa. be, however, treated as authority there for the proposition that a recovery can be had for an injury sustained by one riding on a freight train by inducing a conductor to violate a known rule of the company, of which the conductor at the time informs him, it will not be so treated here, as it is contrary to the former holdings of this court and to the general current of authority.

The judgment must therefore be reversed, and the case remanded for a new trial.

VIRGINIA SUPREME COURT OF APPEALS.

HOME BUILDING & CONVEYANCE CO.,

Appx,

v.

City of ROANOKE *et al.*

(..... Va.)

1. Building in a city an approach to a bridge over railroad tracks leaving access to abutting owners, is not additional servitude.
2. Damage to an abutting owner by an elevated approach to a bridge across railroad tracks which leaves a space of about seven and one-half feet between the structure and the side of the street for access to his premises, is *damnum absque injuria*.
3. A provision that all contracts for public improvements or building shall be let to the lowest responsible bidder does not prevent a city from constructing such work under the direction of its own engineers and officers.

(January 31, 1895.)

A PPEAL by complainant from a judgment of the Circuit Court of the City of Roanoke dissolving an injunction which had been granted to restrain defendants from constructing the approaches to a certain bridge in a highway in front of complainant's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Scott & Staples, for appellant:

The structure is an additional burden upon the appellant's fee simple.

Western U. Teleg. Co. v. Williams, 8 L. R. A. 429, 86 Va. 696.

Lot owners have a peculiar interest in the adjacent street, viz., easements of access, light, and air, which are property or property rights and as such are as inviolable as the property in the lots themselves.

2 Dill. Mun. Corp. 4th ed. § 712; Elliott, Roads & Streets, p. 526; *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 834, 48 Am. Rep. 457; *Story v. New York Elev. R. Co.* 90 N. Y. 146, 48 Am. Rep. 146; *Norfolk City v. Chamberlaine*, 29 Gratt. 584.

Manchester Cotton Mills v. Manchester, 25 Gratt. 825, settles the question of the right of the appellant to an injunction.

Orkley v. Williamsburgh Trustees, 6 Paige, 262, 3 L. ed. 978; *Clark v. Syracuse*, 13 Barb. 38; *Kerr, Inj.* 199, 295, 304; *High, Inj.* § 850; *Story, Eq. Jur.* p. 258, note; 2 Dill. Mun. Corp. §§ 644, 661, note, 723; *Hodges v. Seaboard & R. Co.* 88 Va. 653.

The owner of a lot fronting on a street has a right of access over said street to his lot. This right of access is a property right within

NOTE.—For approach as part of bridge, see note to *Bavannah, F. & W. R. Co. v. Daniels* (Ga.) 20 L. R. A. 416.

For injury to abutter's easment by railroad in street, see note to *Eggerer v. New York Cent. & H. R. Co.* (N. Y.) 14 L. R. A. 381.

For viaduct in street damaging abutting owner see also *Spencer v. Metropolitan Street R. Co.* (Mo.) 23 L. R. A. 605, and *Pueblo v. Strait* (Colo.) 24 L. R. A. 322.

37 L. R. A.

the meaning of the constitution of Virginia, and when a city requires a street, whether by dedication or condemnation, it has the control of that street as a pass-way, but subordinate to this right of access by the lot owner.

Smith v. Alexandria, 33 Gratt. 208, 86 Am. Rep. 788; *Kehrer v. Richmond City*, 81 Va. 745; *Story v. New York Elev. R. Co.* 90 N. Y. 161, 48 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268.

Mr. W. A. Glasgow, Jr., for appellee:

The right to "build bridges in" the street *ex necessitate*, carries with it the right also to build approaches to the bridges.

Sussex County Chosen Freeholders v. Strader, 13 N. J. L. 108, 35 Am. Dec. 580; *Com. v. Deerfield*, 6 Allen, 449; *Willis v. Winona* (Minn.) 26 L. R. A. 142; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 836.

The approach to Randolph street bridge and the bridge itself was practically completed before the injunction in this case was granted, and, therefore, an injunction should not have been granted to restrain the building of the approach to said bridge, when such approach was already completed.

10 Am. & Eng. Encyclop. Law, p. 790, note; *Georgia Pac. R. Co. v. Douglassville*, 75 Ga. 328; *Osborne v. Missouri Pac. R. Co.* 147 U. S. 248, 37 L. ed. 155.

By the charter of the city of Roanoke, the trust is confided to it and the duty imposed upon it, not only of opening the streets, but to "otherwise improve streets, sidewalks, and public alleys in said city," and "to build bridges in and culverts under said streets," and if any injury is caused to any citizen of the city by the careful and reasonable performance of the work resolved upon in furtherance of the duties devolved upon said city, then such damages is *damnum absque injuria*.

Smith v. Washington, 61 U. S. 20 How. 135, 15 L. ed. 853; *Smith v. Alexandria*, 33 Gratt. 208, 86 Am. Rep. 788.

Messrs. Thomas W. Miller and Eaton also for appellee.

Cardwell, J., delivered the opinion of the court:

The city of Roanoke, on the 29th day of July, 1890, entered into an agreement in writing, duly executed, with the Norfolk & Western Railroad Company, whereby the said railroad company agreed on its part to build, and furnish the material therefor, at its own expense, an overhead bridge across the railroad at three points in the city of Roanoke, among the number at Randolph street, where it intersected with Railroad avenue, running parallel to said railroad, and in consideration whereof the city of Roanoke agreed on its part to build the approaches to said bridges. Accordingly, the city of Roanoke proceeded to construct the approach to the bridge to be erected, and which has been erected, by the Norfolk & Western Railroad Company across its road-bed at the point named in Randolph street, and the city prosecuted the work till enjoined, as will be hereinafter stated. On

M. Canal Co. 80 U. S. 18 Wall. 166, 20 L. ed. 557; *Hodges v. Seaboard & R. R. Co.* 88 Va. 653; *Western U. Teleg. Co. v. Williams*, 86 Va. 696, 8 L. R. A. 429. In each of those cases the act complained of was committed by a private corporation for private gain, and not for the public good only. There is, to our mind, a marked difference between a private corporation, or any third party, though claiming, under the authority of the legislature, the right to place additional burdens upon the servitude of a public highway for private gain, and a public corporation clothed with authority from the legislative power to improve its public highways so as to make them more convenient and safe to the traveling public (3 Dill. Mun. Corp. [4th ed.] §§ 715, 716); and on this point see opinion of this court in *Hodges v. Seaboard & R. R. Co.* 88 Va. 655, where Hinton, J., says: "The easement of the public is the right to use and improve the street for the purposes of a highway only. A railroad on the street, being foreign to such purposes, is an interference with the adjoining owner's property rights in the soil, and an acquisition or taking of an estate or interest in his land, for which he is entitled to compensation as in other cases." It is undeniable that the city of Roanoke, in making the improvement in Randolph street of which appellant complains, was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted alike in England and in this country. See opinion of Mr. Justice Strong in *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 641, 25 L. ed. 338, and cases there cited. This case, as we have seen, grew out of the construction of a tunnel under the Chicago river along the line of La Salle street, under authority conferred upon the city by its legislative charter; and Mr. Justice Strong further says: "The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly

encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agent, or give him any right of action. This is supported by an immense weight of authority." Cooley, Const. Lim. p. 542, and notes, and cases there cited. Proceeding further, this eminent jurist says that: "The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166, 20 L. ed. 557, and in *Eaton v. Boston, C. & M. Railroad*, 51 N. H. 504, 12 Am. Rep. 147. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion." So in the case here under consideration.

A case almost exactly similar to the one we now have under consideration has recently been decided by the supreme court of Minnesota, and reported in the Northwestern Reporter (vol. 80, p. 814), styled *Willis v. Winona*, 26 L. R. A. 142. The syllabus of that case is as follows: "(1) The city of Winona, under express legislative authority, constructed a public wagon bridge across the Mississippi river, the Minnesota end of which reaches the river bank near the foot of Main street, and at considerable height above the natural level of the land. For the purpose of connecting the bridge, for the purposes of travel and traffic, with Main street and other public streets, the city constructed an approach in and along the center of Main street in front of plaintiff's abutting lot. This approach, which consists partly of solid abutments and partly of a plankway supported by iron columns, gradually ascends from the natural level of the street at one end to the level of the bridge at the other. (2) Held, that the construction and maintenance of this approach does not impose any additional servitude on the street, and does not render the city liable for damages to plaintiff's lot, in the absence of any negligence on the part of the city, and of any statute imposing such liability." Judge Mitchell, who delivered the opinion of the court in that case, in summarizing the facts alleged adds to what is stated in the syllabus: "This approach commences in the center of Main street, a short distance south of plaintiff's lot, and gradually rises until it reaches the height of about 25 feet opposite the north end of the lot. This approach is 24 feet wide, leaving a portion of the street on each side at the former grade. It is covered with plank, and is supported by abutments and columns of iron and stone. The construction and maintenance of this approach have materially reduced the value of the plaintiff's lot, but there is no allegation that it touches the body of the plaintiff's lot, or that it was negligently constructed, or in any manner not expressly authorized by the act of the legislature." And upon

his statement of what the act of the legislature—that is, the charter of the city—provides with reference to private property taken, etc., it fully appears that it is in effect the same as section 23 of the charter of the city of Roanoke, relied on by appellant. The basis of the claim asserted by Willis against the city of Winona for damages was, as in the case here, based on two grounds: (1) That the Act of 1891 (the charter of Winona), authorizing the building of this bridge, imposes upon the city a positive duty to pay such damages; and (2) that the construction of this bridge approach has imposed an additional servitude upon the street upon which plaintiff's lot abuts. But the court held, in its strong opinion, supported by numerous authorities cited, that, taking all of the provisions of the act (that is, the charter of Winona) together, it was not intended to impose upon the city a liability to pay damages where none already existed, but merely to provide a method of ascertaining and paying damages for such taking of private property as, under existing law, entitled the owner to compensation; and that the construction and maintenance of the bridge approach are not an additional servitude on the street for which the plaintiff could recover damages, saying that "the doctrine of the courts everywhere, both in England and this country (unless Ohio and Kentucky are exceptions), is that, so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action of damages, unless there be an express statute to that effect."

Stress is laid by appellant's counsel here upon section 23 of the charter of the city of Roanoke, as imposing the duty upon the city to compensate appellant for the taking of its property by the construction of the approach to Randolph street bridge, and in like cases; but we think that that section of the charter refers to the acquisition of property for the opening of new streets, the extension of those already opened or dedicated, and to the building or establishment of work-houses, houses of correction, and other buildings or improvements contemplated in the charter; and, if section 23 has any application to appellant's case, it is, after all, but the embodiment of the established law of the state, and only provides a method of ascertaining and paying damages for the taking of private property under existing law where the owner is entitled to compensation. So, after as careful examination of the authorities reported in other states and the federal reports as we could give, we conclude that, since we find from the authorities cited *supra* that the building of an approach to a bridge

authorized by law to be built is but the grading of the street to adapt it to the uses and needs of the public, the determination of the case under consideration must be governed by the rulings of this court in the cases of *Smith v. Alexandria* and *Kehrer v. Richmond City, supra*. The doctrine laid down in those cases is stated clearly by Judge Burks in the first-named case as follows: "The validity of the legislative act, similar to the charters of most of our cities and towns in respect to streets, has not been, and cannot be, questioned; and, the city council having full discretionary power thereunder to improve the streets of the city by grading them, the due exercise of the power cannot, in the nature of things, be wrongful in a legal point of view; and hence, although it may be attended or followed by damage, as a necessary incident, to the owners of adjacent lots, such damage is what is known in the law as '*damnum absque injuria*,' and imposes no legal liability." 33 Gratt. 211, 36 Am. Rep. 768; Dill. Mun. Corp. §§ 762, 763. The opinion of the court by Lewis, P., in *Kehrer v. Richmond City*, 81 Va. 745, but emphasizes the doctrine,—a doctrine that, we admit, appears harsh, and may be really so, when applied to some cases; but it should be remembered that it is not the province of this court to make the law, but rather to enforce it.

It is, however, contended by appellant that because section 50 of the charter of Roanoke requires all contracts for the erection of public improvements or buildings within the jurisdiction of the city council to be let to the lowest responsible bidder, after notice, etc., all the acts and doings of the city in connection with the building or construction of the bridge approach in Randolph street are manifestly contrary to law and illegal,—*ultra vires*.

We see nothing in that clause of the charter which inhibited the city from constructing public buildings or improvements under direction of its own engineers and officers. It simply provides that when such buildings or improvements are let to contract, it shall be to the lowest bidder, and after advertisement, as provided. Any other construction of that provision would prove dangerous, if not injurious, to any city, since we see from this record that, if that construction had been followed, the approaches to the overhead bridges in the city of Roanoke would have cost the city \$8,000 or \$10,000 more than they will under the mode of construction adopted by the city.

Upon a review of the whole case, and for reasons stated, we are of opinion that the judgment of the circuit court of Roanoke city dissolving the injunction awarded in the case, and dismissing appellant's bill, is clearly right in all respects, and must be affirmed.

Rehearing denied.

WISCONSIN SUPREME COURT.

Charles ROSE, Receiver of the Consolidated Mutual Fire Ins. Co., *Resp't.*,
v.

KIMBERLY & CLARK CO., *Appt.*

(.....Wis.....)

A contract made by mail for the insurance of property within the state by a foreign company which is prohibited from transacting insurance business within the state directly or indirectly, will not sustain an action by a receiver of the company against the policy holder to recover an assessment.

(March 5, 1895.)

APPEAL by defendant from a judgment of the Winnebago County Court in favor of plaintiff in an action brought to compel payment of an assessment upon a fire insurance policy. *Reversed.*

Statement by Winslow, J.:

Action by the receiver of an insolvent foreign mutual insurance company to recover an assessment made upon policy holders. The Consolidated Mutual Fire Insurance Company was an Illinois corporation, having its principal office at Chicago, and it never complied with the laws of the state of Wisconsin relating to foreign insurance companies doing business within this state, and consequently had no license to transact such business. In 1890 the defendant made application to the insurance company for insurance upon its property in Neenah, in this state. The applications were sent by mail to the office of the insurance company at Chicago, and there accepted, and the policies mailed to the defendant at Neenah. The policies contained provisions that the insured assumed a contingent liability equal to three times the annual cash premium, to pay losses and expenses, the same to be paid upon the making of assessments for that purpose by the officers of the company. In December, 1890, the officers of the insurance company made an assessment of 20 per cent upon the policy holders, upon this contingent liability to pay losses and expenses, and the defendant refused to pay. In April, 1891, the plaintiff was appointed receiver of the insurance company by the proper court at Chicago, and duly qualified, and brings this action as such receiver. It appeared that said assessment was necessary to pay the losses and expenses of the company outstanding. Upon these facts, which were substantially undisputed, the trial court held that the policies were valid contracts of insurance, and rendered judgment for the plaintiff for the amount of the assessment, and the defendant appealed.

NOTE.—For restrictions on business by foreign insurance companies, see note to *State v. Ackerman* (Ohio) 24 L. R. A. 296, and as to what insurance business or other business by foreign companies is done within the state, see note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 299.
27 L. R. A.

Messrs. Eaton & Weed, for appellant:

The issuing of a policy of insurance is not a transaction of commerce within the clause which declares that congress shall have power "to regulate the commerce with foreign nations and among the several states."

Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *State v. Doyle*, 40 Wis. 175, 23 Am. Rep. 692; *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 148; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.

A state has the right to impose conditions not in conflict with the United States Constitution upon a foreign insurance company.

Doyle v. Continental Ins. Co. of New York, *supra*.

An action cannot be maintained in this state by a foreign insurance company upon an insurance contract unless the company has first complied with our laws.

Aetna Ins. Co. v. Harcey, 11 Wis. 894.

A contract in violation of a statute is void and courts will not aid in enforcing it.

Lemon v. Grosskopf, 23 Wis. 447, 99 Am. Dec. 58; *Brackett v. Hoyt*, 29 N. H. 267; *Buzton v. Hamblen*, 32 Me. 448; *Bancroft v. Dumas*, 21 Vt. 456; *Boutwell v. Foster*, 24 Vt. 485.

Premium notes taken by a foreign insurance company that has not complied with the laws of the state are void.

Cincinnati Mut. Health Assur. Co. v. Rosenthal, and *Aetna Ins. Co. v. Harcey*, *supra*; *Wood*, Fire Ins. § 494.

The legislature may prohibit or permit foreign insurance companies to do business in this state and if permit is granted may impose such restrictions as it sees fit.

Milwaukee Fire Department v. Helfenstein, 16 Wis. 142; *Morse v. Home Ins. Co.* 80 Wis. 496, 11 Am. Rep. 580.

Contracts contrary to the provision of any statute cannot be recovered upon.

Melchoir v. McCarty, 81 Wis. 252, 11 Am. Rep. 605; *Aetna Ins. Co. v. Harcey*, *supra*.

Foreign insurance companies may be excluded entirely or compelled to conform to the laws of the state where they are permitted to do business.

Richards, Ins. § 4; *Doyle v. Continental Ins. Co. of New York*, *supra*; *Fire Assn. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 842.

Our courts will not enforce a contract coming from another jurisdiction contrary to the policy of our laws.

Wight v. Rindskopf, 48 Wis. 844; *Stanhilber v. Mutual Mill Ins. Co.* 76 Wis. 285; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683.

Statutes made for the protection of one class of persons against another are only applicable to the latter.

First Nat. Bank of Milwaukee v. Plankinton, 27 Wis. 177.

A contract to do work by a person who is forbidden to do the work without a license cannot be enforced.

De Wit v. Lander, 72 Wis. 120.

Mr. M. C. Phillips, for respondent

The trial court simply enforced the law of Illinois, which defendant by implication is subject to in making these contracts.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020.

It is not a question of the validity of the policies but the right to litigate in this state, a liability arising from a contract deliberately made by the parties in Illinois.

By the law of comity as well as by statute respondent has this privilege, without complying with a prohibitory statute, on a contract made in its own state.

Wis. Rev. Stat. § 2602; *Bank of Augusta v. Earle*, 88 U. S. 18 Pet. 519, 10 L. ed. 274; *Christian v. American Freehold Land & Mortg. Co.* 89 Ala. 198; *Texas Land & Mortg. Co. v. Wortham*, 76 Tex. 556; *Powder River Cattle Co. v. Custer County Comrs.* 9 Mont. 145; *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910.

In voluntarily entering into these contracts in the state of Illinois, defendant impliedly subjected itself to the laws of the state of Illinois affecting liability; and anything done at the legal home of the company under the authority of such laws, which binds those in like situation with himself, will necessarily bind him.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020.

Accepting these policies and having availed itself of the benefits of them it cannot be heard to deny liability on them.

Lungstrass v. German Ins. Co. 57 Mo. 109; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 644, 19 L. ed. 1018; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 648; *White River Lumber Co. v. Southwestern Imp. Assn.* 55 Ark. 625; *Sherwood v. Alois*, 83 Ala. 115.

These contracts are Illinois contracts.

Lamb v. Bowser, 7 Biss. 315; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. supra*; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 81 Mich. 846; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 38; *Hyde v. Goodnow*, 8 N. Y. 266; *Western v. Genesee Mut. Ins. Co.* 12 N. Y. 258; *Bailey v. Hope Ins. Co.* 56 Me. 474; *May, Ins.* § 568.

Made in the domicile of the company they are not invalid unless expressly so declared by statute.

Toledo Tie & Lumber Co. v. Thomas, 38 W. Va. 566; *Sherwood v. Alois, supra*; *American Loan & T. Co. v. East & West R. Co.* 37 Fed. Rep. 242.

The policy would be valid against the company as a mutual company, as a logical sequence, it must be binding on defendant.

Wright v. Lee, 2 S. Dak. 596; *Ganser v. Fireman's Fund Ins. Co.* 84 Minn. 872; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67.

These policies were bought, issued, delivered and paid for in Chicago. Under these circumstances it is not a question of statutory construction or application, but whether the courts of this state are closed to a resident of Illinois that happens to be an insurance corporation.

Lamb v. Bowser, 7 Biss. 315, 372; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* and *Columbia F. Ins. Co. v. Kinyon, supra*; *Hunt* 27 L. R. A.

ley v. Merrill, 82 Barb. 626; *Hyde v. Goodnow*, and *Western v. Genesee Mut. Ins. Co. supra*; *Lester v. Webb*, 5 Allen, 569.

Winalow, J., delivered the opinion of the court:

The insurance contracts in question were made outside of this state upon property within the state, by a foreign company which had not complied with the laws of Wisconsin, and was thus debarred from doing business within the state. The question arising is not whether these contracts can be enforced in the courts of Illinois where they were made. It might well be that, were this action pending before an Illinois court, it would be held that, the contracts being Illinois contracts, and there being nothing in the statutes or policy of that state prohibiting them, they would be held valid and binding. Such, in substance, was the ruling of this court in the case of *Seamans v. Knapp, S. & Co. Company* (decided at last term) *ante*, 362, where a contract made in Wisconsin insuring property in Missouri by a Wisconsin insurance company which had no license to transact business in Missouri was upheld. But it is obvious that that decision does not reach or control this case. The question here presented is whether the courts of this state will enforce a contract plainly and squarely opposed to the public policy and laws of the state. Doubtless the general rule of law is that a contract valid where made is valid everywhere, but this rule is not without exception. The provisions of our statutes which prescribe the conditions upon which alone foreign insurance companies may do business within this state are very stringent and sweeping. Sanborn & Berryman, Anno. Stat. §§ 1915-1919. They provide, in substance, that no foreign fire insurance company shall, directly or indirectly, take risks or transact any business of insurance in this state, except upon compliance with certain specified requirements. It is unnecessary to state what these requirements are in detail, but it is sufficient to say that they include, among other things, the filing of verified statements showing investments of capital in certain specified securities and to certain amounts, or, in lieu thereof, a deposit with the state treasurer of a certain amount of United States bonds; also, the payment of certain license fees, and the filing of various documents intended for the benefit and protection of policy holders within the state; and only upon compliance with all these requirements is the commissioner of insurance authorized to issue the license which authorizes the doing of business within this state. The object of this statute is so plain that it cannot be mistaken. It is to protect our citizens against irresponsible and worthless foreign companies of the very kind which we have now before us. The evil to be corrected is not the writing of a policy by an unlicensed company within this state alone, but the writing of such a policy at all. Bearing in mind the object of the statute and the evil to be corrected, it is very plain that the object will be largely defeated, and the evil will flourish as before,

if it be held that companies without license can establish their agencies just outside of the state line and conduct their business by mail. Now, it will be observed that the legislature was not content with providing that no unlicensed company should make a contract of insurance within this state, but provided that no such company should, directly or indirectly, take risks or transact any business of insurance in this state. The writing of a policy of insurance upon property situated within this state would seem pretty clearly to be, in some degree at least, the transaction of insurance business in this state, whether the policy be written just within or just without the state line. It was said in *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285, on page 291: "A contract insuring property in this state necessarily involves the doing of business in this state, and hence

is subject to the laws of this state." We regard the remark as entirely correct, and fully as applicable to the present case as to the *Stanhilber Case*. It is not meant by this that the legislation in question has extraterritorial effect, or that it will invalidate a contract made in Illinois, but simply that when that contract is a contract insuring property within this state it is against the policy of our law, and will not be enforced by the courts of Wisconsin unless the conditions prescribed by our law have been complied with. In no other way can the manifest purpose and intent of the statute be reached; any different construction would render the law of little effect. These views necessitate reversal of the judgment.

Judgment reversed, and action remanded, with directions to enter judgment for the defendant in accordance with this opinion.

MICHIGAN SUPREME COURT.

M. Foster CHAFEY

v.

John T. MATHEWS, Receiver of James Moore, Insolvent, *Plff. in Err.*

(.....Mich.....)

1. That a mortgage to cover advances by a bank runs to the cashier individually and not to the bank will not prevent its enforcement in favor of the bank, if no one will be prejudiced by the fact that it was taken in that form.
2. Affidavits for renewal of a perpetual mortgage need not state the amount of matured indebtedness if the obligations matured and unmatured exceed the amount of the mortgage.
3. The security of a mortgage is not affected by statements made in good faith by the mortgagee to creditors of the mortgagor that the latter is doing a good business and will be able to meet his obligations, although the statements prove to be untrue.
4. The interest of a vendee of goods by conditional sale will pass under a mortgage of all his stock, so that the mortgagee may maintain replevin for them against an insolvency receiver claiming them for the benefit of all creditors.

(February 12, 1895.)

ERROR to the Circuit Court for Gratiot County to review a judgment in favor of plaintiff in an action brought to recover possession of certain goods forming part of a stock which defendant had taken possession of as receiver of an insolvent. *Affirmed*.

The case sufficiently appears in the opinion. Mr. B. H. Sawyer, for plaintiff in error;

NOTE.—The above case seems to be a novel one in respect to the right of a mortgagee under a chattel mortgage to claim possession of goods which the mortgagor had obtained under a conditional sale with reservation of title.

On the general subject of such sales, see notes to *Weinstein v. Freyer* (Ala.) 12 L. R. A. 700; *Hineman v. Matthews* (Pa.) 10 L. R. A. 233.

The receiver could not impeach a fraudulent conveyance.

Putnam v. Reynolds, 44 Mich. 118; *Kinter v. Pickard*, 67 Mich. 125; *Heineman v. Hart*, 55 Mich. 64; *Root v. Hart*, 62 Mich. 420; *Kennedy v. Dawson*, 96 Mich. 79; *Root v. Potter*, 59 Mich. 498; *Sweetzer v. Higby*, 63 Mich. 20; How. Stat. chap. 803, § 8741; *Ball v. Staflor*, 26 Hun, 358; *Southard v. Benner*, 73 N. Y. 424.

The same rule must govern the mortgagee's right to testify in this case as would if the general creditors had, prior to the assignment of Mr. Moore, attached the property purported to be covered by the mortgage.

Bank of Utica v. Finch, 8 Barb. Ch. 294, 5 L. ed. 907, 49 Am. Dec. 175; *Stoddard v. Hart*, 23 N. Y. 556; *Ladue v. Detroit & M. R. Co.* 18 Mich. 880, 87 Am. Dec. 759; *Craig v. Tappin*, 2 Sandf. Ch. 78, 7 L. ed. 515; *Jenkinson v. Monroe Bros.* 61 Mich. 454; *Jones, Chat. Mortg.* 2d ed. §§ 98, 99; *Monnot v. Ibert*, 83 Barb. 24; *Davenport v. McChesney*, 86 N. Y. 248.

The testimony of Mr. Chafey was clearly incompetent as attempting to establish and attach to the mortgage the right or ownership of the bank, and the claims and dealings of the bank with and against the mortgagor, Moore, the bank being a party outside of the record and unknown in the mortgage, and the creditors so far as they were informed by the mortgage and the renewals knew only that Chafey was the real owner and mortgagee.

Creditors who have given credit after the failure to comply with the statute as to renewals, whether with knowledge of the existence of the mortgage or not, are not affected by the mortgage.

Ely v. Carnley, 19 N. Y. 496; *Herman, Chat. Mortg.* p. 191; *Beers v. Waterbury*, 8 Bosw. 396; *Fitch v. Humphrey*, 1 Denio, 163; *Briggs v. Mette*, 42 Mich. 14; *Wetherell v. Spencer*, 8 Mich. 123; *Thompson v. Vanvechten*, 27 N. Y. 568.

The affidavits do not apprise the general creditors of the nature of the obligations men-

tioned in the mortgage; nor do they show the amount of money advanced.

Manwaring v. Jenison, 61 Mich. 117; *Herman*, Chat. Mortg. 191; *Beers v. Waterbury*, *Fitch v. Humphrey*, *Briggs v. Mette*, and *Ladue v. Detroit & M. R. Co. supra*.

Goods furnished and delivered to Moore under the contract never became attached to and never came under the terms of the mortgage of the plaintiffs.

F. J. Drives Brewery Co. v. Merritt, 9 L. R. A. 270, 82 Mich. 201; *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158, 13 Am. Dec. 231; *Preston v. Whitney*, 23 Mich. 260; *Johnston v. Whitmore*, 27 Mich. 438; *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lozo*, 42 Mich. 6; *Marquette Mfg. Co. v. Jeffery*, 49 Mich. 283; *Edwards v. Symons*, 65 Mich. 348; *Kendrick v. Beard*, 81 Mich. 182; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196.

They could not, any more than a factor who has possession of the goods and sells them in his own name, pledge the beer for their own debt.

Newson v. Thornton, 6 East, 17; *Rice v. Cutler*, 17 Wis. 852, 84 Am. Dec. 747; *Hirschhorn v. Canney*, 98 Mass. 149.

A mortgage covering after-acquired property does not take precedence of a lien expressly retained on such property for its price.

Wood v. Holly Mfg. Co. 100 Ala. 326; *New Orleans v. Mellen*, 79 U. S. 12 Wall. 362, 20 L. ed. 484; *Fosdick v. Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 844; *Vattier v. Hinde*, 82 U. S. 7 Pet. 271, 8 L. ed. 682; *Central Trust Co. of New York v. Kneeland*, 188 U. S. 414, 84 L. ed. 1014; *Edwards v. Symons, supra*; *Sweetser v. Higby*, 68 Mich. 13; *Angell v. Pickard*, 61 Mich. 561; *Scott v. Chambers*, 62 Mich. 532; *Root v. Potter*, 59 Mich. 498.

The cashier's statements were fraudulent.

Beam v. Macomber, 83 Mich. 127; *Bebe v. Young*, 14 Mich. 138; *Converses v. Blumrich*, 14 Mich. 109; *Ladue v. Detroit & M. R. Co.* 18 Mich. 407, 87 Am. Dec. 759.

Messrs. Stone & Salter, for defendant in error:

The affidavits of renewal set forth with entire certainty the interests of the plaintiff in the property covered by the mortgage and fully conform to the statute.

Manwaring v. Jenison, 61 Mich. 117.

The contract does not provide that the title to the goods ordered shall not pass until they are paid for. It simply provides that it shall remain in the name of the vendor until it shall have received the money for same.

Kendrick v. Beard, 81 Mich. 182; *Edwards v. Symons*, 65 Mich. 348.

Until after demand and refusal of payment for the goods, or demand for the possession of the goods, the possession of the plaintiff must be deemed rightful.

Adams v. Wood, 51 Mich. 411.

That the plaintiff took the mortgage in question in good faith for a valuable consideration is not disputed. He had a right to take it to himself instead of the bank and as trustee for the bank.

Adams v. Niemann, 46 Mich. 185.

27 L. R. A.

And the defendants could not question its execution.

Brown v. Brabb, 67 Mich. 17.

McGrath, Ch. J., delivered the opinion of the court:

Plaintiff was on the 23d day of January, 1891, and is now, the cashier of the First National Bank at Ithaca. On that date he took from one Moore, who was a customer of the bank, a chattel mortgage in the sum of \$4,000, covering Moore's stock of merchandise, and all additions and accessions to said stock, to secure the payment of Moore's obligations, both present and future, to the bank. The bank continued to discount Moore's individual paper, as well as that of his customers, and advance moneys upon drafts drawn by Moore upon his customers, until August, 1893, when Moore made an assignment for the benefit of his creditors. The assignee failing to qualify, defendant was appointed receiver, and took possession. Plaintiff replevied the stock of merchandise under his mortgage.

It is insisted by defendant:

1. That the mortgage runs to plaintiff individually, and not to the bank. Its purpose, however, was fully understood, not only by the mortgagor but by the creditors. All of the business was done through plaintiff, and no one appears to have been prejudiced by the fact that the mortgage did not run directly to the bank.

2. That the affidavits of renewal filed January 18, 1892, and January 3, 1893, did not correctly set forth the facts as they existed at that time. The renewals allege that "there is due and remaining unpaid on said mortgage the sum of \$4,000," and "that the interest of said M. Foster Chafey in the chattels therein and described remains unchanged." It appears upon the face of the mortgage that it was to be a continual indemnity. The mortgage was not required to state the actual amount of the matured indebtedness upon those dates, so long as the obligations, both matured and unmatured, exceeded that sum.

3. That plaintiff made representations to certain creditors which were misleading, and operated as a fraud upon them. It is not claimed that the mortgagee at any time misrepresented the state of the account between the bank and the mortgagor. What is charged is that, upon inquiry made by creditors, plaintiff represented that Moore was doing a good business, and would be able to meet his obligations. These were opinions, merely, and there was nothing to show that they were not given in entire good faith. Indeed, at the time of the failure, Moore was indebted to the bank in the sum of \$14,000,—a sum largely in excess of the security held by the bank.

4. That certain goods seized by plaintiff under the writ had been delivered to Moore by the McFarland Carriage Company, under written contracts, by the terms of which the title to the goods was to remain in the carriage company, and it is urged that plaintiff had no right to take these goods under his writ. The right to possession of these goods

under the contract in question was at the date of the assignment in Moore. He cannot be said to have had no interest in the goods, and whatever interest he had passed under the mortgage. Whatever payments he may have made upon them inured to the benefit of the mortgagee. The receiver took through Moore, and subject to the mortgage. He cannot be allowed, in this proceeding, to represent the carriage company. The claim of that company is adverse to that of the receiver and the creditors. The carriage company, when it asserts this claim, if it ever does, will do so, not as a creditor, but as having

the title to the goods in question. It further appears that the carriage company, on the 14th day of October, 1893, filed its claim as a creditor for the balance of its account, without reference to any claim of ownership. It is not necessary to determine whether the filing of said claim was a waiver of its right to claim title. It is sufficient that Moore mortgaged his interest in these goods—including, as an incident, the right of possession—to plaintiff.

The judgment is affirmed.

The other Justices concurred.

KENTUCKY COURT OF APPEALS.

Mary L. G. LAWRENCE, *Appt.*,

City of LOUISVILLE.

(.....Ky.....)

The vested right to a defense under the statute of limitations after bar of a cause of action is complete, is protected against subsequent changes in the law by the constitutional provision that all "rights" shall continue valid.

(February 9, 1895.)

APPPEAL by plaintiff from a judgment of the Louisville Law and Equity Court in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Affirmed.

The facts are stated in the opinion.

Messrs. Thomas F. Hargis, Oscar Turner, Jr., and Matt O'Doherty for appellant.

Mr. H. S. Barker for appellee.

Paynter, J., delivered the opinion of the court:

On the 30th day of January, 1891, this action was brought by the appellant, Mary L. G. Lawrence, against the city of Louisville for damages for personal injury alleged to have been caused by the neglect of the city in the erection and use of its bridge at the east terminus of Breckenridge street, and that the bridge was defective and perilous, which could be and was discovered by the city; that on the 2d day of June, 1890, she was run over on the bridge, by reason of the defect in the construction and condition of the bridge, and her leg was so mangled and injured that it became necessary to amputate it. Among other defenses made by the city was that more than six months had elapsed from the time the cause of action accrued before the action was instituted, and it pleaded

the statute of limitation as a bar to the action. The statute relied upon is an amendment to the charter of the city of Louisville, approved March 29, 1892, and reads as follows: "No action for damages of any character whatever to either person or property, shall be instituted or maintained against the city, unless such action be commenced within six months after the accrual of the cause of action. . . . A demurrer was filed to the paragraph of the answer pleading this statute as a bar to the action. The court overruled the demurrer. Plaintiff declining to plead further, the petition was dismissed.

To review this action of the court the cause is before this court. The demurrer was overruled in January, 1892. The statute of limitation, *supra*, was held by this court to be constitutional in the case of *Preston v. Louisville*, 84 Ky. 118. This court held a similar statute in relation to the city of Covington to be constitutional. *Covington v. Hoadley*, 88 Ky. 444. It is insisted by counsel for appellant that this statute, *supra*, which barred the action because it was not brought within six months, was not in force when the demurrer was overruled by the court, but that the general limitation law of the state was then applicable, which did not bar an action for such injuries for one year after the cause of action accrued. The present constitution was adopted September 28, 1891. It is contended that by the schedule of the constitution all laws not inconsistent therewith shall remain in force until altered or repealed by the general assembly; that all actions not inconsistent with it are construed as valid, and all laws inconsistent with the constitution shall cease upon its adoption; and that as, by section 59, subdiv. 5, of the Constitution, the general assembly is prohibited from passing any local or special acts "to regulate the limitation of civil or criminal causes," the special statute, *supra*, ceased, because it is inconsistent with that constitutional provision. It is claimed, as the special statute ceased, the general law then in force became applicable, and, as the action was brought within one year from the time the cause accrued, the action was not barred. In other words, that the general law became retroactive, and restored her right to maintain her action, and destroyed the complete

NOTE.—For some authorities on the general subject of vested rights, see *note* to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 406.

For remedy as part of the obligation of a contract within constitutional protection, see *notes* to *Phinney v. Phinney* (Me.) 4 L. R. A. 348, and *Best v. Baumgardner* (Pa.) 1 L. R. A. 356.

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defense which the city had to it. The question as to whether or not the special act is inconsistent with the constitution, and ceased on its adoption, is not decided, although the court may consider the question involved apparently from that point of view. To reach the conclusion which the court announces in the case, it is not necessary to determine that the special statute has ceased. It is no longer an open question as to the power of the legislative branch of the government to pass limitation laws, and to alter or change them by extending the time for their enforcement, or it may shorten the time by giving a reasonable time for asserting the right. The power to do this before the bar takes place is conceded. In some cases retrospective legislation may be upheld. However, words of a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. *Mr. Justice Paterson in United States v. Heth*, 7 U. S. 3 Cranch, 399, 2 L. ed. 479; *Harvey v. Tyler*, 69 U. S. 2 Wall. 347, 17 L. ed. 875; *Sohn v. Waterson*, 84 U. S. 17 Wall. 596, 21 L. ed. 737. While the first subdivision of the schedule of the constitution continues as valid all actions not inconsistent therewith, the same subdivision continues as valid all rights not inconsistent therewith. It reads as follows: ". . . All rights, actions . . . not inconsistent therewith shall continue as valid as if the constitution had not been adopted. . . ." At the time of the adoption of the constitution, the right to plead the statute of limitation had accrued. It was a complete bar to the action. The language of the constitution shows an intention to "preserve that 'right' as fully as the second subdivision provides that 'actions and causes of actions, except as herein provided, shall continue and remain unaffected by the adoption of this constitution.'" It follows that this action was unaffected by the adoption of the constitution. The right to recover, or the cause of action, having been extinguished by the lapse of time, the adoption of the constitution did not revive the right or cause of action. Evidently it was not intended that it should be done. The law making branch of the government has no more power to destroy a defense that has accrued than it has to take the citizen's property "without due process of law." When one is released from a demand by the statute of limitation, his right of defense is as valuable as the right to institute the action. When the defense has accrued, the right to maintain the action is destroyed. When one has occupied land adversely for a given number of years, the statute of limitation destroys the remedy which the owner possesses to recover it. His right was extinguished by the destruction of his remedy. The defense is in the nature of a vested right. In the application of the statute of limitation, it is the same whether the suits arise *ex contractu* or *ex delicto*. *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558. Though a debt has never been paid, the statute of limitation bars it after a certain lapse

of time, and no legislative authority can reimpose the obligation. The obligation can only be imposed by his will and consent. When one is guilty of a tort, and immunity from suit has arisen by operation of the statute of limitation, the legislature cannot deprive him of it, any more than it can the debtor who has been exempted from a demand by operation of the statute of limitation. *Naught v. Oneal*, 1 Ill. 29 Appendix, was an action for slander, and the court said: "If the cause of action accrued one year or more before the repeal of the statute of limitation, still the old statute of limitation is a good bar to the action. It is a complete bar before the repeal, and the repeal of a statute does not affect the rights acquired under the repealed statute." In *Moore v. Luce*, 29 Pa. 262, 72 Am. Dec. 629, the court said: "It is a mistake to suppose that the person barred by the statute loses nothing but his remedy. The law never deliberately takes away all remedy without an intention to destroy the right. Remedies are frequently changed. One is withdrawn and others remain, or one is substituted for another. But when all remedies are taken away after a specified period of neglect in asserting rights, and when this is done for the purpose of promoting the best interests of society, the right itself is destroyed. In *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 554, 18 L. ed. 409, the court said: 'A right without a remedy is as if it were not. For every beneficial purpose, it may be said not to exist.'" In *Sprecher v. Wakeley*, 11 Wis. 440, the court said: "And although it is generally true that the statute only bars the remedy, and does not destroy the right, yet, when the defense has been vested, no subsequent revival of the right to sue, as by repeal of the statute or other act, without the consent of the party entitled to the defense, could take away or destroy such defense." Kent, *Ch. J.*, in *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, quotes with approval the declaration as follows: "A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it produced." In *Kinsman v. Cambridge*, 121 Mass. 558, it was decided that the Statute of 1874 extending the time for filing a petition for damages for land taken to widen a street did not revive an action already barred by the statute existing before the new act was passed. *Sutherland, Stat. Constr.* § 480, holds that there is a vested right in a defense to an action, even in the statute of limitation, when thereby the bar has attached. Mr. Cooley, in his work on Constitutional Limitations (page 455), says: "Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of lim-

itation is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties,—a thing quite beyond the power of legislation." In *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325, the high court of errors and appeals of Mississippi decided that a law reviving the right of action barred by the statute of limitation is void. The chief justice, in delivering the opinion of the court, said: "To my mind it is clear that the moment the remedy was gone, by the running of the statute, the right was gone also, and a right to set this lapse of time up as a defense vested in the opposite party, and he could not be deprived of the privilege, without his consent, by subsequent litigation. This must be the rule if a defense may form the subject of a right, and that it may seems to me to be clear." It was decided in *Thompson v. Read*, 41 Iowa, 48, that the repeal of the statute of limitation cannot act retrospectively so as to disturb rights acquired thereunder, and deprive parties of protection to which they were fully entitled under the prior enactment. The current of decisions in other states treats as a vested right the privilege to plead the statute of limitation when it has run and become a bar to a demand arising either *ex contractu* or *ex delicto*. We believe the right of defense is

just as important as the right to bring an action. When the right to recover property has been extinguished because of the statute of limitation, we say that the one who thus holds has a vested right. He acquired it, not by a moral, but a legal, remedy. He is, then, beyond the power of the legislature to divest him of his rights therein, except by his consent or due process of law. From a wise public policy, the legislature has declared that a cause of action is destroyed by certain neglect, thus securing a party a right to withhold his property from subjection to a demand. The legislature has no more right in the one than in the other case, by retrospective legislation, to destroy the right to property; each being held by virtue of the statute of limitation. The right to a defense should be held as inviolate as the right of action. When the remedy is destroyed, the right to maintain the action is extinguished.

From the foregoing views, it will be seen that the court is of the opinion that the demurrer was properly sustained, although, when the constitution was adopted, the six-months statute of limitation may have ceased, and the one-year statute become operative, as to the city of Louisville. However, this point is not decided.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

H. R. CRANE *et al.*, *Appts.*,
v.

PACIFIC BANK, *Reept.*

(.....Cal.....)

1. An attachment of property of an insolvent bank which has failed and closed its doors cannot be allowed under the Bank Commissioners' Act, § 11, which fully provides for the winding up of insolvent banks by commissioners, and takes them out of the operation of the insolvent act applicable to other corporations.

2. The complaint, answer, and decree in a suit by the people to wind up an insolvent bank are admissible in evidence against the plaintiff in an attachment against such bank to show that its property has been placed beyond the reach of attachment.

(February 5, 1896).

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco, dissolving attachments which they had sued out against the

NOTE.—As to preferences of creditors of insolvent corporations in general whether by means of judicial proceedings or otherwise, see note to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 L. R. A. 802.

The above case is an unusual one in holding, by virtue of the California statute, that recognized insolvency without any proceedings to wind up the corporation defeats the remedy of attachment in case of banks.

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assets of the bank which had become insolvent. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. A. Barnard, Thomas A. Cator, and W. H. Hutton, for appellants:

The time when attachment ceases to be proper should be the commencement of the proceeding under the act to have the bank adjudged insolvent.

Up to the 15th day of August, 1893, the Pacific Bank was transacting its usual business. The right of attachment then clearly existed; the 16th day of October, 1893, did not dissolve them.

People v. San Francisco City & County Super. Ct. 100 Cal. 120.

The attachments stand in precisely the same position that they would if a receiver were in the bank. The receiver takes the property subject to attachment liens.

Von Roun v. San Francisco Super. Ct. 59 Cal. 360; *Hubbard v. Hamilton Bank*, 7 Met. 340; *Arnold v. Weimer*, 40 Neb. 216; *Arnold v. Globe Investment Co.* Id. 225; *Breene v. Merchants & Mechanics Bank*, 11 Colo. 97; *Jones v. Bank of Leadville*, 10 Colo. 464; *Vermont Marble Co. v. San Francisco City & County Super. Ct.* 99 Cal. 581.

The bank commissioners' act is a special statute and must be strictly construed.

Long v. San Francisco City & County Super. Ct. 103 Cal. 452; *People's Home Sav. Bank v. San Francisco City & County Super. Ct.* 103 Cal. 27.

Meers, Sawyer & Burnett, Dunn & McPike, and W. T. Baggett, for respondents:

The bank is in liquidation under the bank commissioners' act, and the judgment of the superior court relates to the time the bank became insolvent, which was prior to the attachments.

First Nat. Bank of Selma v. Colby, 88 U. S. 31 Wall. 609, 22 L. ed. 687; *National Shoe & Leather Bank v. Mechanics Nat. Bank of Newark*, 89 N. Y. 467; *Central Nat. Bank v. Richmond Nat. Bank of Mansfield*, 53 How. Pr. 186; *People v. San Francisco City & County Super. Ct.* 100 Cal. 106.

The object of the commissioners' bank act is to have the assets of the Pacific Bank applied ratably to the payment of its debts; to place each creditor on an equal footing.

Atty-Gen. v. Continental L. Ins. Co. 53 How. Pr. 22.

Under the bank commissioners' act the assets of the bank are in the custody of the law, under the supervision of the commissioner and no judgment can be rendered.

Those actions must abate because it would be an idle thing for the court to render a judgment and then not be able to enforce it.

Freeman, Executions, § 129; *Jackson v. Lahe*, 114 Ill. 287; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Edwards v. Norton*, 55 Tex. 405; *Bouker v. Hill*, 60 Me. 172; *Columbian Book Co. v. De Golyer*, 115 Mass. 69; *Pipher v. Fordyce*, 88 Ind. 436; *Hamilton-Brown Shoe Co. v. Mercer*, 84 Iowa, 537; *Wissall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322.

Haynes, C., filed the following opinion: Appeal from an order dissolving an attachment. On the 10th day of August, 1893, the plaintiff brought his action in the superior court of the city and county of San Francisco to recover from the defendant, a banking corporation, a certain sum alleged to have been deposited with it as a commercial deposit, and on the same day procured a writ of attachment to issue in said action, and which was on the same day levied upon assets of said bank sufficient to cover his claim. On November 17, 1893, the defendant served upon plaintiff notice of a motion to dissolve said attachment, "upon the ground that the attachment was improperly issued and levied, and on the ground that said attachment is dissolved by operation of law, by reason of the transaction of unsafe business and the insolvency and suspension of business by said Pacific Bank, defendant, prior to the issuance of said attachment, and by reason of the judgment of said superior court, duly made and entered, that it was unsafe for said bank to continue business, and that said bank was insolvent, and enjoining said bank from transacting business." Said motion was based upon affidavits served therewith, and upon the records and papers in said superior court in the action entitled: "*The People, etc., v. Pacific Bank*, No. 42,863." The affidavit of A. Gerberding read in support of said motion shows, in substance, the following facts: That from January 5, 1891, he was a member of the state board of bank commissioners; that the defendant was incor-

porated in 1863, under an act of the legislature entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved April 11, 1862, under the name and style of the Pacific Accumulation & Loan Company, with a capital stock of \$1,000,000; that in 1866 the name of said corporation was changed to that of the Pacific Bank, under an act of the legislature approved March 31, 1866, authorizing it to change its name; that said corporation closed its doors for business, and wholly suspended payment of its debts, dues, and liabilities, on the 23d day of June, 1893, and has not since resumed payment; that on said last-mentioned day said bank held in trust for persons, partnerships, and corporations an aggregate fund amounting to about \$1,868,041.45; that, prior to said last-mentioned day, said bank commissioners examined said bank, and found that it had been guilty of a violation of law in conducting business contrary to its articles of incorporation in an unsafe manner, and so as to seriously jeopardize the capital, property, and business of the bank, and thereupon directed it, by an order addressed to it, to discontinue such illegal and unsafe practices, and to conform to the requirements of its charter, but that the bank refused and neglected to comply with said order; that on said 23d day of June, 1893, the indebtedness of said bank was largely in excess of the reasonable and actual value of its assets; that the entire capital stock, together with the surplus, had become completely exhausted, and that the directors and stockholders neglected and refused to pay in said depleted stock, or any part of it, and "that on said 23d day of June, 1893, said Pacific Bank was wholly insolvent and remains so insolvent;" that the commissioners reported the condition of the bank to the attorney-general, as required by law; that said attorney-general commenced an action in the superior court on the 14th day of October, 1893, entitled, "*The People of the State of California v. The Pacific Bank, a Corporation, et al.*," in which action it was decreed on November 8, 1893, that said bank was insolvent, etc., and enjoining it and its officers from transacting any further business. The complaint in said action of *People v. Pacific Bank* alleged substantially the facts stated in the foregoing affidavit of Mr. Gerberding, and, in addition, specified particular acts of mismanagement and of losses sustained by the bank, and its insolvency. The answer of the bank in that case denied all acts of fraud and mismanagement, admitted its insolvency, and alleged that the interest of the creditors and stockholders required that the bank should be enjoined from the transaction of any further business, and that its business and affairs should be closed under the provisions of the bank commissioners' act. This answer, it was further alleged, was duly authorized by vote of the board of directors.

Appellant excepted to the reading of the said complaint, answer, and decree in support of said motion, upon the ground that he was not a party to said action, and was not bound by the proceedings therein. The

affidavits read by appellant in opposition to the motion did not deny that the Pacific Bank was insolvent on the 23d day of June, 1893, which was prior to the issuance of the attachment, nor that said bank was incorporated under the Act of 1862, providing for the formation of corporations "for the accumulation and investment of funds and savings" (Stat. 1862, p. 199), but alleged that it conducted the business of a commercial bank, and no other, and advertised and held itself out as "the oldest chartered commercial bank on the Pacific coast;" that the claim upon which his attachment issued was a balance due him upon an ordinary commercial deposit; and upon these facts appellant contends that the property and assets of the bank were properly subject to attachment, and that the court erred in dissolving it; while counsel for respondent contend (1) that the Pacific Bank is a savings bank; that the Act of 1862, under which it was organized, declared that "the capital stock and assets of the corporation shall be a security to depositors who are not stockholders," and that such security is sufficient to prevent an attachment under section 538 of the Code of Civil Procedure; and (2) that, at the time respondent moved to dissolve the attachment, the bank was in liquidation under the bank commissioners' act, and that the judgment of the superior court in the case of *People, ex rel. Bank Commissioners v. Pacific Bank*, rendered November 8, 1893, related back to the time the bank became insolvent, viz. June 23, 1893, which was prior to the attachment.

Whether the Pacific Bank should be held to have been a commercial bank or a savings bank is an important question, in some aspects affecting the settlement and adjustment of its affairs; but, so far as this appeal is concerned, I think it immaterial, and therefore not necessary to be considered or decided; for if it were beyond doubt or question that it not only conducted its business as a commercial bank, but was chartered as such, I think the attachment was properly dissolved. Under the act creating a board of bank commissioners, and prescribing their duties and powers (Stat. 1877-78, p. 740), and the amendments thereof (Stat. 1887, p. 90), the state not only requires all banks, including commercial as well as savings banks, to report twice each year, under oath, to said board, their financial condition, but through said board exercises the high prerogative power of visitation without notice, and of making an independent examination of its books, papers, bonds, and all securities, "to ascertain the condition of every such corporation, its solvency, its ability to fulfill all its obligations and report its condition to the attorney-general as soon as practicable after such examination." Stat. 1887, p. 91, § 4. Section 11 of said Act, as amended (Stat. 1887, p. 91), further prescribing the powers and duties of said board and of the attorney-general, and the mode of liquidation of insolvent banking corporations, is quoted in full in *People v. San Francisco City & County Super. Ct.*, 100 Cal., at pages 111-114, and need not be inserted here. It will there be seen that if the commissioners find that

the bank has been violating its charter or the law, or is conducting its business in an unsafe manner, they shall by order direct the bank to discontinue such practices; and if the bank refuses to comply with such order, and if it shall appear to the commissioners that it is unsafe for such bank to continue to transact business, they shall notify the attorney-general of such fact, who, after examination, in his discretion may commence suit to enjoin and prohibit the transaction of any further business; and if the court is of opinion that it is unsafe for the parties interested, or for such corporation, to continue to transact business, and that such corporation is insolvent, he shall grant the injunction, and direct the bank commissioners to take such proceedings against such corporation as may be decided upon by its creditors. This section further fixes the time within which liquidation shall be accomplished; that the commissioners shall have a general supervisory control thereof, may extend the time for final settlement, shall designate the number of officers and employees necessary to close up the business of the corporation, and fix the salaries of the same; and imposes heavy penalties, by fine or imprisonment, or both, upon any officer or employee of any insolvent corporation mentioned in the act if they shall disregard or refuse to obey the directions of the bank commissioners given in accordance with the provisions of the act.

It needs no argument to show that the exercise of the sovereign power of the state over such corporations in the manner above indicated is intended for the protection, not only of the stockholders, but especially for the protection of depositors and all others transacting business with or through the bank. In *People v. San Francisco City & County Super. Ct.*, supra, certain creditors of the Pacific Bank, the respondent here, filed a petition in insolvency against said bank, under the Insolvent Act of 1880; and the case there was an application on relation of the bank commissioners for a writ of prohibition to prevent the superior court from proceeding under the insolvent act against the bank. After quoting said section 11 of the Bank Commissioners' Act, the court said: "We have no doubt that this section was intended by the legislature to provide for every case involving the winding up of the business of a banking corporation, and that it necessarily supersedes the provisions of the insolvent act of 1880 so far as this class of corporations is concerned." This conclusion was approved in *Long v. San Francisco City & County Super. Ct.* 102 Cal. 449. The case of *People v. San Francisco City & County Super. Ct.*, supra, seems to me to be conclusive of the question involved in this case. If the bank commissioners' act operates to take banks out of the operation of the insolvency act, the proceedings under which, though summary and expensive, result in the equal distribution of its assets among its creditors, it is equally clear that it was not intended that the moment a bank closed its doors its assets should be the prey of the first creditors who should secure the issuance of attachments, and thus permit its assets to be con-

verted into money by a still more expensive process, and that the proceeds should be applied to the payment in full of these attachments, leaving other creditors, who, by reason of distance or otherwise, should not be informed of the bank's condition, or be able to secure the prompt issuance of an attachment, wholly without a right to share in its assets. The great care and supervision exercised by the state over banking corporations through the board of bank commissioners indicates a different purpose than that the commencement of proceedings by the state through the attorney-general should be a mere signal to conveniently located creditors to absorb the bank's assets by means of writs of attachment, to the exclusion of equally meritorious creditors less favorably located. The direction of the statute is that if the court should be of the opinion that it is unsafe for the corporation to continue to transact such business, and that it is insolvent, an injunction shall be issued, and thereupon "said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors;" thus clearly showing that the creditors—all the creditors—are interested in and affected by the proceedings in liquidation, and are to be equally protected.

Appellant contends, however, that the right of attachment is a positive statutory right, and that the bank commissioners' act makes no provision for dissolving attachments levied before the machinery of the act was put in motion by the commencement of the action by the people. But, before the attachment was levied, the bank had suspended and closed its doors. The affidavits in support of the motion not only state that fact, but also that it was in fact insolvent, and these facts are not denied. Under these circumstances, the right of attachment did not exist. Section 21 of said Bank Commissioners' Act (Stat. 1877-78, p. 745) declares that "all acts are hereby repealed in so far as they are inconsistent with the provisions of this act." It requires no argument to show that the right of attachment under the provisions of the Code of Civil Procedure is inconsistent with the machinery of the bank commissioners' act, as well as with its obvious purpose and intent. The state never

intended that after the continued exercise of its high prerogative powers for the safety of all depositors and creditors, as well as stockholders, its purpose should be thwarted by the seizure of the assets of the bank by one or more creditors, perchance through the connivance of one of its officers or employees. In the later case of *People's Home Sav. Bank v. San Francisco City & County Super. Ct.*, 103 Cal. 27, a case involving the construction of the bank commissioners' act, the court said: "The attorney-general is authorized to proceed against the corporation alone, and for the sole purpose, in effect, of winding up its business. In other words, he represents the interests of the people in a matter of public concern."

Appellant's exceptions to the complaint, answer, and decree in the case of *People v. Pacific Bank*, cannot be sustained. As the suit was by the people under a statute authorizing it, and for the purposes hereinbefore stated, the judgment declaring the bank insolvent is conclusive for all the purposes of the act, and binding upon appellant, so far at least as concerns his right to maintain his attachment; and the pleadings were properly read, for the purpose of showing that the judgment of insolvency was rendered in a case within the statute. If it were otherwise, since the affidavit of Mr. Gerberding that the bank was in fact insolvent on June 28, and ever since remained so, was not controverted the order dissolving the attachment might have been properly sustained without the evidence excepted to, and, if so, appellant was not prejudiced by its admission. As our conclusion is based upon the force and effect of the bank commissioners' act, and proceedings thereunder, a review of the numerous cases cited by appellant which do not refer to this statute could not be profitable. The order appealed from should be affirmed, but without costs to either party, the parties having so stipulated.

We concur: *Vanclef, C.; Searls, C.*

Per Curiam:

For the reasons given in the foregoing opinion, the order appealed from is affirmed, without costs to either party.

Petition for rehearing *in banc* denied.

TENNESSEE SUPREME COURT.

FIRST NATIONAL BANK OF JOHNSON
CITY

v.

E. B. MANN *et al.*

(.....Tenn.....)

1. The difference between the cash and the credit price on a sale of property may

be put into the form of interest on a note given for the purchase price without violating the usury law although the per cent agreed upon is greater than the lawful rate of interest.

2. Payment of a principal debt pending suit on a note held only as collateral security leaves it subject to any defense that existed against the pledgor although the suit may be continued.

NOTE.—Usury in deferred payments of purchase money.

FIRST NATIONAL BANK V. MANN and PEOPLE'S BANK V. JACKSON fairly represent the distinction which runs through the decisions upon this subject. The one line holds that there may be a cash and a

credit price for property and that the adoption of the latter will not be usurious although it is made up of the cash price plus interest at an illegal rate. The other line holds that illegal interest cannot be reserved upon the purchase price although it is provided for in the contract of sale. The distinction

3. The fact that in using a blank form, a note is on its face dated at a certain place and made payable there does not prevent it from being considered a contract of another state in which it was delivered when such was the intention.

(October 30, 1894.)

CROSS-APPEALS by complainant and defendant Mann from a decree of the Chancery Court for Knox County rendered in an action brought to compel payment of a promissory note, the complainant appealing from so much of the decree as held that it had not sufficient interest to maintain the suit, and defendant Mann appealing from so much of the decree as overruled his demurrer to the bill. *Reversed.*

The facts are stated in the opinion.

Messrs. Kirkpatrick, Williams & Bowman, for complainant:

The note being given in part payment for a stock of furniture and the rate at eight per cent per annum being contracted for in the preliminary negotiations of the sale, the note is not usurious in Tennessee, where the legal rate of interest is six per centum.

Garrity v. Cripp, 4 Baxt. 86; *Brown v. Gardner*, 4 Lea, 145; *Roger v. O'Neal*, 6 L. R. A. 427, 33 W. Va. 159.

Recovery upon the collateral note by the pledgee, does not depend upon the maturity of the original or principal debt; nor is such recovery limited to the amount of the principal debt.

Jones, Pledges, § 664.

The suit by the pledgee upon the collateral note ought not to be defeated by the payment of the principal debt after the suit is brought. The recovery would of course be in the name of the complainant bank, but in trust for the pledgee.

Logan v. Cassell, 88 Pa. 288, 32 Am. Rep. 453; *Houser v. Houser*, 43 Ga. 415; *Jones, Pledges*, § 664.

Mr. J. W. Crumley also for complainant.

Messrs. Williams, Henderson & Davis for defendant.

Wilkes, J., delivered the opinion of the court:

This is an action upon a note in the following words:

seems to be rather fine at first, but further consideration may show it to be substantial. In the one case the purchaser pays a definite price for the privilege of making his payments at a definite time in the future. Default of payment then will subject him only to payment of legal interest until the payment is made. In the other case the purchaser gets no advantage from the high interest. He may pay whenever he can and the amount of illegal interest which he will pay will vary with the time and the whole transaction is in reality nothing more than a usurious contract.

Making interest a part of the purchase price.

Some of the courts have taken the position that the transaction would not be within the usury laws if the agreement for illegal interest was made a part of the purchase price of the property.

Making the interest part of the purchase price will prevent the contract from being usurious. *Beete v. Bidgood*, 7 Barn. & C. 453.

If the increased rate of interest is in fact a part 27 L. R. A.

"\$2,668.00. Knoxville, Tenn., May 11th, 1891.

"Eighteen months after date I promise to pay to the order of R. G. Johnson \$2,668.00, at Holston Banking & Trust Company, value received, with interest at 8 per cent per annum. E. B. Mann." Indorsed: "W. W. Avery. R. G. Johnson."

The note was not paid at maturity, and was duly protested, and notice given, and the bill is filed against the maker and indorsers by the First National Bank of Johnson City and E. S. Wolfe. The bill alleges that the note was executed as part of the consideration for a stock of furniture in Asheville, N. C., and was indorsed to complainant in due course of trade for value and before maturity; that while the note on its face purports to be executed at Knoxville, Tenn., it was in fact executed with reference to the laws of North Carolina, which permit the charge and collection of 8 per cent per annum as interest, and said note was intended to be and was in fact a North Carolina contract; that the stock of furniture was sold on terms of part cash and the balance on a credit, and the rate of interest provided for in said note was but a means of compensating for the time granted for the payment of the balance of the purchase price, and was in no sense meant to be a charge for the use of money, and is not in either aspect usurious, but is a property contract. The bill further alleges that, in addition to the transfer of the note, the claim of Johnson against Mann, based on the original consideration, has been transferred to complainant, and it has been requested to bring the suit by said Johnson. The prayer is for judgment on the note and 8 per cent interest and protest fees, or, in the alternative, for the amount of the original consideration; the recovery to go into the hands of the bank, to be disbursed according to the rights of the parties. The parties were served except Avery, who appears not to have been found, and no further action appears to have been taken as to him. Johnson answered, admitting the execution of the note and the consideration, and that it was a North Carolina contract, and that under the laws of that state 8 per cent was legal interest; that the note was trans-

of the purchase price of the land, it is not illegal. *Swayne v. Riddle*, 37 W. Va. 291; *Roger v. O'Neal*, 6 L. R. A. 427, 33 W. Va. 159.

Where interest at a greater rate than that allowed by law is in fact a part of the consideration for land, it is not usurious. *Rhodes v. Henderson Bldg. & Loan Assn.* 13 Ky. L. Rep. 773; *Brook v. Elliott*, 13 Ky. L. Rep. 537.

That the contract for houses is to be paid in installments with interest at a higher than the legal rate, does not render it usurious if the interest was a part of the contract price of the houses. *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 130.

In *Van Schaick v. Edwards*, 2 Johns. Cas. 362, two of the judges were of the opinion that interest contracted for as part of the purchase price of land was not illegal.

The interest is not usurious if it is part of the original contract price of the land, although there was no cash price fixed. *Tousey v. Robinson*, 1 Met. (Ky.) 663.

But the majority of the courts have refused to

ferred as collateral to Wolfe before maturity, and that the bank had no interest in the note except a right to use its proceeds during certain litigation between Wolfe and Johnson; denies that any claim against Mann on the original consideration had ever been assigned to Wolfe or the bank, and denying that the suit was at his request, and denying all liability. Mann also answered, and with his answer filed demurrer, assigning as grounds: (1) That the note sued on was usurious and illegal on its face, and could not be enforced; (2) that the note extinguished all prior claims; (3) that the suit was multifarious, in seeking to enforce the note and at the same time to set same aside and recover on the original consideration. The demurrer was overruled. The answer set up that there had been fraudulent misrepresentations in the original sale as to the stock of merchandise sold; that the trade was actually made in Tennessee, and the notes accidentally executed in North Carolina, but dated and made payable in Tennessee, and for property located in both states; denies that the contract was a North Carolina contract, or intended to be controlled by the interest laws of that state; that the note is illegal, because it provides for a usurious rate of interest on its face, and its terms cannot be changed by parol; that the bank held the note as collateral, and subject to all equities between the original parties. The case proceeded to proof and hearing, when the chancellor held that complainant, because of insufficiency of interest or title in the note sued on, was not entitled to recover, and dismissed the bill. From this decree complainant appealed, and defendant Mann also appealed from the decree of the chancellor overruling the demurrer, and each appellant has assigned errors.

It further appears in the proof that the complainant bank and Wolfe each held this note simply as collateral, and that the debts for which it was held have been wholly paid, pending this litigation. It is evident the complainants must recover upon the note sued on in this case if they recover at all, as the proof shows conclusively that no assignment of any claim growing out of the original

consideration was ever transferred to them, the only transfer made to them or held by them being the note and its indorsements, and there was never any promise to them except as shown by the note. It has been repeatedly held that when a contract is usurious on its face the payee may sue on the original consideration, but an assignee or indorsee cannot recover without an express promise to him. *Ottenheimer v. Cook*, 10 Heisk. 309. No recovery can therefore be had in this suit against the defendants unless it can be maintained upon the note and its indorsements.

It is next insisted the note is usurious on its face. If so, there can be no recovery upon it, as the court will not enforce an illegal contract. *Iser v. Brunson*, 6 Humph. 277; *Hutchins v. Turner*, 8 Humph. 417; *Causey v. Yates*, Id. 608; *Thompson v. Collins*, 2 Head, 444; *Caruthers v. Andrews*, 2 Coldw. 385; *Gill v. Creed*, 3 Coldw. 298; *Thornburg v. Harris*, Id. 172; *Cats v. Blair*, 6 Coldw. 640; *Richardson v. Brown*, 1 Leg. Rep. 352. And this would be so without any plea of usury sworn to, as the defense rests upon the illegality appearing on the face of the instrument, and not as set up by the pleadings or as developed by the proof. It is insisted, however, in argument, that the note is not usurious, because it was executed in North Carolina, where 8 per cent is legal interest. The note appears on its face to be executed at Knoxville, and is shown by the proof and the face of the note to be payable at Knoxville. It appears that the proposition of sale was submitted to defendant Mann in Knoxville, and accepted by him there, and that fact was wired to Johnson at Asheville. After the invoice was taken at Asheville the note was executed at that place, and delivered at that place, upon a blank used in the Knoxville business, the parties having been interested in a business conducted both at Knoxville and at Asheville. It is also contended that the contract is a property contract, and the rate of interest was part of the purchase consideration given for the property, and was not for a loan of money or forbearance of a debt, which constitutes usury under our law. The ar-

adopt that doctrine and have held that such a contract could not be enforced.

The original contract cannot stipulate for interest at more than the legal rate. *Compton v. Compton*, 5 La. Ann. 620.

If the additional sum was intended as interest the contract cannot be upheld. *Torrey v. Grant*, 10 Smedes & M. 86; *Parohman v. McKinney*, 12 Smedes & M. 681; *Mitchell v. Griffith*, 22 Mo. 515.

More than the statutory amount cannot be taken on the deferred amounts of the purchase money of real estate, under the name of rent. *Soofield v. McNaught*, 52 Ga. 62.

But rent will not ordinarily be regarded as a cover for usury. *Sessions v. Richmond*, 1 R. I. 298.

Every written agreement to pay interest on a debt in excess of the rate allowed by law as compensation for making the debt payable in the future, or for forbearing to enforce its payment after maturity is in violation of the Texas statutes, whether the transaction involves a loan of money or the sale of property, or any other agreement by 27 L. R. A.

which a debt is created. *Fisher v. Hoover*, 3 Tex. Civ. App. 81.

If the price is payable at any time and the additional amount is to be paid as long as the principal sum remains due and to cease when it is paid, it is merely a cover for usury and is illegal. *Hartman v. Ublinger*, 115 Pa. 270.

Where the price of a thing is permitted to be retained for the accommodation of a purchaser it is as much a loan as if it had been paid to the seller in the first instance and formally returned to the purchaser. *Evans v. Negley*, 13 Serg. & R. 218.

If the contract plainly is that the additional amount shall be interest at a usurious rate the contract cannot be upheld. *Garlington v. Coleman*, 3 Speers, L. 238.

A statute prohibiting a contract in which more than a certain rate of interest has been contracted for, received or reserved, will cover the case of a sale of land, upon which interest is reserved at a greater rate in the form of separate notes, one set covering the principal sum and the legal interest.

gument is that the 8 per cent agreed to be given is a part of the consideration to be given, and is but a mode of expressing the difference between the cash and credit price of the goods sold, and that it is not usurious to charge more than legal interest when credit is given, and this difference in credit and cash price may as well be put in the shape of a per cent for the time credit is extended as in the shape of a round sum for such time or credit. In other words, a party may be willing to take for a horse \$100 in cash, but would not be willing to sell the same horse on twelve months' credit for less than \$120, and such sale at \$120 would be legal, and not in any respect usurious; and it is now insisted it cannot matter whether the additional amount of \$20 charged for this credit is stated as a round sum or as a per cent upon the \$100 for the twelve months' credit granted. This contention is well supported by authorities in our own state and elsewhere. *Garrity v. Cripp*, 4 Baxt. 86; *Brown v. Gardner*, 4 Lea, 167; *Rieger v. O'Neal*, 38 W. Va. 159, 6 L. R. A. 427; *Touzey v. Robinson*, 1 Met. (Ky.) 663; *Graeme v. Adams*, 28 Gratt. 225, 14 Am. Rep. 180; *Cutler v. Wright*, 23 N. Y. 472; *Hansbrough v. Peck*, 72 U. S. 5 Wall. 509, 18 L. ed. 524. We think the allegations of the bill as well as the proof bring this contract within this rule, even if it should be considered a Tennessee contract. There is in it neither the loan of money nor the forbearance of a debt, and the per cent agreed to be given for the credit was a part of the original consideration for the trade, and we are unable to see in it any device or attempt to evade the usury laws.

There is another feature in the case that it is material to mention. It appears from the proof that pending this litigation the debts due the bank and Wolfe have been paid, for which this note was pledged as collateral, and neither the bank nor Wolfe has now any interest in the recovery. Still, under the law, notwithstanding the princ-

pal debt has been paid pending suit on the collateral, such suit may properly continue to judgment, and, if the holder collect the same, he will hold it as trustee for the benefit of the debtor; that is, the owner of the collateral. *Jones, Pledges*, § 664; *Logan v. Cassell*, 83 Pa. 288, 32 Am. Rep. 453. But this is only when the maker will not be thereby deprived of some equitable defense he might have against the payee; or, in other words, the holder can only recover subject to the equities of the maker against the payee. *Logan v. Cassell*, *supra*; 2 Pars. Notes & B. 437; *Pearce v. Austin*, 4 Whart. 489, 34 Am. Dec. 523.

In this case it is alleged that there are equities as between Mann, the maker, and Johnson, the payee, of the notes, and some proof is taken on that point, but it is not sufficient to determine the rights of these parties as between themselves, nor has the case been passed upon in the court below with a view to an adjudication and determination of these equities. We are of opinion from the record that the contract is a North Carolina contract, and so intended, and the fact that the note is dated Knoxville and payable in Knoxville arises simply from an accidental use of a blank note with these words in it, and not from a design to make it a Tennessee contract, or that it should be governed by Tennessee law. This being so, complainant has the right to collect the note from Mann, and hold the proceeds, as trustee, for Johnson, but subject to all equities existing between Mann and Johnson arising out of the trade between them.

The decree of the chancellor is reversed, and the cause remanded for such further proceedings as may be necessary to fix the rights and equities between Mann, the maker, and Johnson, the payee, growing out of their contract of sale and purchase. The costs of the appeal will be paid equally by Mann and Johnson, and the costs of the court below will be adjudged on final hearing.

and the other set, the excess of interest. *Crawford v. Johnson*, 11 Ind. 258.

Where the price was fixed at \$1,000, but the purchaser desiring time, it was agreed that he might have three years if the price was increased to \$1,300, and the contract provided that there might be a reduction of 10 per cent per annum upon the amounts paid before that time, it was held usurious. *Thompson v. Nesbit*, 2 Rich. L. 73.

In *Ellenbogen v. Griffe*, 55 Ark. 268, it was held that "where a certain price was fixed for property payable in one year at a certain rate of interest and the payment of other charges, each element was as much a part of the consideration for the sales as the other and that since by the terms of the contract the price fixed for the forbearance of money was within the statutory limits, the other charges did not make it usurious." If the per cent charged was a part of the contract price of land it does not appear why there should be a difference if it was in excess of the statutory rate, but the language of the court clearly implies that if it had been in excess of statutory rate, there would have been an unlawful charge for the forbearance of money which would not have been upheld.

Cash and credit prices.

There may be a cash and a credit price and it is
37 L. R. A.

lawful and not usurious for the seller to charge more for the property when sold on time, than when sold for cash, but if the land is sold at a cash price and time is given upon a portion of the purchase money and a greater rate of interest than that allowed by law is charged for such time, the contract is usurious; in other words if the contract was that the property should be purchased at a cash valuation and that certain payments therefor were to be deferred in consideration that a greater rate of interest than that allowed by law, was to be paid by the purchaser, then the contract would be usurious. *Irvin v. Mathews*, 75 Ga. 739; *Ford v. Hancock*, 36 Ark. 248; *Borum v. Fouts*, 15 Ind. 50; *Newkirk v. Burson*, 21 Ind. 129.

There is no loan of money nor forbearance of a debt, within the meaning of the usury laws, when in order to gain time for the payment of the purchase price of property, the purchaser agrees to pay a sum in excess of the cash price which has been asked for the property. *Hogg v. Ruffner*, 66 U. S. 1 Black, 115, 17 L. ed. 33, in that case the court says a vendor may prefer \$100 in hand to double that sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that

SOUTH CAROLINA SUPREME COURT.

PEOPLE'S BANK, *Appt.*,
v.
Adam JACKSON *et al.*, *Respts.*

(.....S. C.)

1. A statute limiting the rate of interest upon any contract "for the hiring, lending, or use of money or other commodity" applies to a promissory note for the purchase price of real estate.
2. One of three joint makers of a note for the purchase price of real estate is not limited in setting up the defense of usury to the portion corresponding with his interest in the land, and the fact that he has purchased the interests of his co-makers is immaterial.

(January 19, 1895.)

A PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Fairfield County sustaining defendant's defense of usury in a proceeding to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Mr. J. E. McDonald, for appellant:

The note having been given for the purchase money of land, is not a "contract arising in this state for the hiring, lending, or use of money or other commodity."

It was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling.

Scott v. Lloyd, 34 U. S. 9 Pet. 418, 446, 9 L. ed. 178, 188.

It is neither a present loan nor is it a forbearance in respect to some debt previously existing, but is a part of the contract price for land sold and conveyed.

Swayne v. Riddle, 37 W. Va. 291; *Harns-barger v. Kinney*, 6 Gratt. 287.

When a party buys land upon his own terms the contract is not in violation of the statute against usury.

Wheeler v. Marchbanks, 32 S. C. 594.

The interest of Adam Jackson alone could be affected thereby.

The defense of usury is personal to the borrower, or party to the contract against which it is alleged.

Stein v. Indianapolis Bldg. Loan Fund and Sav. Assn. 18 Ind. 237, 81 Am. Dec. 853, notes; *Stephens v. Muir*, 8 Ind. 352, 65 Am. Dec. 764; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 558; 2 Pom. Eq. Jur. § 987, p. 458; *Cheney v. Dunlap*, 5 L. R. A. 466, 27 Neb. 401.

Messrs. Ragsdale & Ragsdale, for respondent:

An offer to sell land at one price for cash, or at a much higher price on a long credit, has nothing usurious in it as there is neither a loan nor a forbearance of a debt.

7 Wait, Act. & Def. 619; *Wheeler v. Marchbanks*, 32 S. C. 594.

But where by the sale of land, chattels, or any other species of property a money debt is created and a higher rate of interest than the law allows is charged on such debt, it is usury.

Hogg v. Ruffner, 66 U. S. 1 Black, 115, 17 L. ed. 38; *Crawford v. Johnson*, 11 Ind. 258; 7 Wait, Act. & Def. 618, 619; *Newkirk v. Burson*, 21 Ind. 129; *Scotfield v. McNaught*, 52 Ga. 69; *Shober v. Hauser*, 20 N. C. 91.

Usury laws apply to mortgages in the same manner that they apply to contracts in general, and the same principles of law are applicable to the inquiry, whether they are usurious or not.

1 Jones, Mortg. § 638; 7 Wait, Act. & Def. 616; 1 Hilliard, Mortg. 535.

A stranger cannot set up the defense of usury. But it is otherwise with one claiming under and in privity with the mortgagor in law or otherwise; thus, a purchaser from the mortgagor or a second mortgagee.

1 Hilliard, Mortg. 599; *Post v. Dart*, 8 Paige, 640, 4 L. ed. 573; *Brolasky v. Miller*, 9 N. J. Eq. 807; *Doub v. Barnes*, 1 Md. Ch. 127; *Westerfield v. Bried*, 26 N. J. Eq. 357; *Bridge v. Hubbard*, 15 Mass. 96, 8 Am. Dec. 86;

differ may say with apparent truth that B pays 100 per cent for forbearance, and may assert that such a contract is usurious, but whatever truth there may be in the premises the conclusion is manifestly erroneous.

The principle of that case was applied in *Gruell v. Smalley*, 1 Duvall, 358.

It will not make the contract usurious although the credit price is made up of the cash price plus interest at an illegal rate. *Brown v. Gardner*, 4 Lea, 145.

In every article of value the time within which its price is to be paid affects its value, it being worth less for cash, more on short time, and still more than on long time. *Garrity v. Cripp*, 4 Baxt. 86. In that case the following note was held not to be usurious: "One day after date I promise to pay \$20.00 for 40 bushels of corn at 50 cents per bushel, bearing interest at ten and one half per cent (a legal rate). If this note is not paid on the 8th day of July, the note is to be paid at 60 cents per bushel or \$24.00, bearing interest at ten and one half per cent."

In *Newkirk v. Burson*, 28 Ind. 436, the cases of 37 L. R. A.

Crawford v. Johnson and *Borum v. Fouts* are limited, and it is stated that their doctrine is true only where there was a cash price fixed and the usurious rate was taken upon that and not where the interest represents the difference between the cash and credit price of the land.

When a contract for land is made upon a basis of a certain cash price and the purchaser is unable to procure the money and the vendor agrees to deliver the deed upon the execution of notes for an amount fifteen per cent above the cash price, the transaction will not be usurious. *Dykes v. Bottoms* (Ala.) June 15, 1893.

A mortgage given for land is not rendered usurious by the fact that the purchaser not being able to comply with the terms of the owner of the land requiring a certain amount cash agrees to give a mortgage for a greater amount in consideration of which the vendor agrees to execute a deed in case the mortgage can be disposed of in the market for the amount of cash demanded by him. *Brooks v. Avery*, 4 N. Y. 225.

In *Outler v. Wright*, 22 N. Y. 472, *Selden, J.*, says there can be no doubt that an agreement to pay

Gunnison v. Gregg, 20 N. H. 100; *Shufelt v. Shufelt*, 9 Paige, 187, 4 L. ed. 639, 37 Am. Dec. 381; *Brooks v. Avery*, 4 N. Y. 225; *Berdan v. Sedgwick*, 44 N. Y. 636; *Bullard v. Raynor*, 30 N. Y. 197; *Banks v. McClellan*, 24 Md. 62; *McAlister v. Jerman*, 32 Miss. 142.

Gary, J., delivered the opinion of the court:

This action was brought for a foreclosure of a mortgage of realty, executed by Adam Jackson, James Jackson, and Albert Gladney to Calvin Brice and John A. Brice and assigned by them to the plaintiff herein after maturity. The mortgage was given to secure the payment of a note which had been executed by the defendants for the purchase money of the mortgaged premises. It was the joint note of all the defendants for the sum of \$1,595, with interest from date at 10 per cent per annum, and was dated the 1st day of January, 1883. Before the commencement of this action James Jackson and Albert Gladney had conveyed their interests in the mortgaged premises to Adam Jackson, and he alone answered the complaint. His answer interposed the defenses of payment and usury. The referee to whom the case was referred filed a report adverse to the defendant. The case came on for trial before his honor R. C. Watts, presiding judge, on exceptions to the report of the referee. His honor modified the report by sustaining the plea of usury and in other respects not material here. The plaintiff appealed to this court on the following exceptions: "(1) For that his honor erred in holding that the plea of usury was applicable to the note set forth in the complaint, and that the plaintiff could not recover anything except the principal of said note, without costs. (2) Because his honor erred in not holding that the said note was given for the purchase money of the tract of land described in the mortgage, and for that reason the interest mentioned and charged therein was not usurious. (3) For that his honor erred in not holding that the note, having been given for the purchase money of land, was not a 'contract arising in this state for the hiring, lending, or use

of money or other commodity,' and therefore the plea of usury should not have been sustained. (4) For that his honor erred in not holding that the plea of usury, even if applicable, could only affect said note and mortgage to the extent of the interest of Adam Jackson in the land at time said note and mortgage were executed."

This case is ruled by the principle laid down in the case of *Thompson v. Nesbit*, 3 Rich. L. 73, the facts of which are as follows: To an action of assumpsit on a note for \$1,800, credited by \$750 paid at various times, the defendant pleaded usury. The note was given for a negro sold by the plaintiff to the defendant. The plaintiff asked \$1,000 for the negro. The defendant was willing to purchase at that price, but could not pay the cash. The plaintiff was willing to give any time that the defendant wanted if he could have the price increased by the addition to the \$1,000 of 10 per cent per annum until payment should be made. After consultation with several persons as to the best means of carrying out their bargain so as to steer clear of usury, it was agreed that the defendant should fix the time, and the plaintiff the price. The defendant said he must have three years; the plaintiff said he must have \$300 more. Whereupon the bill of sale was drawn, expressing the consideration to be \$1,000, and the note was drawn in the following words: "Three years after date I promise to pay H. Thompson or bearer thirteen hundred dollars, to be paid at such times as I please, and to deduct 10 per cent per annum off of the amount paid at each payment. 11th Nov., 1839. Samuel Nesbit." The intention was that 10 per cent per annum should be added to each payment from the time it was made until the note became due, so that the defendant should have the right of paying as he pleased within three years, and upon every payment should have interest calculated in the same manner as it had been done on the \$1,000. His honor left it to the jury to say whether there was a bona fide sale of the negro at \$1,800 upon credit with a stipulation of advantage to the defendant upon payments anticipated, or

the purchase money of land in installments of a certain amount each is valid and cannot be defeated for usury.

Agreement as to interest made after original contract completed.

After a contract for the sale of land has once been taken out of the statute of frauds by the taking of possession, the parties cannot agree to postpone payment of the purchase price for a consideration which is greater than the statutory rate of interest. *Stewart v. Cross*, 66 Ala. 22.

If the price of goods is payable in sixty days and at the expiration of that time an agreement for further credit is made, interest cannot be charged from the time of purchase but only from the time of such agreement. *White v. Friedlander*, 35 Ark. 52.

Other contracts.

Where by a contract for the sale of goods fifteen per cent is to be added to the purchase price in case they are not paid for within thirty days, the question is one of intention whether the fifteen per cent is in fact a part of the price of the goods or is interest illegally reserved for the forbearance. *Bass v. Patterson*, 68 Miss. 310.

A sale of goods on three months' credit which stipulates that in case the money is not paid at the end of that time, there shall be an allowance of a certain amount per month until the debt is paid, is not usurious. *Floyer v. Edwards* (1774) 1 Cowp. 112.

A contract to pay a certain gross sum for sheep and in addition two pounds of wool for each sheep, each year for two years, is not necessarily usurious. *First Nat. Bank of Marshalltown v. Owen*, 23 Iowa, 133; *Gilmore v. Ferguson*, 23 Iowa, 220.

If the title to property is passed through the lender for the purpose of disguising the usurious character of the transaction, it will not be upheld if the loan was in fact made upon usury. *Babcock v. Stimmel*, 33 N. Y. S. R. 1005.

Paying a third person who assists the intending purchaser to carry out his agreement, a profit on the transaction for the accommodation rendered, will not be usurious. *Wheeler v. Marchbanks*, 33 S. C. 504.

H. P. F.

whether there was forbearance of \$1,000 upon usurious terms. The court in that case said: "The effect of the agreement is precisely the same as if the note had been taken for \$1,000, the price of the negro, with usury at 10 per cent per annum. . . . No proof of a corrupt agreement is necessary, for the contract may be usurious, though the parties did not know that it was against law." The court also held that "the jury should have been instructed that the uncontradicted state of facts submitted to them presented a case of usury, and that they should find for the plaintiff only that balance." The plea of usury was sustained. The case of *Wheeler v. Marchbanks*, 32 S. C. 594, does not conflict with the case just mentioned. *Chief Justice Simpson*, in delivering the opinion of the court in *Wheeler v. Marchbanks*, says: "It is sufficient for us to say that the question involved is whether the transaction between the parties, and which gave rise to the action below, was a loan of money by the plaintiff to the defendant, or was a sale of land to said defendant by said plaintiff." In that case the circuit judge found that the facts made out a sale of the land; whereas, in the case at bar, interest *eo nomine*, at a greater rate than was allowed by law was charged in the note secured by the mortgage.

We do not think there is force in the fourth exception of appellant. The defendant was liable on the note to the full extent, and had the right to plead usury to such extent. The purchase by the defendant from his co-mortgagors of their two-thirds interest in the land did not relieve him from liability on the note, and therefore should not affect his defense of usury.

It is the judgment of this court that the judgment of the court below be affirmed.

McIver, Ch. J., concurring:

If the question whether the contract evidenced by the note set out in the complaint was such a contract as would fall under the usury law, under the undisputed evidence in the case, were an open question, I should feel bound to hold that the usury law did not apply to such contract. The contract here sought to be enforced, having been entered into on the 1st day of January, 1883, before the Act of 1882, approved 21st December, 1882, went into effect, the twenty days not having expired, must be governed by the law which was in force at the time the contract was entered into. That law will be found in the Act of 1877 (16 Stat. at L. p. 325), incorporated in Gen. Stat. 1882 as section 1288. That statute forbids the taking or charging interest, at greater rate than 7 per centum per annum, "upon any contract arising in this state for the hiring, lending or use of money or other commodity." It will be observed that the statute does not forbid the taking or charging of interest at a greater rate than 7 per cent per annum upon any contract for the payment of money, but

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only upon any contract for "the hiring, lending or use of money or other commodity." Hence, when the question is whether a given contract falls within the provision of the statute, the inquiry must necessarily be whether it is a contract for "the hiring, lending, or use of money or other commodity." If it is, then the statute applies; but if it is not, then the statute does not apply. If the legislature intended that the usury law should apply to any contract for the payment of money, it would have been very easy and most natural for them to have said so. But they did not use any such general language, and, on the contrary, expressly confined the operation of the statute to contracts of a particular and specified character, to wit, contracts "for the hiring, lending or use of money or other commodity." Now, in this case the undisputed evidence is that the contract here in question was a contract to pay the purchase money of a certain tract of land, and not a contract for the hiring, lending, or use of money, or other commodity. It seems to me, therefore, that under a proper construction of the statute the contract here sought to be enforced is not a contract to which the usury law applies; and I would so hold, in the absence of controlling authority to the contrary. But in the case of *Thompson v. Nesbit*, 2 Rich. L. 73, cited by *Mr. Justice Gary* in the leading opinion, and fully and fairly there set forth, requires a different construction; and yielding to the authority of that case, as I am bound to do, I must concur in the conclusion reached by *Mr. Justice Gary*. It is true that the case just cited arose under the Act of 1830 (6 Stat. at L. p. 409), and not under the statute which was in force at the time the contract in question was made; but the language of the two statutes, so far as relates to the particular question here under consideration, is, in my judgment, substantially the same, and therefore the construction placed by the former court of appeals upon the language of the Act of 1830 must be regarded as authoritative construction of similar language in the Act of 1877. It is also true that in the previous case of *Garlington v. Coleman*, 2 Speers, L. 238, it is plainly intimated by *O'Neill, J.*, who cites the case of *Beets v. Bidgood*, 7 Barn. & C. 453, that the usury law (Act of 1830) did not apply to a contract to secure the payment of the purchase money of property sold. But I do not understand that that was a point decided in that case. At all events, the case of *Thompson v. Nesbit*, *supra*, was subsequently decided, and is therefore the controlling authority; especially when we find that *Judge O'Neill*, who had prepared the opinion of the court in *Garlington v. Coleman*, subsequently concurred in the decision in the case of *Thompson v. Nesbit*. As to the other question, I do not deem it necessary to add anything to what has been said by *Mr. Justice Gary*.

MICHIGAN SUPREME COURT.

David ROBERTS

City of DETROIT, *Plff. in Err.*

(.....Mich.....)

1. Recovery for the loss of services of a wife and expense incurred by her personal injury on a defective sidewalk cannot be had against the city, under How. Stat., §§ 1446c-1446h, which authorizes a recovery only by a person "sustaining bodily injury," or the owner of a "horse . . . or vehicle, or other property" injured by defective highways or sidewalks.
2. The mere imposition of a public duty to keep highways in repair upon a municipal corporation does not create a private right of action for injuries sustained by an individual.

(September 25, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages caused to him by reason of injuries sustained by his wife in falling upon a defective sidewalk in defendant city. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. John J. Speed for appellant.

Mr. Thomas Hislop for appellee.

Hooker, J., delivered the opinion of the court:

Plaintiff recovered a judgment against the city of Detroit, based upon the loss of the service of his wife, who was injured by falling upon a defective sidewalk. Money paid for surgical attendance and nursing constituted a part of the damages recovered. The only question presented for our consideration is whether he had a right of action.

Municipal corporations, in Michigan, are liable for injuries resulting from their neglect to repair public highways only where made so by statute. That there is no common-law liability was decided in the case of *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 460, which was a cross-walk case. It was followed by *McCutcheon v. Homer*, 48 Mich. 483, 38 Am. Rep. 212. The earlier case contains an exhaustive discussion of the subject, holding that the duty of cities to repair highways is a public one, and that a right of private action does not lie for negligence in such cases. Subsequently a statutory liability was created, and it is under this that the plaintiff must recover, if at all. The statute consists of several sections, viz., 8 How Stat. §§ 1446c-1446h, inclusive. Section 1 (1446c) provides: "That any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks,

crosswalks, and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation, whose corporate authority extends over such public highway, street, bridge, sidewalk, crosswalk, or culvert, and whose duty it is to keep the same in reasonable repair, such township, village, city, or corporation shall be liable to and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction." So far as this section is concerned, it limits the liability to cases of bodily injury. The second section covers property interests. It is as follows: "If any horse or other animal, or any cart, carriage or vehicle, or other property, shall receive any injury or damage by reason of neglect by any township, village, city or corporation to keep in repair any public highway, street, bridge, sidewalk, crosswalk, or culvert, the township, village, city, or corporation whose duty it is to keep such public highway, street, bridge, sidewalk, crosswalk, or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case before any court of common jurisdiction." The plaintiff's case does not fall within the first section (1) because he has no right to recover for the bodily injury—i. e. pain and suffering, etc.—of another; (2) because the statute in terms limits the recovery to the person so injured or disabled. Under another statute the right of action has been held to extend to administrators or persons injured. *Racho v. Detroit*, 90 Mich. 92. If his case is covered by the second section, it must be because he is injured in his property. It is asserted that he is so injured, inasmuch as he has lost the services of his wife, and had been obliged to spend money for her recovery. We think that this position is not tenable. Services (which may or may not be rendered) can hardly be called present property, as was held in *Reed v. Belfast*, 20 Me. 246, where a father was denied relief upon a claim of loss of services of a minor son who had been injured upon a defective highway. Moreover, while this statute uses the word "property," it is preceded by several words descriptive of particular kinds of property, and the provision is thereby limited to things of a like kind. In the language of *Chief Justice Shaw*: "Therefore, though the word 'property' is used, it follows words designating goods and chattels, and could not extend to mere rights." *Harwood v. Lowell*, 4 Cush. 310; *Ohlsey v. Canton*, 17 Conn. 475. Counsel cites the following cases supporting this rule of construction: *American Transp. Co. v. Moore*, 5 Mich. 368, 386; *McDade v. People*, 29 Mich. 50; *Board of Education v. Detroit*, 80 Mich. 505; *Brooks v. Cook*, 44 Mich. 617; *Wood v. Michigan Air Line R. Co.* 81 Mich. 358, 363.

Our attention is called to the case of *Hunt v. Winfield*, 86 Wis. 154, 17 Am. Rep. 482, as an authority sustaining the plaintiff's position, but the Wisconsin statute is broader than that of Michigan, providing that if any damage

NOTE.—As to the husband's right to recover in general for injuries to his wife, see *Skoglund v. Minneapolis Street R. Co.* (Minn.) 11 L. R. A. 222, and note. The above case is peculiar in respect to the statutory provisions which are applied to defeat such right of action.

As to husband's negligence to bar recovery for wife's injuries, see note to *Pennsylvania R. Co. v. Goodenough* (N. J.) 22 L. R. A. 460.
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shall happen to any person, his team, etc., such person may recover. It may therefore be distinguished from the statute of this state.

Counsel for the plaintiff make the further point that section 1446c makes it the duty of cities to keep their streets in reasonable repair, so that they may be reasonably safe and fit for travel, etc., and argues that, the duty being imposed, the liability must follow: citing the case of *Nanticoke v. Warne*, 106 Pa. 373, in support of the proposition. "Whatever the law may be in other states, Pennsylvania towns and boroughs are bound to keep roads and streets in repair, and are liable for injuries resulting solely from negligence in performing that duty. The liability is the consequence of a neglect of a statutory duty, and the right of a person does not depend on the construction of a statute providing who may recover, and for what, in case of injury from defect in the highway." That case seems to recognize the fact that some states hold otherwise, and as already seen, that is true of Michigan. See *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450, which asserts the doctrine that the imposition of a public duty upon a municipal corporation does not create a private right of action for injuries sustained by an individual.

Again, the statute under discussion gives certain rights of recovery, but only against corporations whose duty it is to keep streets in repair. This appears from both sections 1446c and 1446d. The succeeding section prescribes the duty. As these sections must be construed together, and in the light of the previous decisions of the court, it cannot be held that the effect of this statute was to give a right of action to everybody because it imposed a public duty. If such was the legislative intent, the first two sections were superfluous.

The judgment of the Circuit Court must be reversed.

No new trial will be granted.

Long, J., did not sit. The other Justices concurred.

John T. RICH, Relator,
v.

William CHAMBERLAIN.

(.....Mich.....)

1. A transfer of a convict from one place of imprisonment to another is not such a judicial act that it cannot be performed by the governor under authority of statute.
2. The constitutional power of the governor to grant a pardon or commutation of sentence is not infringed by a statute providing a board of pardons to investigate the facts on petition for a pardon and to report the results of their investigation with such recommendations as to them shall seem expedient.

NOTE.—As to encroachments on the power of the governor in respect to pardons and reprieves, see also *Parker v. State* (Ind.) 23 L. R. A. 850; *People v. Monroe County Court of Sessions* (N. Y.) 23 L. R. A. 866, and *People v. Cummings* (Mich.) 14 L. R. A. 285, and *note*.
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where such recommendations have no binding force upon the governor.

(*McGrath, Ch. J., and Hooker, J., dissent from proposition 2.*)

(March 19, 1895.)

APPLICATION by the governor of the state for a writ of mandamus to compel the warden of the state prison to comply with relator's order to transfer a convict from the state prison to the house of correction. *Granted.*

The facts are stated in the opinion.

Mr. Fred A. Maynard, *Atty. Gen.*, for relator.

Messrs. Wilson & Cobb, for respondent: Act number 150 of the Public Acts of 1893, providing for "the advisory board in the matter of pardons," is unconstitutional.

Section 2 of article 5 of the Constitution vests the pardoning power in the governor.

This provision necessarily imposes upon the governor the responsibility of examining personally all applications for pardons and acting upon his own judgment from a knowledge of the facts and circumstances.

People v. Brown, 54 Mich. 28; *People v. Moore*, 62 Mich. 498; *People v. Cummings*, 14 L. R. A. 285, 63 Mich. 251.

The statute does not require that the rules of the different prisons shall be uniform. Good time when earned is a vested right which can only be forfeited in pursuance of the rules under which earned.

Re Walsh, 87 Mich. 466; *Re Canfield*, 93 Mich. 644; *State v. McClellan*, 87 Tenn. 52.

The duty is imposed upon the courts of determining judicially to what prison a person convicted of a crime shall be sentenced. Such determination must be embodied in and become a part of the sentence.

This shows clearly that it was the intent and understanding of the legislature that the determination of the prison should form a constituent part of the sentence.

Section 1, article 6, of the Constitution vests the judicial power in the courts, which includes the determination of the punishment to be inflicted in criminal cases, within the statutory provisions, and the particular prison at which such punishment shall be inflicted.

People v. Cummings, supra.

It would not be within the power of the court to change the place of confinement, after the sentence is once imposed.

People v. Meservey, 76 Mich. 223; *People v. Kelley*, 79 Mich. 320.

The section is unconstitutional, as an attempt to confer upon the advisory board and the governor judicial powers.

Chandler v. Nash, 5 Mich. 409; *Rowe v. Rowe*, 28 Mich. 353; *Re Buddington*, 29 Mich. 473; *Re Burper*, 39 Mich. 203; *Allor v. Wayne County Auditors*, 43 Mich. 97.

Hooker, J., delivered the opinion of the court:

Act 118 of the Public Acts of 1893 is an act entitled "An act to revise and consolidate the laws relative to the three prisons known as the state prison at Jackson, the branch of the state prison at Marquette, and the house

of correction at Ionia." A board of control was provided for each, consisting of three members, to be appointed by the governor, by and with the advice and consent of the senate, of which board the governor is *ex officio* a member. These boards were authorized to make general rules for the government of their respective prisons. Section 28 of this law authorizes the governor to order the transfer of prisoners from one to another of these prisons, upon the recommendation of the state board of pardons. Upon such recommendation the governor issued his order and warrant, as provided in the law under discussion, for the transfer and removal of one William K. Stevenson, a convict, from the state prison to the house of correction. The warden of the state prison refused compliance, and these proceedings were instituted by the governor to compel it.

The warden returns that his refusal was in pursuance of a resolution adopted by the board of control of the prison directing him not to obey the command of the governor, for reasons therein set forth. A copy of this resolution, signed by two of the appointed members, is attached to the answer of the warden. The authority for transferring prisoners is found in section 28, Act 118, Laws 1898.

It is contended that the transfer is a judicial act, and can only be performed by an officer clothed with judicial powers; that the determination of the circuit judge as to the prison in which the convict should be confined is a judicial determination; and that the prisoner has a right to remain in such prison for the period of his imprisonment; or, at all events, that he cannot be summarily removed without a hearing. It is said that the law discriminates between the prisons; that certain offenders cannot be sentenced to the state prison; and that the worst criminals cannot be sentenced to the house of correction, which is said to be designed for the less hardened class of criminals. The legislature has full authority to provide prisons, and to determine where prisoners may be sent; and the courts have no discretion as to the place to which criminals may be sentenced except as the legislature gives it. Such discretion is lodged with the circuit judges, and they act judicially in its exercise. But this doctrine is a qualified one, or rather the order of the judge is qualified by the law and such rules and regulations of the prisons as may have been lawfully adopted. Every sentence is subject to these, although it does not mention them. The law requires every person convicted of murder in the first degree to be sentenced to solitary confinement and hard labor for life. Yet, under the law and prison rules, such prisoners are taken from their solitary confinement after a short time, and are allowed to work with other convicts.

Again, all sentences direct that the prisoners be confined in the state prison; but, under the law, they may be hired to do work outside of the walls, in factories or mines or upon the highways, different states having different rules. The sentence is always imposed and received under and interpreted by

the law to which it is subject. The judge and the prisoner act with the knowledge of this fact, and must be presumed to understand that, while the judge may or may not sentence a prisoner to one or another institution, there is an existing law under which he may be lawfully transferred. The sentence impliedly subjects him to this when, in the discretion of the proper executive officer or board, crowded prisons or any other reasons require or make it advisable. We need not determine whether this would be applicable to cases of sentence before the law providing for transfer took effect. The judicial act is fully performed by the sentence, which, though in form absolute, involves conditions imposed by law by which the prisoner's rights are limited and to which they are subject; and while the court may not, in terms, sentence certain classes of offenders to one or the other of the prisons, the sentence construed by the law is to the designated prison, but subject to transfer in accordance to law.

It was urged at the hearing that section 28 was defective, and did not make the necessary provision to protect the rights of convicts; that there is no requirement to transfer his personal effects from one prison to the other; and that no method is provided by which it can be determined whether or not he was entitled to what is called "good time" at the time of the transfer. Doubtless, these are the subjects of rules made by the boards of control, but, if not, the former is of little importance, while, as to the latter, the prisoner might be amply protected by a presumption of good behavior, unless the contrary should appear. The action of the governor, under this statute, must be based upon a recommendation of the advisory board of pardons, and, if such board has no legal existence, its recommendation would be of no validity, and could not be a substantial basis of action by the governor. This board was established in 1889, and a new act was passed in 1898, under which the present board exists. The board consists of four members, appointed by the governor, by and with the advice and consent of the senate. The board may appoint a clerk, may hold sessions when and where occasion may require, send for persons and papers, and administer oaths. Its duties are to investigate the cases of convicts, confined in the various prisons, who may petition for pardons or for license to go at large, and to report to the governor the results of investigations, with such recommendations as, in the judgment of its members, shall seem expedient, either in respect to pardons or commutations, or refusal of pardon or commutation. The act provides, further, "that upon receiving the result of any such examination, together with the recommendations aforesaid, the governor may, at his discretion, upon such conditions with such restrictions, and under such limitations as he may deem proper, grant the desired pardon, or commutation." Const. art. 5, § 11, provides that "he [the governor] may grant reprieves, commutations and pardons after convictions, for all offenses except treason, and cases of impeachment, upon such conditions, and with such restrictions and limitations as he

may think proper, subject to regulations provided by law relative to the manner of applying for pardons. He shall communicate to the legislature at each session, information of each case of reprieve, commutation or pardon granted, and the reasons therefor." This section of the constitution, in express terms, lodges the pardoning power with the governor, and with it the co-ordinate branches of government have nothing to do, except as the legislature may by law provide how applications may be made, and is entitled to a report of action taken. *People v. Brown*, 54 Mich. 28; *People v. Moore*, 62 Mich. 498; *People v. Cummings*, 88 Mich. 251, 14 L. R. A. 285; *United States v. Wilson*, 82 U. S. 7 Pet. 150, 8 L. ed. 640; *Ex parte Wells*, 59 U. S. 18 How. 307, 15 L. ed. 421; *Ex parte Garland*, 71 U. S. 4 Wall. 383, 18 L. ed. 866. The power conferred by this section of the constitution is practically unrestricted, and the exercise of executive clemency is a matter of discretion, subject, perhaps, to the remedy by impeachment in case of flagrant abuse. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is lodged in the governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him, if a pardon is to be granted. "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended." Opinion of Chief Justice Marshall in *United States v. Wilson*, 82 U. S. 7 Pet. 160, 8 L. ed. 643. Lord Coke defines "pardon" as "a work of mercy, whereby the king, either before or after conviction, forgiveth any offense," etc. 8 Inst. 283. See also 1 Bishop, Crim. L. § 898.

There are many reasons why a power of this kind should be confided to the highest executive officer. It involves a wide discretion. The proceedings upon the trial may be reviewed. New evidence may be taken upon which to rest the pardon, thus, in effect, granting a new trial. It may be *ex parte*, after the witnesses have disappeared or are dead. It may be and often is based upon an alleged reform of an offender. Youth or age may furnish an excuse for its exercise. Petitions which a good-natured public sign without reading, and importunities of interested persons and friends, may be expected wherever there is hope of success. It is therefore of the highest importance to the public that this power should be carefully exercised, and that the fullest responsibility should rest upon the person to whom it is confided. The office of governor seems to be generally considered the proper one with which to lodge such responsibility, and the public have the right to insist upon his performance of the duty. Not only is it beyond the power of the legislature to impose the duty upon others, but it should not in any way lessen his responsibility to the public, when

he sets aside the judgment of court and jury by opening the doors of a prison to a convicted felon. If the act in question does this, it should not be sustained. The effect of it is to establish a sort of tribunal open to convicts, where the question of whether they should be pardoned or be licensed to go at large may be tried. The conclusion reached,—i. e. the result,—accompanied by a recommendation, must be certified to the governor, who then grants or refuses a pardon, as he may think advisable.

We understand that the practice of this board is to conduct its investigations with care and thoroughness, to require notice to be given to the authorities, to reduce proof to writing, and to return the same, with a report in detail, to the governor. This, however, seems to be under rules of its own devising, or prescribed by the governor, for the act requires nothing of the kind. This is unimportant, however, as it might be remedied by legislation. But the vital defect in the act is that it tends to substitute the judgment of the board for that of the governor. It can be truly said that the opinions of the board need not be controlling. But the tendency is naturally to offer an opportunity, if not an inducement, to an overburdened magistrate, to depend upon the judgment of a board in which he has confidence, and which has made a more careful investigation than he has made, and to act upon the recommendation of such board, while the public have a right to the fullest exercise of his own understanding and judgment, which they have signified by their constitution that they desire. This right should not be thwarted or placed in jeopardy by a law whose natural result may be expected to contravene the spirit of the constitutional provision. A loose exercise of the pardoning power is greatly to be deplored. It is inexcusable. It is a blow at good order, and is an additional hardship upon society, in its conflict with crime and criminals,—a conflict which is irrepressible, and in which the criminal has many, and possibly undue, advantages. The erection of a court of pardons is of such doubtful expediency, offering, as it does, an opportunity to the convict—practically within the doors of every prison—to press his suit for pardon, that it should never be permitted until the people have signified a willingness that the safeguards placed in their constitution be removed. The erection of a court of pardons is to invite unworthy applications. A practice grows up. It offers a premium to pardon-brokers, and the pardon, in place of remaining a matter of high executive discretion, based upon legitimate clemency, degenerates to a routine award of a committee, to be obtained and justified by compliance with fixed rules, and sought as an assertion of right rather than clemency. This section contemplates that the legislature may regulate the manner of applying for pardons, but this should not be construed to confer the power to limit the discretion of the governor to grant pardons or to require any other officer to first pass upon the question. All power is taken from the legislature except

that of regulating the manner of applying to the executive. Act 150 does not profess or attempt to do this. Its title is silent upon the one and only subject in relation to pardons which the constitution permits the legislature to act upon. It nowhere provides how applications for pardons shall be applied for, or that such applications shall be uniform. It does not regulate applications for pardons. It provides for a board, which must act in cases where petitions are filed, and gives no authority to the board to act in the absence of petitions. It seems to regulate the board which the act creates, instead of regulating the manner of making application to the only officer authorized to grant pardons. Under the claim that it is prescribing a manner of applying for a pardon, it imposes a duty to investigate and report, and professes to authorize the governor to act upon such report and recommendation. If this means anything, it is that the governor might lawfully forego any investigation, and act upon the recommendation of the board, substituting their judgment for his own. The answer to this is that we cannot suppose that the governor will pay any attention to the recommendation, because the constitution imposes a duty upon him. The act does not regulate the method of applying for pardons. It does provide for a sort of investigation, which we are told that the legislature intended should be disregarded. In my opinion, this was not the legislative intent. On the contrary, it was expected that the governor would do just what the legislature undertook to provide that he might do, viz., act upon the report and recommendation without personal investigation. If there were no board of pardons, a governor would not be likely to feel at liberty to grant a pardon upon a mere application, without investigation. If he did, such a practice would not meet public approval, nor would it be a proper discharge of his duty. Yet the act in question provides that he may do that very thing, and, to sustain the act, the argument must be made that the legislature did not mean what the language expressly states, but intended that the report and recommendation should be wholly disregarded by the governor.

Our attention has not been called to a case involving the question that has been discussed. Our own investigation has disclosed that, by most state constitutions, the pardoning power is lodged with the governor, as it is with the president under the Federal Constitution. In several states the power of the governor is restricted, possibly to cut off any danger of an undue exercise of the power. In most of these, however, the consent of the governor is indispensable. It is, however, a significant fact, and one that bears forcibly upon this case, that we have found no instance where a board has been created by statute, but invariably by constitutional provisions. In Florida, pardons may be granted by the governor, justices of the supreme court, or a major part of them, provided that the governor be one. Fla. Const. art. 6, § 12. In Louisiana, the governor may act by and with the consent of the sen-

ate. La. Const. 1868, title 3. In Maine, after conviction, the governor may pardon, with the advice of a council of seven members chosen by the general assembly. Me. Const. art. 5, § 11. In Massachusetts, the governor and a council of nine chosen by the legislature may grant pardons. Mass. Const. art. 3, chap. 2, § 1. In Nevada, the governor, justices of the supreme court, and the attorney-general constitute the board. The governor must concur. Nev. Const. 1864, art. 5, § 14. In New Hampshire, the governor acts, with the advice of a council of five elected by the people. N. H. Const. art. 51. In New Jersey, the governor, chancellor, and six judges of the court of error constitute the board. The governor must act. N. J. Const. art. 5, § 10. In Pennsylvania, the governor, lieutenant governor, secretary of state, attorney-general, and secretary of interior affairs constitute the board. Any three may act. Pa. Const. 1873, art. 4, § 9. In Vermont, the governor and a council consisting of lieutenant governor and 12 councilmen, to be elected by the people, exercise the pardoning power. Vt. Const. 1793. Michigan appears to be the only state that has attempted to regulate the matter of pardons by statute. As we have already said, the subject is expressly removed from legislative interference, and we think that the Law of 1898, providing for the advisory board, is clearly unconstitutional. Being so, said board could not lawfully make the recommendation which is a condition precedent to an order to transfer a prisoner. We think that the writ should be denied.

McGrath, Ch. J., concurred with **Hooker, J.**

Grant, J.: We concur in the opinion of Brother Hooker, except that portion wherein he holds the law providing for the board of pardons to be unconstitutional. We also agree with him in saying that "the pardoning power should be carefully exercised, and that the fullest responsibility should rest upon the person to whom it is confided." That power is vested exclusively in the governor of the state, and any law which restricted this power would be unconstitutional and void. While, however, the constitution unqualifiedly vests this power in the governor, it, at the same time and with equal clearness, vests in the legislature the power to provide, by law, regulations relative to the manner of applying for pardons. Article 5, § 11. Under this power, it would clearly be competent for the legislature to provide as regulations that the petition or application should be under oath; that it should be first submitted to the judge and prosecuting attorney, for them to indorse thereon or attach thereto such statements as they might deem proper to make touching the merits of the application, and designed to furnish the governor information upon which to base his action; that the testimony taken upon the trial, if it exists, should accompany the petition; and that testimony under oath should be taken at the prison or elsewhere bearing upon the reasons urged in the peti-

tion for pardon. Is there any doubt of the right of the governor under this constitutional provision, without any act of the legislature, to ask the opinion or advice of any of these officers, or to ask either to examine the facts, the conduct of the prisoner or any other material facts upon which conviction was based, and report to him, without any abandonment of his constitutional duty? How else can he obtain the necessary facts upon which to base intelligent action? In the absence of any law providing regulations, the governor possesses the undoubted right to require, as a condition precedent to the consideration of application, that it shall be accompanied by these statements. Certainly, a law which imposes no other regulations than those which he himself might impose is not unconstitutional.

The law in question does nothing more than to prescribe the regulations for obtaining the information which must be conceded to be necessary for an intelligent and proper exercise of the pardoning power. No governor ought to pardon without having before him the facts upon which the conviction was based, as well as the conduct of the prisoner after conviction. This law does nothing more than to prescribe the methods and regulations for obtaining this information which is so necessary for an intelligent and proper exercise of the pardoning power. The section of the act upon which is based the alleged unconstitutionality reads as follows: "It shall be the duty of said board to investigate the cases of such convicts now or hereafter confined in the state prisons and house or houses of correction as may petition for pardon, or for a license to be at large, and to report to the governor the results of their investigations, with such recommendations as shall in their judgment seem expedient either in respect to pardons, or commutations, or refusal of pardon or commutation. Upon receiving the result of any such examination, together with the recommendations aforesaid, the governor may at his discretion upon such conditions, with such restrictions and under such limitations as he may deem proper, grant the desired pardon or commutation, which warrant shall be obeyed and executed instead of the sentence originally awarded." Pub. Acts 1893, Act No. 150, § 6. It was not the purpose or intention of this act to infringe upon the constitutional prerogatives or power of the governor. The name given to the board in section 1—viz. "the advisory board in the matter of pardons"—clearly indicates this. In practice, as shown in Brother Hooker's opinion, the board assumes none of the power of the governor to pardon, but recognizes its sole duty to be to gather information; and for this purpose it conducts its investigation with care and thoroughness, requiring notice to the authorities and proofs to be taken and returned to him for his examination. The fact that such board is authorized to make recommendation is no infringement upon executive power. It might as well be held that the report and recommendation of the circuit court commissioner, to whom a case in equity has been referred, were an infringement.

27 L. R. A.

ment upon the power of the court, upon which the constitution and the law have conferred exclusive jurisdiction. It has been a common practice heretofore for the trial judge, the prosecuting attorney, and the jury who tried the prisoner to recommend to the governor that he be or be not pardoned. It might as well be held that such recommendations were an unconstitutional interference with his power as to hold that the recommendations of this board were unconstitutional. The recommendations in the one case are of no greater significance than in the other. In neither case have they any binding force upon him, and the law neither provides nor intends that they shall have. We hold the law to be constitutional, and the power to transfer convicts from one prison to another valid.

The writ must issue.

Long and Montgomery, JJ., concurred with **Grant, J.**

ROUSE, HAZARD & CO.

Joseph W. DONOVAN, Circuit Judge.

(.....Mich.....)

A statute authorizing execution to issue against individual members of a limited partnership to the extent of the unpaid portions of their subscriptions, if execution against the association has been returned unsatisfied, does not violate the constitutional provision requiring due process of law, where it allows judicial investigation as to the amount remaining unpaid on such subscriptions.

(February 20, 1895.)

APPLICATION for a writ of mandamus to compel defendant to vacate an order which had been granted, refusing to permit execution to go against the individual members of the Detroit Cycle Company upon a judgment which had been recovered against the company. *Granted.*

Statement by Grant, J.:

The relator, a foreign corporation, recovered judgment against the Detroit Cycle Company, a limited partnership association, for \$1,705.50 and costs, being for goods sold. The cycle company was organized under chapter 79, How. Stat. Execution was issued,

NOTE.—While limited partnerships such as that involved in the above case have been created under the laws of a considerable number of states in which the above decision will be important, it would seem that additional importance attaches to the case by reason of statutes in some of the states authorizing execution against stockholders on judgments against a corporation. This remedy has not yet been much contested. It would seem that the same rule would apply in case of executions against stockholders that would apply to executions against members of a limited partnership on judgment against the company. As to the close relation of joint-stock companies to corporations, see *People v. Coleman* (N. Y.) 16 L. R. A. 183, and *People v. Wemple* (N. Y.) 6 L. R. A. 303.

and returned *nulla bona*. The plaintiff then moved the court for an order directing execution to issue against the individual members of the defendant to the extent of the portions of their subscriptions, respectively, in the capital of the company not paid up. The motion was based upon the files and records of the cause, and an affidavit thereunto attached, which set forth the judgment, the organization of the defendant, the issuance of execution and return, a copy of its articles of association, showing that the association consisted of three members; that the capital stock was \$10,000, subscribed for in equal amounts by each of its members; that \$1,000 was paid in by each at the time of the organization; that the balance of the capital, \$7,000, was to be paid from time to time, as needed; that subsequently each member paid in \$500, and that the balance of the capital had not been paid. The affidavit further alleged that the defendant had mortgaged all its property to one creditor, and that each member had executed a note to the defendant for the balance of his unpaid subscriptions, and had then turned these notes over to that creditor, with the agreement that they were not to be paid; that such action was in fraud of other creditors who were entitled to the amount of the unpaid capital to apply upon their debts. A copy of this notice and of the affidavit was duly served upon the defendant association, and each of its members. These members appeared specially at the hearing of the motion, and protested against its consideration by the court, because section 2366, How. Stat., which provides for the issuing of an execution against the individual members, is unconstitutional and void, in that it violates section 1 of the 14th Amendment to the Constitution of the United States, and section 33 of article 6 of the Constitution of this state, both of which provide that no person shall be deprived of life, liberty, or property without due process of law. The judge sustained this contention, and denied the motion. Relator thereupon applied to this court for the writ of mandamus to compel the vacation of this order made by the respondent.

The section upon which the question arises reads as follows: "The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided, that is to say: If any execution or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy or enforce such execution or other process, then such execution or other process may be issued against any of the members to the extent of the portions of their subscriptions respectively in the capital of the association not then paid up: provided always, that no such execution shall issue against any member except upon an order of court or of a judge of the court in which action, suit, or other proceeding shall have been brought or instituted; and 27 L. R. A.

the said court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions, and from them or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association, at all reasonable times: provided, that nothing herein contained shall be construed to exempt the members of such partnership association from individual liability for all labor performed for the association."

Mr. Otto Kirchner, with Messrs. Bowen, Douglas & Whiting, for relator:

Unincorporated joint-stock companies existed in England, and although prohibited by a statute of George I. on account of the famous "bubble," they have been recognized as existing in this country at common law. Their existence in the state of Michigan has been recognized by several of the decisions of this court.

See *Re Ticknor's Estate*, 18 Mich. 44; *Butterfield v. Beardsley*, 28 Mich. 412; *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159.

All the members are individually liable for the debts of the association, and real estate held by them is held as by ordinary partnerships.

But associations similar in all particulars to the one in question in this litigation first made their appearance in the state of Pennsylvania.

In *Maloney v. Bruce*, 94 Pa. 349; *Bement v. Philadelphia Impact Brick Mach. Co.* 12 Phila. 494; and *Cox v. Watts*, 157 Pa. 95,—judgment was first obtained against the defendant association, and then precisely in the manner in which relator is acting in this case, the lower court, after ascertaining the fact that there were unpaid subscriptions to the capital stock of the association, ordered executions to be issued directly against the members who hold the unpaid stock.

In *Shible v. Strong*, 128 Pa. 315, the court holds that "plaintiffs had a right to sue them as a limited partnership association in the mode pointed out by the act because they held themselves out as such association, and upon failure to recover their debt by execution against the association, they might have had execution against the non-paying members, if any there were, for the amount of their unpaid subscriptions.

It can make little difference how the court is moved, provided due notice is personally given the members of the defendant association.

Lauder v. Tivlia, 117 Pa. 304.

The statute should not be declared unconstitutional unless the conflict between the constitution and the statute is palpable and free from reasonable doubt.

Green v. Graves, 1 Dougl. (Mich.) 351; *Scott v. Smart*, 1 Mich. 295; *Southworth v. Palmyra & J. R. Co.* 2 Mich. 287; *Seirs v. Cottrell*, 5 Mich. 251; *Tyler v. People*, 8 Mich. 320; *People v. Blodgett*, 18 Mich. 127; *People v. Maha-*

ney, 13 Mich. 481; *Inkster v. Carver*, 16 Mich. 484.

These defendants are not in position to raise the question of its unconstitutionality. They are absolutely estopped to do this.

Not only a corporation and its members, but also those who have had dealings with the corporation as such, are estopped in subsequent litigation between the members of the association and those persons who have thus dealt with it, to deny the legality of the formation of the corporation.

Swartwout v. Michigan Air Line R. Co. 24 Mich. 389; *Merchant's & Mfrs. Bank v. Stone*, 88 Mich. 779; *Hall Mfg. Co. of Grand Rapids v. American Railway Supply Co.* 48 Mich. 381; *Eddy Mfg. Co. v. Runnels*, 55 Mich. 180; *Eaton v. Walker*, 6 L. R. A. 102, 76 Mich. 579; *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550; *Chicago & G. T. R. Co. v. Miller*, 91 Mich. 166; *McCarthy v. Lavasche*, 89 Ill. 270, 81 Am. Rep. 83; *Wheelock v. Kost*, 77 Ill. 286; *Casey v. Galli*, 94 U. S. 675, 24 L. ed. 168; *Pitkin v. Springfield*, 112 Mass. 509; *Beal v. Bass*, 86 Me. 325; *Corpus Christi v. Central Wharf & Warehouse Co.* (Tex.) Sept. 18, 1894.

Inasmuch as the respondent, holding the circuit court in chancery, had full power to pass upon the matter of relator's petition and award execution against the parties for the amount of their subscriptions remaining unpaid, it would seem to follow that it is competent, by statute, to confer upon him the same power when holding the circuit court at law.

The power thus conferred is equitable in its nature, and the partners are therefore not entitled to a trial by jury of the matter involved.

Flaherty v. McCormick, 113 Ill. 588; *State v. Churchill*, 48 Ark. 426; *Mahan v. Casender*, 77 Ga. 118; *Re Burrows*, 83 Kan. 676; *Eikenberry v. Edwards*, 67 Iowa, 619, 56 Am. Rep. 860; *McKinsey v. Squires*, 82 W. Va. 41; *Carleton v. Rugg*, 5 L. R. A. 198, 149 Mass. 550.

The partners have waived any claim they might have had to a jury, by associating under the statute they must be deemed to have assented to and accepted all its provisions.

People v. Murray, 5 Hill, 468; *Cooley*, Const. Lim. 6th ed. pp. 215 et seq.

Messrs. Russel & Campbell, for respondent:

The statute provides for no notice to the persons against whom the execution is to issue. This is fatal to its constitutionality.

Weimer v. Bunbury, 80 Mich. 201; *Re Frazer*, 68 Mich. 396; *Noyes v. Hillier*, 65 Mich. 636; *Robison v. Miner*, 68 Mich. 549; *Prince v. Clark*, 81 Mich. 169; *Sligh v. Grand Rapids*, 84 Mich. 497; *Grand Rapids v. Powers*, 14 L. R. A. 498, 89 Mich. 94; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Risser v. Hoyt*, 53 Mich. 185; *Parsons v. Russell*, 11 Mich. 118, 88 Am. Dec. 728.

Grant, J., delivered the opinion of the court:

Joint-stock companies, similar in character to those authorized by the statute of Michigan, were early organized in most of the states, and were recognized as lawful without legislative enactment. Their existence and methods were early modified and controlled

by statute. An act, similar in character, was passed by the legislature of New York in 1849. Pennsylvania, in 1874, enacted the first law in this country for the organization of limited partnership associations. In 1877 the legislature of Michigan passed an act similar in all essentials to that of Pennsylvania. It is almost an exact reprint of it. The Pennsylvania act first required the capital stock to be paid in cash. It was afterwards amended so as to permit contributions to be made in real or personal estate. Virginia, New Jersey, and Ohio enacted the same law in 1875, 1880, and 1881, respectively. In Pennsylvania alone does the law appear to have come before the courts of last resort for construction. The supreme court of that state in many decisions has sustained its validity in its entirety, and has expressly passed upon the question now before us. Such decisions are entitled to great respect by the courts of sister states, and in most cases are held to be controlling when the law has been enacted after the construction placed upon it by the court of that state. The following are the leading cases in Pennsylvania sustaining the act: *Maloney v. Bruce*, 94 Pa. 249; *Bement v. Philadelphia Impact Brick Mach. Co.* 13 Phila. 494; *Lauder v. Tillia*, 117 Pa. 304; *Lauder v. Logan*, 128 Pa. 84; *Cox v. Watts*, 157 Pa. 98. All the decisions of that state were rendered after the passage of the act in Michigan, and therefore it cannot be said that the legislature adopted the construction which that court has given. The decision in the case now before the court must be reached with the well-recognized principle in view that "the power declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict. In case of doubt, every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of the act." *Sears v. Cottrell*, 5 Mich. 259, and authorities there cited. The due process of law required by the constitution means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property. This constitutional provision was "intended only to protect persons from being deprived of their property without their assent unless by due process of law." The same objection was raised to an entry of judgment upon an appeal bond against the sureties without notice to them. But it was held that the bonds should "be read in all respects as if the whole of the statute in reference to the appeal, the bond, and mode of entering up judgment upon it were recited at large in the bond." *Chappes v. Thomas*, 5 Mich. 58. So the summary seizure upon a warrant, without a suit, of the property of a defaulting township treasurer and his sureties was held not to have been made without due process of law. *Weimer v. Bunbury*, 80 Mich. 201. This was upon the ground that the warrant was an administrative, and not a judicial, process. An able and instructive discussion by *Mr.*

Justice Cooley on the meaning of due process of law will there be found.

It appears conceded that if, under this statute, the members of the association are entitled, as a matter of right, to their day in court in a proceeding where the issue of fact may be framed and determined, the notice given is due process of law. But it is insisted that the statute makes no provision for a trial, and it is left to the court's discretion to give one. This point was expressly decided in *Lauder v. Tillia, supra*, in which execution was issued against the members without notice to them. The court held that, when the property of the association was exhausted, the court should subrogate the creditor in its demands against its members for unpaid subscriptions; that the association was not in position to show cause for its debtors; and that the rule to show cause why execution should not issue should be served upon the members. That the creditors of such associations are entitled to the unpaid subscription is too clear for argument. The proceeding is analogous to that authorized by statute, whereby the judgment creditor may summon his judgment debtor or other persons before the court, after return of an execution *nulla bona*, to disclose property subject to an execution. The proceeding against the members in the original suit and in the court, in which judgment has already been rendered against them in their collective capacity, is ancillary to that suit and judgment. By their own voluntary act in organizing they have read the statute into their articles of association, and have solemnly agreed with their creditors that execution may issue against their unpaid subscriptions. The issue to be determined by the court is simple, viz., how much, if any, of their subscription is unpaid? The statute clearly contemplates and provides for an investigation by the court, for it is authorized to compel the production of the books, and to ascertain the truth from other sources of information. The court has jurisdiction and is clothed with all the machinery necessary to frame the issue and afford a trial with all the incidents of a judicial proceeding. What other course should be pursued? The creditors are certainly not without remedy, for this would result in the accomplishment of a gross fraud. Should they resort to a court of equity? No such course is provided by this statute, and all parties would still be in the same court, and

before the same judge, and with the same issue. Is there any objection or lack of power in the legislature to authorize the court of law to determine the question? We can see none. We think it the obvious purpose of the statute to avoid an expensive proceeding in chancery, which might necessarily result in the appointment of a receiver. It must be presumed that the legislature understood that it was conferring this power upon a court already equipped with the necessary machinery to bring the parties before it and to adjudicate their rights. The learned counsel for the respondent cite and appear to rely mainly upon *Parsons v. Russell*, 11 Mich. 113, 89 Am. Dec. 728, and *Risser v. Hoyt*, 53 Mich. 185. It is unnecessary to review these decisions at length. We think the distinction between them and the case at bar is apparent. In *Parsons v. Russell* the boat and vessel law was held unconstitutional and void, because it provided that a vessel could be seized and sold upon the mere assertion of a debt, without any proof to substantiate the claim before a judicial tribunal, and without any judgment or decree allowing the sale. In *Risser v. Hoyt*, Act. No. 193 of 1883, to prevent debtors from giving preference to creditors, etc., was held unconstitutional for many reasons. It was held that the act provided for no judicial proceedings whatever, nor for any adjudication upon the allegations of the petitions filed. Three opinions were written, in but one of which was any reference made to the point that the act provided for the taking of property without due process of law. In the present case the members of the association, through the suit against it, have had their day in court to test the relator's claim, and judgment has been duly entered. The relator is entitled to a levy upon all the assets of the association and to a sale thereof in satisfaction of his judgment. The subscriptions of the members are a part of such assets, which they are legally and morally bound to contribute. The statute and their own solemn agreement have provided a simple method by which such assets can be reached. The proceedings taken by the relator were such as are contemplated by the statute, and constitute due process of law.

The writ of mandamus must issue.

The other Justices concurred.

ILLINOIS SUPREME COURT.

City of MT. CARMEL, *Appt.*,

v.

Maria L. SHAW *et al.*

(.....Ill.....)

1. A city may do anything with its streets not incompatible with the end for

which streets are established, under the powers given by the Illinois general incorporation act to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve its streets and sidewalks, and vacate the same.

2. Under the power given by the Illinois statutes to a city to vacate streets, it may vacate a strip upon each side of the street

NOTE.—For rights of abutting owners in respect to streets on streets, see *Chase v. Oshkosh* (Wis.) 15 L. R. A. 553, and *note; Tate v. Greensboro* (N. C.) 37 L. R. A.

24 L. R. A. 671; *Dailey v. State* (Ohio) 24 L. R. A. 722; *State v. Vineland* (N. J.) 23 L. R. A. 635.

so as to narrow it, where the purpose of narrowing is not for the benefit of private owners, but because it is deemed that so great a width of street is not required for public use and convenience.

3. **An ordinance vacating a strip upon each side of a street for the purpose of narrowing it is not invalidated by a provision that such strip is donated and given to the abutting lot owners, where the strip was laid out upon the original plat of the city by dedication from the land owners, as upon the vacation of such strip the title of the abutting owners to such strips become absolute by operation of law, and such provision is mere surplusage.**
4. **A street line fixed by a valid ordinance vacating a strip along both sides of the street as originally laid out applies to and is coincident with the outside line of such street as mentioned in a subsequent ordinance providing for and locating a sidewalk with reference to such line.**
5. **Shade trees in the public streets of a city in Illinois are the property of the municipality, and it has complete control over them.**
6. **A city council in Illinois has authority to order a sidewalk six feet wide to be built along the line of a street 96 feet wide, adjoining the lots of abutting owners.**
7. **The location of a sidewalk upon a street is, under the Illinois statute, within the discretion of the city authorities, and cannot be interfered with by the courts.**
8. **A court of equity has no jurisdiction to interfere by injunction with the action of municipal authorities within their well-recognized powers, or in the exercise of a discretionary power, unless the power or discretion is manifestly being abused to the oppression of the citizen.**
9. **Municipal authorities will not be enjoined from cutting down shade trees two feet in thickness standing within the line of a sidewalk ordered to be constructed, where they would constitute permanent obstructions if left standing.**

(January 14, 1895.)

APPPEAL by defendant from a decree of the Appellate Court, Fourth District, modifying and affirming a judgment of the Circuit Court for Wabash County which granted an injunction restraining defendant from cutting trees in the street in front of complainant's property. *Reversed.*

Statement by Baker, J.:

The appellees are the owners and in possession of lot 329, situated on the north side of Sixth street in the city of Mt. Carmel, Illinois, near the center in width of which lot is located their dwelling house, in which they have resided for about thirty years. On each side of the front of their house, in the street, are two large maple trees, about 40 feet high and 3 feet in diameter. They were planted about the year 1857, and the nearest is situated 6 feet from the south line of the lot and north line of the street as the city was originally platted. The sidewalks here before constructed were always placed between said lot and trees. The uniform width of the streets of the city was 99 feet.

In July, 1891, the city council passed an ordinance in relation to lawns and sidewalks, and narrowing or cutting down the width of

streets, and donating certain portions of ground to the property holders. The first six sections of said ordinance were as follows:

"Sec. 1. That there shall be set aside for sidewalk and other purposes hereinafter mentioned 18 feet on both sides of all the streets in said city that were originally laid out and are now 99 feet wide, except Market street.

"Sec. 2. That the city surveyor, under the supervision of the street committee, shall survey and lay off said 18 feet along both sides of said streets, and shall designate the outside line of said 18 feet.

"Sec. 3. That in making such survey no street or any part thereof shall be less than sixty-three (63) feet in width, measuring from outside to outside line of said 18 feet.

"Sec. 4. That a strip 2 feet wide next to the property, lands, lot or lots abutting on said streets shall be and is hereby vacated, donated and given to, and shall be a part of said lands, lot or lots.

"Sec. 5. That 6 feet of the remaining 16 feet, next to the property, lands, lot or lots on both sides of said streets shall be set apart upon which to build sidewalks, and the remainder of said 16 feet, namely, 10 feet more or less, on both sides of said streets shall be set apart for lawn purposes.

"Sec. 6. That the city shall retain and have full control of said 16 feet, along both sides of said streets set apart for sidewalk and lawn purposes, and shall have the right to grade said 11 feet on both sides of said streets set apart for sidewalk and lawn purposes, so as to make said 10 feet correspond with the established grade of said city."

On July 25, 1892, the city council passed an ordinance for the construction of a brick sidewalk 6 feet in width on the north side of Sixth street. Said ordinance provided that "said sidewalk shall be made and constructed along the outside line of said street and adjoining the property, lands, lot or lots abutting on said street."

The city, in constructing the sidewalk under said last-mentioned ordinance, recognized the outside line of Sixth street as the one established by the ordinance of July, 1891, whereby 2 feet of each side of the street was vacated and donated to the adjoining lot owners, thereby extending the sidewalk into the street so far as to include the larger part of the bodies of the above mentioned trees; and these trees the city officials proposed to cut down and move out of the way of said improvement.

Thereupon appellees filed their bill in chancery, and prayed for and obtained a writ of injunction. Upon a hearing in the circuit court the injunction was made perpetual. Upon appeal to the appellate court, the injunction was so modified as that it should remain in force only so long as there is no public necessity for a sidewalk along lot 329 in excess of the width of 6 feet. The decree, as thus modified, was affirmed.

Mr. George P. Ramsey for appellant.
Messrs. Mundy & Organ for appellees.

Baker, J., delivered the opinion of the court:

By the general incorporation act under

which the city of Mt. Carmel is organized, it has power to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve its streets and sidewalks, and vacate the same. It may do anything with its streets which is not incompatible with the end for which streets are established. *Roberts v. Chicago*, 26 Ill. 249; *Murphy v. Chicago*, 29 Ill. 379, 81 Am. Dec. 307. And where the municipal authorities are acting within their well-recognized powers, or are exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the oppression of the citizen. *Brush v. Carbondale*, 79 Ill. 74.

The rights of the parties to this controversy seem to depend largely upon the question whether the city, under its power to vacate streets, has power to vacate only a portion of a street. Under the familiar rule, that the whole of a thing includes all of its parts, it would seem that it has. In *Hyde Park v. Dunham*, 85 Ill. 569, this court, speaking of the village there a party, said: "The corporate authorities are vested with complete control, as is every other municipal corporation, over its streets. They may contract or widen them, whenever, in their opinion, the public good shall so require. Property owners purchase and hold subject to these powers, and they have no vested right to deny the widening, contracting, or otherwise improving any street." From the decisions in *Chicago v. Union Bldg. Assn.* 103 Ill. 879, 40 Am. Rep. 598, and *People v. Hyde Park*, 117 Ill. 462, there is a plain implication that a municipal corporation may vacate a part of a street as distinguished from the vacation of an entire street. In *Meyer v. Teutopolis*, 181 Ill. 552, an ordinance of the village vacating a certain portion of a street in that village was held valid. In *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 293, the ordinance was not held invalid on the ground that only a portion of the street was vacated. It was a part of the particular case, that the ordinance assumed to vacate not the whole but a portion only of the street there involved, but the gist of the decision was that the corporate authorities had no power to so vacate for the sole benefit and use of a private person. The vacation of an entire street, under like circumstances, would be alike *ultra vires*. The rule there laid down would be applicable to the case of the whole of a street, as well as to that of a portion of it. We said: "The municipal corporation holding and controlling its streets in trust for the use of the general public, without power of converting them to any other use, it follows, necessarily, that the right to 'vacate the same' is to be exercised only when the municipal authorities, in the exercise of their discretion, determine the street is no longer required for the public use or convenience." No reason is perceived why a city council might not under some circumstances, and in the exercise of a sound official discretion, conclude that a portion of a street, either in length or in width, was not necessary for public use and convenience; and that public interests would be subserved by vacating the same, and

thus freeing the municipality from the duty and burden of keeping it in good and safe condition and repair.

This case is wholly different from *Smith v. McDowell*, *supra*. It conclusively appears upon the face of the ordinance, as well as from the other evidence in the record, that the vacation of parts of the public streets was for entirely legitimate purposes, and in furtherance of what the city council, in the exercise of the discretion vested in them by the statute, deemed a wise and salutary public policy.

The streets were all 99 feet wide, and it was evidently concluded that so great a width of street was not required for public use and convenience, except in respect to Market street, the business street of the city. And, so, the ordinance was passed, and the cost of paving and maintaining a useless width of public highway lifted from the shoulders of the municipality and its taxpayers.

It is claimed that section 4 of the ordinance is void; that the city authorities had no power to sell, donate, or give away parts of the public streets that they held in part.

It is ordained in the ordinance "that a strip two feet wide next to the property, lands, lot or lots, abutting on said streets, shall be and is hereby vacated." It is admitted that the original plat of the city and streets was signed by the attorney in fact of the proprietors of the land, and that this makes it a common-law dedication of the streets. *Gosselin v. Chicago*, 103 Ill. 623; *Earll v. Chicago*, 136 Ill. 377; *Thomson v. McCormick*, 136 Ill. 185. It therefore resulted, when the strips two feet wide were vacated by the city, that they became parts of the lots adjoining them, and the lot lines were extended 2 feet. And it also resulted that by operation of law the titles of the owners of the abutting lots to the portions of the strips located in front of their respective lots became absolute, and freed from the incumbrance of the easements that had been upon them.

It follows that the concluding words of the section, to the effect that the strip taken from the streets was donated and given to the lot or lots, were but mere surplusage.

The Ordinance of 1891 was and is valid. And when the city council, by the Ordinance of July 25, 1892, made provision for the construction of a brick sidewalk 6 feet in width on the north side of Sixth street and that it should be made and constructed along the outside line of said street and adjoining the lot or lots abutting on said street, the line so fixed by the ordinance applied to and was coincident with the lot line and street line as fixed by the prior Ordinance of 1891.

Shade trees in the public streets of a city are the property of the municipality; and it has complete control over them. *Baker v. Normal*, 81 Ill. 108.

There was nothing unlawful in the conduct of the city officials. The council had authority to order a brick sidewalk 6 feet wide to be built along the line of the street and adjoining the lot of appellees. It is to be presumed that there was a public necessity for its construction. At all events, that was a matter that the statute submitted to their

discretion. The two large trees were in the line of the sidewalk ordered, and the larger part of their bodies were within the limits upon which the sidewalk was located by the ordinance. The sidewalk could not be constructed in conformity with the ordinance, without cutting them down and removing them. If left standing, they would be permanent obstructions. We do not think that the proposed action in the premises of the city officials can justly be regarded as wanton, or as so unreasonable and oppressive as to give a court of chancery jurisdiction to interfere. *Brush v. Carbondale*, 78 Ill. 74. In fact it seems to us that it would be more unreasonable to destroy the symmetry and impair the convenience and safety of the sidewalk, by either leaving obstructions in it

that are 2 feet in diameter, or by turning it out, on the south side of the trees, 6 or 7 feet into the roadway of the street, or by contracting it, on the north side of the trees, to the width of 4 feet—than it would be to cut down the trees that do not belong to appellees, but afford shade to their premises.

In our opinion, both the decree of the circuit court, and that decree as modified by the appellate court, are erroneous; as is also the judgment of affirmance.

The judgment and the decrees are reversed; and the cause is remanded to the circuit court, with directions to dissolve the injunction, and dismiss the bill of complaint for want of equity, at the cost of the complainants therein.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

GOODLANDER MILL CO., *Plff. in Err.*,
v.

STANDARD OIL CO.

(63 Fed. Rep. 400.)

1. Crude petroleum is not so dangerous that a shipper is bound to so protect and guard it that harm therefrom shall come to no one, but his duty is performed by providing a suitable vehicle able to encounter the usual risks of transportation.
2. Negligence in omitting to have a proper valve in the outlet of a tank car is not the proximate cause which will render the shipper liable for the destruction of a mill a few feet from the railroad track at the point of destination, which results from the act of the consignee's agents in opening the outlet of the tank upon which they were unable to prevent the oil from flowing down into the furnace room of the mill and catching fire.
3. The proximate cause of an injury is that cause which in natural and continuous sequences unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred.

(May 31, 1894.)

ERROR to the Circuit Court of the United States for the District of Illinois to review a judgment in favor of defendant in an action brought to recover the value of certain property which was destroyed by fire through defendant's alleged negligence. *Affirmed.*

Statement by Jenkins, Circuit Judge:

In November, 1887, the defendant shipped in a tank car from Lima, Ohio, to the Ft. Scott Gas Company, at Ft. Scott, Kan., some 6,000 gallons of crude petroleum, deliverable to that company at East St. Louis.

NOTE.—For a somewhat similar case involving the question of negligence toward employees in failing to provide a stopcock in a pipe connecting an oil tank with a burner, see *Pullman's Palace Car Co. v. Laack* (Ill.) 18 L. R. A. 215.

For a case of negligence in shipping naphtha, see *Standard Oil Co. v. Tierney* (Ky.) 14 L. R. A. 877. 37 L. R. A.

The tank car had a discharge pipe in the bottom and about the center of the tank, some four inches in diameter, and projecting about six inches below the bottom. The projection was threaded to receive a heavy cap screw. Within the tank the discharge pipe is fitted with a heavy valve to prevent the escape of oil. The valve rests upon a shoulder in the upper part of the discharge pipe. Below the shoulder there are four concaves made in the valve, to permit the flow of oil upon raising the valve. An inflexible iron rod is attached to the valve, extending through the dome on the top of the tank, and projecting a foot or more above it. Within the tank at the top there is a coiled wire spring, arranged to hold the rod down, and keep the valve in position, closing the outlet. To discharge the contents of the car through the lower discharge pipe, the cap is unscrewed and the pipe coupling attached. The valve, by means of the rod, is then lifted, and the oil permitted to flow through the outlet into the pipe, and conducted to the reservoir provided for its reception. The tank car arrived at Ft. Scott on the 17th of November, and was received by the consignee on the next day. The gas company caused the car to be removed from the yard of the railroad company, where it was delivered, and to be placed upon the switch track of another company located in a street a half mile away, between the property of the gas company and the steam flour mill of the plaintiff in error. This was done for the purpose of piping the petroleum contained in the tank into the reservoir of the gas company, located beyond the mill, and upon the further side of an intercepting street. The railroad track upon which the tank car stood was three feet distant from the furnace room of the mill, the latter being three feet below the level of the railroad track at that point. The car was placed directly opposite the window of the furnace room of the mill. On the afternoon of the 18th of November, and before or at the time of the removal of the car on that day it was observed by the engineer of the switch engine that the tank was leaking, the

oil dripping at the outlet under the car, and forming a pool upon the ground. On the morning of the 19th of November, two servants of the gas company undertook to discharge the oil into the reservoir of the gas company, through a pipe laid from the reservoir to the tank car. One of them examined the rod at the top of the car, and reported to the other that it was pushed down, indicating the valve to be in proper position. The other went under the car with a wrench to remove the cap, and attach the pipe leading to the reservoir. He observed that the cap was loose, and removed it with his hand; and it is stated in the brief of counsel for plaintiff in error—without reference to the record for verification of the statement—that this man observed, as he went under the car for the purpose of removing the cap and attaching the coupling, that the oil was leaking some, but that he did not deem the fact of moment, supposing that the valve was in its proper position, and would prevent the discharge of the petroleum until it was raised. Upon removing the cap, the oil flowed out before the coupling could be attached; and despite the efforts made to prevent, and before the car could be removed from its position, the oil flowed down the descent, through an open window, into the boiler room, and also upon some hot ashes located at the rear of the engine room and boiler house, and some eight feet distant from the car, and caught fire, whereby the mill and its contents were destroyed, and property of the value of about \$107,000 consumed. After the fire and upon examination of the tank, it was discovered that it contained no valve; that it had been removed, but how or when is not disclosed by the evidence, but presumably before the tank car was filled with the oil for shipment. The evidence established that crude petroleum oil will give off a vapor or gas which will flash at a temperature of 90°, igniting by contact with fire, and explosive in its ignition; that it is in common use for fuel purposes; and that it is about as volatile as turpentine. The action against the Standard Oil Company by the mill owner is predicated upon negligence in omitting to have a proper valve in the outlet of the tank. At the trial of the cause, and upon the conclusion of the evidence for the plaintiff, the court directed the jury to find a verdict in favor of the defendant.

Before Woods and Jenkins, *Circuit Judges*, and Bunn, *District Judge*.

Mr. Myron H. Beach, for plaintiff in error:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent or reasonable man would not do.

Parrott v. Wells, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Blyth v. Birmingham Waterworks Props.*, 11 Exch. 781. See also *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Great Western R. Co. v. Haworth*, 39 Ill. 846; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503. 27 L. R. A.

Defendant is bound to use the most recently invented and approved appliances to prevent injury to the public in the transaction of its business, and it is liable to any member of the public for damages sustained by such member by reason of any neglect of that duty; and the law considers injurious such acts as a reasonable careful man would foresee might be productive of injury and which he would abstain from doing.

Blyth v. Birmingham Waterworks Props. and Baltimore & P. R. Co. v. Jones, *supra*.

Defendant is liable for its negligence.

Thomas v. Winchester, 6 N. Y. 307, 57 Am. Dec. 455; *Heaven v. Pender*, *supra*; *George v. Skicington*, L. R. 5 Exch. 1; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715; *Schubert v. J. R. Clark Co.* 15 L. R. A. 818, 49 Minn. 331.

Defendant being guilty of negligence and a breach of duty by which the plaintiff has suffered damage, it was the duty of the court to submit the case to the jury.

Grand Trunk R. Co. of Canada v. Ives, 144 U. S. 403, 36 L. ed. 485; *New Jersey R. & Transp. Co. v. Pollard*, 89 U. S. 22 Wall. 341, 22 L. ed. 877; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213; *Thompson v. Flint & P. M. R. Co.* 57 Mich. 300; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Marietta & O. R. Co. v. Pickels*, 24 Ohio St. 654; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Jamison v. San José & S. C. R. Co.* 55 Cal. 593; *Redf. Railways*, 5th ed. § 133, ¶ 2; 16 Am. & Eng. Encyclop. Law, title, *Negligence*, 402, and note 2.

Messrs. W. G. Ewing and Virgil P. Kline for defendant in error.

Jenkins, *Circuit Judge*, delivered the opinion of the court:

Without doubt, whether a given act or omission is the proximate cause of an injury is ordinarily a question for a jury. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. This, however, is subject to the well-settled rule that the court should withdraw a case from the jury, and direct a verdict, when the undisputed evidence is so conclusive that the court should set aside a verdict in opposition thereto. *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 128 U. S. 727, 733, 31 L. ed. 287, 288; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 473, 35 L. ed. 213, 215; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 39 L. ed. 434. The ruling directing a verdict upon the evidence presented by the plaintiff sanctions a review of that evidence here, to enable us to determine whether, as matter of law, upon the testimony adduced, a verdict for the plaintiff could have been sustained. *American Paper-Bag Co. v. Van Nortwick*, 9 U. S. App. 25, 3 O. C. A. 274, 52 Fed. Rep. 752.

We are confronted, therefore, with certain questions, always interesting and often perplexing, touching the law of negligence,—whether, upon the facts stated, the defendant stood in breach of duty to the plaintiff, and whether the omission to provide a valve for the discharge pipe of the tank was the proximate cause of the destruction of the plaintiff's mill.

It is not every one who suffers loss from another's negligence that may recover therefor. Negligence, to be actionable, must occur in breach of a legal duty, arising out of contract or otherwise, owing to the person sustaining the loss. *Kahl v. Love*, 37 N. J. L. 5; *National Sav. Bank of District of Columbia v. Ward*, 100 U. S. 195, 25 L. ed. 621. Mr. Wharton defines "legal duty" to be "that which the law requires to be done or forborne to a determinate person, or to the public at large and as correlative to a right vested in such determinate person or in the public." Whart. Neg. § 24. There was here no contractual relation between the parties. Any duty arising out of the contract was due to the gas company, not to the plaintiff. If, by reason of the shipment of the petroleum, a legal duty arose in favor of the plaintiff, it was a duty distinct and apart from the contract,—a duty implied by law. The duty, then, upon which the plaintiff must rely, was a duty owing by the defendant to the public. The law imposes the obligation that one should so use one's property that injury should not result therefrom to another. This duty, however, is not absolute; but one is responsible for negligent use, for failure to do or forbear that which the law requires to be done or forborne in respect of the use. If the failure to provide a valve was in breach of a duty owing to the public, it must be because the character of the shipment was such and so dangerous that the defendant owed the duty to all who might in any way be brought in contact with it, to so protect and guard it that harm therefrom should come to no one. One who uses a dangerous agency does so at his peril, and must respond to the injuries thereby occasioned, not caused by extraordinary natural occurrences, or by the interposition of strangers. *Fletcher v. Rylands*, L. R. 1 Exch. 285, 279, affirmed *Rylands v. Fletcher*, L. R. 3 H. L. 330. The books are replete with cases falling within and illustrating this principle. Thus, in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, an apothecary carelessly labeled a poison as a harmless medicine, and sent it so labeled into the market. He was held liable to all who, without fault on their part, and in consequence of the false label, were injured by its use. *Norton v. Sewall*, 106 Mass. 148, 8 Am. Rep. 298; *Bishop v. Weber*, 139 Mass. 411, 53 Am. Rep. 715; *Davis v. Guarneri*, 45 Ohio St. 470,—are like cases.

The rule is limited, however, and justly so, to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger; to acts that are ordinarily dangerous to life or property. *Loop v. Litchfield*, 42 N. Y. 351, 357, 1 Am. Rep. 548. 27 L. R. A.

And so, where the wrongful act is not immediately dangerous to the life or property of others, the negligent party is liable only to the party with whom he contracted. *Collis v. Selden*, L. R. 3 C. P. 496, cited with approval in *National Sav. Bank of District of Columbia v. Ward*, 100 U. S. 195, 204, 25 L. ed. 621, 624. Thus, in *Davidson v. Nichols*, 11 Allen, 514, the defendant, a wholesale druggist, negligently delivered to a customer sulphide of antimony for black oxide of manganese. The purchaser, a retail druggist, delivered the package unopened to the plaintiff, both supposing the substance to be black oxide of manganese. In that belief the plaintiff proceeded to use the same in combination with chloride of potassium,—a substance with which the oxide may be safely and properly used, but from the combination of which with sulphide of antimony a dangerous explosion follows. The plaintiff was injured by the resulting explosion, and brought suit. The court held the defendant not liable, and, after declaring that there existed no privity of contract between the parties, says:

"We think it equally clear that the plaintiff shows no cause of action *ex delicto* against the defendant. The insuperable difficulty is that the averments in the declaration do not disclose any duty or obligation which rested on the defendants towards the plaintiff in the sale of the article to the person from whom the plaintiff purchased. As has been already stated, it was an innocuous substance, which became dangerous only when used in composition with another chemical agent. It was not sold by them with any knowledge or understanding of the purpose for which it was intended to use it, nor did they know that it was to be resold to the plaintiff. There being no duty imposed on the defendants towards the plaintiff arising out of any contract, this action is to be maintained, if at all, by showing a breach of some duty or obligation imposed on them by law. They have been guilty of no actionable carelessness or negligence, unless it can be shown that they were bound to use some care or caution upon which the plaintiff has right to rely. Failing to show this, or to aver a state of facts from which the law would imply it, the gist of this action, which is founded on alleged negligence and want of due care, is wholly wanting. We know of no rule or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of an article arising from his carelessness and negligence, which causes loss or injury to other persons than his immediate vendee, where there has been no fraudulent or false representation in the sale, and the article sold was in itself harmless; especially where the sale is made without any notice to the vendor that the article was bought for a third person, or that it was intended to be used in combination with other substances which may make it dangerous or injurious to person or property. In such case a vendor assumes no responsibility, and incurs no liability beyond that which results from his contract with his vendee. With remote vendees of the article,

who purchase it by subsales from those to whom it was originally sold, he enters into no contract, either express or implied, and takes on himself no obligation or duty whatever. Nor has he done any wrongful or illegal act towards third persons for the consequences of which he is liable. The general principle applicable to this class of cases is that a vendor takes upon himself no duty or obligation other than that which results from his contract. For breach of this, he is liable only to those with whom he contracted. All others are strangers. The law fastens on him no general or public duty arising out of his contract for the breach of which he can be held liable to those not in privity with him."

And so in *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, the manufacturer of a steam boiler constructed it improperly and of poor iron, knowing that it was to be used in the vicinity of and adjacent to dwelling houses and stores; so that, in case of an explosion while in use, there would be likely to be destruction to human life and adjacent property. After delivery and acceptance by the purchaser, and while in use by him, an explosion occurred, in consequence of such defective construction, to the injury of a third person. It was held that the latter had no cause of action against the manufacturer.

In *Bailey v. Northwestern Ohio Natural Gas Co.*, 4 Ohio C. Ct. Rep. 471, the defendant, under contract with another, put in fixtures for using natural gas for heating a steam boiler connected with an engine in the electric plant of that other. By reason of negligence and imperfect construction of the fixtures, an explosion ensued, and the engineer in charge of the boiler and engine was injured, and brought suit. It was held that there was no contract relation between the plaintiff and the defendant, and that the defendant owed him no duty. It was there conceded that gas, under certain circumstances, might be a dangerous article; that it was explosive when allowed to escape so as to come in contact with flame. It was not in and of itself dangerous. And the defendant was acquitted, although the imperfect fixtures were placed by it for the purpose of being used in connection with the use of gas as fuel. See also, *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Roddy v. Missouri Pac. R. Co.* 104 Mo. 234, 12 L. R. A. 746; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322.

There is a class of cases of which *Heaven v. Pender*, L. R. 11 Q. B. Div. 506, and *Deolin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 811, are examples, holding the builder of a scaffolding to be used by workmen, and negligently constructed, rendering it unsafe, liable for an injury occurring from its use. These cases recognize the rule that the liability of the builder is in general only to the person with whom he contracted, but rest liability to third persons upon the ground that the defect was such that it rendered the article in itself immediately dangerous, and that serious injury was the natural and probable consequence of its use. Of the same character is the case of *Necker v. Harvey*, 49 37 L. R. A.

Mich. 517, holding the constructor of an elevator, while in possession of and operating it, liable to a stranger for injuries arising from its negligent and unsafe construction; otherwise, if possession had been surrendered.

We are thus brought to the question whether crude petroleum may properly be classified as a "dangerous agency," within the meaning of the rule. It is an extensive article of commerce, transported by rail to all parts of the land, shipped in steamers and sail vessels to all parts of the world. It is innocuous of itself. It is dangerous only when in considerable quantity it is brought in contact with fire. It is in general use for fuel and other purposes. It is no more volatile than turpentine, no more explosive than gas; does not necessarily, in its handling, involve imminent danger to any one. It is not a dangerous agency of itself, but becomes such by subjection to a high degree of heat, or from actual contact with fire. The shipment of such an article of commerce casts upon the shipper a certain duty to the public,—that of providing a suitable vehicle for the petroleum in all respects adapted to the purposes of carriage, and able to encounter the usual risks of transportation, so that the petroleum in its transit should not be exposed to danger of ignition from causes incident to its transportation, reasonably to be anticipated. We think that to be the true limit of the shipper's duty, and that duty, as it appears to us in this case, was properly discharged. The petroleum was contained in a tank impervious to fire. The shipment reached its destination in safety. The case is not like that of the shipment of explosives, the character of the shipments being concealed. *Brass v. Maitland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553; *The Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206. Here the contents of the tank were declared by the peculiar construction of the car. The properties of the petroleum were known to the consignee and to the public equally with the defendant. They are matter of common knowledge. There was here no disguise and no concealment.

It may be said that it was the duty of the shipper so to equip the car that its contents might be safely discharged in ordinary methods and by the exercise of due care. This we may concede. It was a duty, however, growing out of the contract, and owing to the consignee; and, for failure therein, the shipper would be liable to the consignee for the damages naturally and proximately flowing from such failure. That duty, however, was not owing to the plaintiff, the material shipped not being in and of itself essentially dangerous.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

In *Aetna Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. ed. 395, 398, the court says: "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely

incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones."

The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, a cause of the injury,—an antecedent cause; but, where the negligent act is not wanton or *malum in se*, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, "the intervener acts as a nonconductor, and insulates the negligence." The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction. If but for such interposition the defendant's negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury. The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. There the court says: "The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the *Boon Case*, above referred to, the incidental cause, or the instrument of a superior and controlling agency, and was therefore not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion? So here the gas company had received this oil into its possession. It was entirely harmless in and of itself. The natural and probable consequence of the negligent act of omission charged upon the defendant was the leakage and loss of the oil. The omission of the valve did not render it dangerous. If not interfered with, the omission of the valve had no tendency whatever to produce the injury complained of. The petroleum was subject to ignition, and its ignition at the time and place produced the injury.

27 L. R. A.

That was caused by subjecting it to contact with heat and fire. That was done by the gas company, which had possession and control of the oil, and acted independently, and not under the direction of the defendant. The company was chargeable with knowledge of the properties of petroleum, and had actual knowledge, through its servants, that the oil was leaking from the discharge pipe, and this prior to the removal of the car from the yards of the carrier. With this knowledge, the company placed the car within three feet of the engine and boilers of a mill located below the grade of the railway, and with knowledge of the leakage, sufficient, in view of the dangerous proximity of fire, to place a careful person upon diligent inquiry, undertook to discharge the oil in close proximity to hot ashes, and near an open window of the boiler room. We cannot say that the negligent omission of the valve "necessarily set the other causes in operation;" nor can we say that the injury was the natural and probable consequence of the negligent act. In marshaling the probable consequences which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and abnormal that this injury should result. We are of opinion that the intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered effective to an injury that was not the probable and natural consequence of the act. *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 298, 27 Am. Rep. 653; *Carter v. Towns*, 98 Mass. 587, 96 Am. Dec. 683; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

The cases to which we are referred are not in conflict with the principles asserted, and are quite distinguishable in the facts from the case at bar. In *Oil Creek & A. R. R. Co. v. Keighron*, 74 Pa. 316, the negligent act of the company's servant caused a collision which set fire to the cars of a train, which fire directly communicated to and destroyed plaintiff's house, situated within 20 feet of the track. There the negligent act was immediately dangerous, and there was no intervening cause between the negligence and the injury.

In *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.*, 158 Mass. 570, 20 L. R. A. 297, a fire occurred in the wire tower of the plaintiff's building, through which the wires for electric lighting were carried from the building. The fire was extinguished without contact with other parts of the building, and with slight damage to the tower or its contents. By reason of the fire, a connection was made between the lightning arresters, causing a short circuit; and the short circuit resulted in an extra strain upon the belt through the action of electricity, thereby causing, in a part of the building remote from the fire and untouched thereby, a disruption of the fly wheel of the engine and other damage. It was held, and justly so,

that there was unbroken connection between the fire and the injury, and without the intervention of a new cause acting from an independent source.

We are of opinion that if, upon the facts presented, a jury had rendered a verdict for

the plaintiff, it would have been the duty of the court to have set aside the verdict, and that, therefore, the court below rightly directed a verdict for the defendant, and that *the judgment must be affirmed.*

VERMONT SUPREME COURT.

Charles W. SCOTT

v.

SCHOOL DISTRICT NO. 9, IN WILLIAMSTOWN.

(.....Vt.....)

1. **An allegation of unavoidable accident, or of default or neglect of duty by an officer,** is necessary under Rev. Laws 1880, § 973, to avoid a plea of the statute of limitations by reason of the failure of a prior writ, whether that is regarded as an abatement or otherwise.
2. **Usage cannot excuse a failure of the warning of a school district meeting to specify the business or question to be considered,** as required by Rev. Laws 1880, § 521.
3. **The person who is the prudential committee of a school district empowered to hire and remove teachers, has no right himself to act as teacher.**
4. **A school district is liable to pay for services of a teacher who, though duly licensed to teach, had no valid contract where he taught without objection, and properly kept and returned the school register by reason of which the district drew public money according to the attendance at his school.**

(December 8, 1894.)

EXCEPTIONS by defendant to rulings of the Washington County Court made during the trial of an action brought to recover for services as teacher of defendant's school and for repairs made upon the school-house which resulted in a verdict in plaintiff's favor. *Reversed.*

A demurrer to a replication to the plea of the statute of limitations was overruled and exceptions duly reserved under a stipulation that the case might proceed without prejudice. Plaintiff resided in the school district and was appointed prudential committee by the selectmen of the town. In September, 1885, a meeting of the district was held under the following warning: "The legal voters of school district No. 9 in the town of Williamstown are hereby notified to meet at schoolhouse in said district on the 18th day of September, 1884, at 1 o'clock in the afternoon, to consider and act on the following propositions: (1) to choose a moderator to govern said meeting; (2) to see if the district will vote to sustain a school or schools in said district, and to fix the time for the commencement of the terms thereof, and the length of such terms; (3) to see if the

district will vote a tax upon the grand list to defray the expense of such school or schools, or take other measures therefor; (4) to transact any proper and necessary business." At that meeting the district voted to sustain a school for eight months beginning September 2 and to provide for the instruction of those who might wish to attend school in the winter in adjoining districts. Plaintiff as prudential committee not being able to satisfactorily provide for the instruction of the scholars in the adjoining district, decided to teach the school himself. The district drew the public money upon the attendance of the scholars during the term. Plaintiff made some repairs upon the schoolhouse and provided some fuel for which he charged \$2.50.

Further facts appear in the opinion.

Mr. Edward W. Bisbee, for defendant:

The replication must show all that is necessary in order to bring the case within the provision of the statute relied on, if the plaintiff would have the benefit of that provision.

Poland v. Grand Trunk R. Co. 47 Vt. 77.

Presumptions which arise from pleadings are to be those most unfavorable to the party pleading.

Stephens, Pl. p. 333; *Phelps v. Wood*, 9 Vt. 898; *Spear v. Curtis*, 40 Vt. 59; *Hayes v. Stewart*, 23 Vt. 622.

To bring a case within the equity of the statute, the replication must show a case in which affirmative equity requires the operation of the statute; and must preclude the idea that the exigency for such extension resulted in any part from the fault of the party asking for it.

Poland v. Grand Trunk R. Co. 47 Vt. 73; *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290; *Davison v. Heffron*, 81 Vt. 687.

The plaintiff was elected prudential committee, and as such it was his duty to protect and guard the interests of the district. This he could not do by setting himself up as teacher, because his own financial interests thereby became adverse to those he was required by law to protect.

Judevins v. Hardwick, 49 Vt. 180; *Davenport v. Johnson*, 49 Vt. 403.

Messrs. W. A. & O. B. Boyce for plaintiff.

Rowell, J., delivered the opinion of the court:

The replication to the statute of limitations is demurred to. The replication seeks to bring the case within the statute (Rev. Laws 1880, § 973), that if, in an action commenced within the time limited, the writ fails of a sufficient service or return by unavoidable accident, or by default or neglect of the officer

NOTE.—As to contracts by officers in a double capacity, see *note* to *Tippesano County v. Mitchell* (Ind.) 15 L. R. A. 520.
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to whom it is committed, or is abated, the plaintiff may commence a new action for the same cause within a year; and it alleges, in effect, that this plaintiff seasonably commenced a former action for the same cause, and that the writ therein was served on the defendant only fifteen days before the return day, and that, for that reason, the defendant being a corporation, and therefore entitled to at least thirty days' notice, the county court dismissed the action on motion, to which the plaintiff excepted, but, as he did not file his exceptions in time, the judgment became final, and that this action was commenced within one year thereafter. The replication is not good as constituting an answer to the plea on the ground of a failure of sufficient service of the writ in the former action, for it does not allege that such failure was by unavoidable accident, nor by default or neglect of the officer to whom the writ was committed, as was necessary to bring the case within the statute. Nor is the replication good as constituting an answer to the plea on the ground of abatement of the former action, for the abatement was caused solely by reason of the failure of service, and it would be illogical to give the abatement greater effect as an answer to the plea than is given to the thing that alone caused the abatement, such thing itself being, when occasioned as mentioned in the statute, substantive ground for allowing another action to be brought.

The offer to show that for eight or nine years the district had used this same form of warning in respect to having scholars instructed out of the district was properly excluded. The statute (Rev. Laws 1880, § 521), required that warnings for school district meetings should specify the business to be transacted or question to be considered at such meetings. This warning contained nothing upon the subject of having scholars instructed out of the district, and usage could not supply the defect. The powers of the district being wholly statutory, they could not be enlarged nor diminished by proof of usage. 1 Dill. Mun. Corp. 2d ed. § 356. Abuses of power and violations of rights derive no sanction from time nor usage. *Hood v. Lynn*, 1 Allen, 103. The vote to have the scholars instructed out of the district being void, the plaintiff, as prudential committee, was at liberty to "appoint and agree with a teacher to instruct" a school in the district; and the question is whether he could himself instruct the school, and recover for it on the *quantum meruit*. As said in *Brown v. School Dist. No. 9 in Clarendon*, 55 Vt. 43, there are cases in this state that seem to indicate that agents and officers of corporations have authority to pledge the credit of the corporation to one another; but, after a review of some of the cases the true rule is there said to be that a committee may do by one of its members what it has a right to do by all, and that, for all things furnished or done by one or all, recovery can be had on the *quantum meruit* or *valebant*, and that it is not understood to have been decided by this court that a committee with authority only to contract have power to enter into agreements with themselves. The

case of *Langdon v. Castleton*, 80 Vt. 285, not referred to in *Brown v. School Dist. No. 9 in Clarendon*, comes nearer to holding that than any other, perhaps. There the plaintiff was agent of the defendant town to prosecute and defend suits in which the town was interested, and, being himself a lawyer, he prosecuted a suit in that capacity; and it was held that he could recover for his services and disbursements therein. The question is not discussed in the opinion, the court merely saying that it saw no reason why the plaintiff was not legally entitled to be paid, and that such had been the general understanding and practice in such cases. But the statute concerning the powers of such agents is different from the statute concerning the powers of prudential committees of school districts in respect of hiring teachers. Such agents are chosen, to use the language of the statute, "to prosecute and defend suits in which the town is interested." This language does not in terms nor in effect, we think, restrict the authority of the agent to contracting for legal services, but leaves him at liberty to perform them himself, if competent. It has always been quite the practice for towns to elect lawyers as such agents, because they could act in the double capacity of agent and lawyer, and thereby make it cheaper and better for the town. But the statute (Rev. Laws 1880, § 515), concerning the authority of prudential committees of school districts was much more restrictive. Its language was, "shall appoint and agree with a teacher to instruct the school, and remove him when necessary." This confined their authority to appointing and agreeing; and, as their official power in this regard was fiduciary, the case would seem to fall logically within the principle that it is against public policy to allow one standing in such a relation to contract with himself concerning the subject of his trust; and, when we consider that it was the duty of such committees to remove a teacher when necessary, the case all the more clearly falls within that principle, for it is fundamental that a man shall not be a judge in his own case, and that doctrine is not alone applicable to strictly judicial officers, but to every one who acts in a judicial capacity, as a prudential committee did when he sat to determine whether it was necessary to remove a teacher or not. The law of this subject is so well settled and so familiar that we deem the citation of authority unnecessary, but those desirous of looking into the books will find an instructive case in *Pickett v. Wiota School Dist. No. 1*, 25 Wis. 551, 8 Am. Rep. 105. That case goes much further than this court has gone, and would prohibit recovery in many cases where we permit it; but the ground and reason of the law is there well stated. We hold, therefore, that the plaintiff had no authority to teach the school himself.

The parents in the district sent their children to school without objection, and the plaintiff kept the school register properly, and duly returned it to the town clerk's office, and the district drew public money according to the attendance that term; and

the question arises whether by reason of these things, or of any and which of them, the district became liable to the plaintiff for his services. If it did, it was upon the ground of assent and ratification. It is said that when work done for a corporation without complete legal authorization is for a corporate purpose, and beneficial to it, and the price reasonable, strong evidence of the assent of the corporation is not required, but that such assent must be shown, and that ratification, whatever its form, must be by the principal or by authorized agents. 1 Dill. Mun. Corp. 4th ed. §§ 464, 465. The work in question comes within this proposition, in that it was done without such authorization, was for a corporate purpose, and, presumably, beneficial to the corporation, and we think it further comes within it in that it was assented to and ratified by an authorized agent. By reason of the plaintiff's services in teaching the school and properly keeping and seasonably returning the school register, the district became and was entitled to a proportionate share of the public moneys, which share the district re-

ceived in due course; and it was presumably, as the statute provided it should be, paid over to the treasurer of the district, who was, by statute, fully authorized to accept and receive it, which made his act in this behalf, in legal effect, the act of the district. And so the question is, Had the district, by authorized corporate action, accepted and received this money, would it thereby have made itself liable to the plaintiff for his services? We think it would have, on the ground that if one accepts, or knowingly avails himself of, the benefit of services performed for him without his authority, and the fruits of which he can reject, he shall be held to pay therefor a reasonable compensation,—a principle as applicable to a corporation when the services are performed in and about a corporate business as to an individual. One cannot, in such a case accept in part and reject in part. If he accepts in part, he thereby ratifies and confirms the whole.

Judgments reversed, demurrer sustained, replication adjudged insufficient, and cause remanded.

CALIFORNIA SUPREME COURT (In Banc).

Margaret H. COLGROVE *et al.*, *Respts.*,

Fred. J. SMITH *et al.*, *Appts.*

(102 Cal. 220.)

Persons having a franchise to lay water pipes in streets cannot relieve themselves from responsibility for negligence in failing to cover the pipes properly by letting the work to independent contractors and requiring the latter by express stipulation to perform its duty.

(March 30, 1894.)

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The case was first heard in department and Commissioner Haynes handed down an opinion containing the following portions, which did not appear in the opinion of the court in banc, which was afterwards handed down in response to a petition for rehearing:

It is very different from the erection of a building, or the doing of other work upon private property, which does not constitute a nuisance, and which causes no danger to the public unless negligently performed. The owner, in such case, is under no contract relation to the public. He owes a duty, however,—that of care to prevent accidents; but when he selects a competent workman, and

intrusts the whole work to him, he discharges that duty. But if I am under a duty to another, created by contract or by statute, it is obvious that I cannot relieve myself of any of its obligations by contracting with another to do the same work; or, if a work which I may lawfully do creates a danger to others, I cannot escape liability by contracting with another to do it; for by contracting with another I authorize him to create the danger. But where the work is unattended with danger, except from negligence, a contract to do the work excludes negligence, and the contractor is liable. Attention is not called by counsel to any case in this court where the question here presented appears to have been considered, but authorities elsewhere are abundant, and quite generally uniform in support of the views above expressed. In *Gray v. Pullen*, 5 Best & S. 970, A. was empowered, under the metropolis local management act (18 & 19 Vict.), to make a drain from his premises to a sewer by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. Held, that A. was responsible in an action by B. In *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 326, Cockburn, *Ch. J.*, said: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming

NOTE.—For exceptions to the rule excluding liability of an employer for acts of an independent contractor, see *note* to *Hawver v. Whalen* (Ohio) 14 T. R. A. 828.

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wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventive measures are adopted." In *Pickard v. Smith*, 10 C. B. N. S. 470, the defendant, having employed a coal merchant to put coals into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. In this case, after referring to the general rule placing the liability upon an independent contractor, the court said: "That rule, is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned."

Appellants contend that in this state municipal corporations are not liable for injuries resulting from imperfections in the streets, and upon this ground attempt to distinguish this case from a large number of cases where the city was primarily liable, and also from other cases where the person or corporation which had obtained permission to do the work had agreed with the city to be answerable for all damages that might be sustained. Whether or not the city of Pomona was liable for the injury to respondent is immaterial. The contractors, O'Neill and Osler, were undoubtedly liable, and if so, appellants would have been liable, had they done the work themselves; and the question here is whether they did or could relieve themselves from responsibility by letting the work to independent contractors. Nor does the fact that there was not an express contract between appellants and the city to answer all damages at all affect the question, since the implied obligation arising from the franchise and the character of the work imposed upon them a liability for injuries caused by their negligence, in every respect as conclusive as an express contract. *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427, and *St. Paul Water Co. v. Ware*, 88 U. S. 16 Wall. 566, 21 L. ed. 485, all sustain the view we have taken. *Woodman v. Metropolitan R. Co.* 149 Mass. 835, 4 L. R. A. 218, and *Curtis v. Kiley*, 153 Mass. 128, on appellants' brief, are directly against them. The first of these cases was that of a street-railway corporation which employed a contractor to lay a new track in a city street, and through whose negligence in not properly guarding the work the injury happened. The railway company was held liable. The court said: "If the performance of a lawful contract necessarily will bring wrongful consequences to pass, unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those

whom he employs." In the American cases above referred to will be found cases cited from many of the states sustaining the same doctrine. Appellants, however, seem to rely principally upon the case of *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161, and *Fulton County Street R. Co. v. McConnell*, 87 Ga. 756. In the first of these cases the court recognizes and enumerates the exceptions to *respondent superior*, but concludes that the facts do not bring it within any of the exceptions. The correctness of its conclusion in that case may well be doubted, though whether correct or not need not be considered here, since the case at bar comes clearly within the second exception to the general rule there stated, and to which the learned justice cites *Bower v. Peate*, and *Pickard v. Smith*, *supra*. The broad distinction between that case and the case at bar is apparent, since the trenches could not be dug in the streets of Pomona without danger to those having occasion to use the streets, while a railroad embankment could be constructed without danger of creating a nuisance by impounding water which by stagnation produced malaria, and thereby became a nuisance. The second case, *Fulton County Street R. Co. v. McConnell*, supports appellants' contention, but the court clearly came to a wrong conclusion. But three cases are cited in support of the conclusions reached by the court. One of these, *Overton v. Freeman*, 11 C. B. 867, was a "common pleas" decision made in 1852, and which is in direct conflict with *Gray v. Pullen*, 5 Best & S. 970 (decided in 1864, in exchequer chamber, on appeal from queen's bench); and upon the appeal *Overton v. Freeman* was not only cited in the argument, but quoted from, and, though it is not referred to in the opinion, it was clearly overruled. Another of the cases there cited is *Hackett v. Western U. Tele. Co.* 80 Wis. 187. There the defendant contracted with a railroad company to erect for it a line of telegraph. A hole was left unguarded overnight, into which a child fell, and was injured. A clear distinction between that case and the one at bar is stated by the court as follows: "The railroad company was not required, by its contract, to dig any hole in a traveled public street;" while here the work was required to be done in a public street in a city, and the negligence was in doing improperly that which the contract required to be done, and not in some matter collateral to, and not required to be done in the performance of, the contract. The other case referred to in the case of *Fulton County Street R. Co. v. McConnell* is that of *Atlanta & F. R. Co. v. Kimberly*, above noticed.

The judgment and order appealed from should be affirmed.

We concur: Vanciel, O.; Temple, O.

Messrs. Joy & Sumner, C. E. Sumner, and Edwin A. Meserve, for appellants.

The independent contractors who performed the work in this case are alone liable, and the doctrine of *respondent superior* does not apply.

Borwell v. Laird, 8 Cal. 469, 68 Am. Dec. 845; *Du Pratt v. Lick*, 38 Cal. 601; *O'Hale v. Sacramento*, 48 Cal. 212; *Krause v. Sacramento*, 48 Cal. 221; *Aston v. Nolan*, 68 Cal. 269; *Bennet v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117;

Fulton County Street R. Co. v. McConnell, 87 Ga. 756; *Hackett v. Western U. Teleg. Co.* 80 Wis. 187; *Overton v. Freeman*, 11 C. B. 867; *Ellis v. Sheffield Gas Consumers Co.* 23 L. J. Q. B. N. S. 42; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Hilliard v. Richardson*, 8 Gray, 349, 63 Am. Dec. 743; *Burgess v. Gray*, 1 C. B. 578; *Peachey v. Rowland*, 13 C. B. 181; *Hobbit v. London & N. W. R. Co.* 4 Exch. 254.

Messrs. A. W. Hutton, P. C. Tonner, and J. W. Swanwick, for respondents:

Appellants had no right to use the streets of the city of Pomona for the purpose of laying water-pipes therein except upon compliance with the provisions of the constitution in regard to such use, and as they have failed to show that they complied with those provisions, they were mere trespassers upon the street, and liable for any injury resulting from their negligence, without regard to the question of independent contractor.

Wood, Mast. & S. § 316, p. 624; *Stons v. Cheshire R. Corp.* 19 N. H. 427, 51 Am. Dec. 192.

This case falls within the well-established exceptions to the independent contractor rule.

Stone v. Cheshire R. Corp. supra; *Whart. Neg.* § 180; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 218.

Per Curiam:

Action for personal injuries. Appeal by defendants from the judgment, and an order denying a new trial. Appellants, as copartners doing business under the name of the Citizens' Water Company of Pomona, obtained from the city of Pomona, by ordinance, a grant or franchise to dig trenches and lay pipes in the streets of the city for the purpose of selling to and supplying its inhabitants with water. Afterwards, on June 1, 1889, appellants contracted with M. O'Neill and Frank Osler to dig and fill the trenches for the pipe at a specified price per 100 feet, a part to be 2 feet wide, and part 20 inches wide, and all 30 inches deep. The contract contained the following clause: "Said ditches to be filled as required by city ordinance. All road crossings to be properly tamped and kept in repair for sixty days after completion of the work. Parties digging ditch to be responsible for all damages resulting by reason of injury to, or breaking of, any pipes owned by other persons." The ordinance required the grantee (appellants) or its assigns, immediately after laying the pipes, to restore the streets to their former condition, and have the same in

as good repair as before; the work to be done under the direction, and to the satisfaction, of the superintendent of streets. Plaintiff Margaret A. Colgrove (wife of her coplaintiff), on June 15, 1889, was driving along Garey avenue, where defendants' pipe had been laid, and the trench improperly filled with loose dirt, in which her buggy wheels sank, whereby she was thrown out and injured. There were no guards along the line of the trench, nor any notice of its unsafe condition. Several exceptions were taken to evidence, and to the refusal of the court to give to the jury certain instructions requested by defendants; but all these exceptions present a single question, arising upon the issue raised by defendant's answer, to the effect that O'Neill and Osler were independent contractors, in the exclusive control of the work of filling up the ditch, and for whose negligence defendants claim they are not liable.

It is commonly stated—and, in a large class of cases, correctly—that the principle of *respondet superior* does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employé, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see *Roswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. But there are exceptions to the general doctrine, and this case, we think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not, by such contract, have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street and lay their pipes relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created; and, if not done in the manner required by the ordinance, the departure creates a nuisance.

The judgment and order are affirmed.

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KANSAS SUPREME COURT.

City of TOPEKA *et al.*, *Ptfs. in Err.*,

D. W. BOUTWELL.

(63 Kan. 20.)

*1. Where pertinent questions of fact are stated in writing and handed to the court by a party at the conclusion of the testimony, to be submitted to the jury for their findings thereon, it is error for the trial court to refuse to submit them.

*Headnotes by ALLEN, J.

NOTE.—Right to compel prisoners to labor.

I. The power generally.

II. Constitutional restrictions.

III. Necessity of express authority.

IV. Exception when labor is a part of the prison discipline.

V. Construction of statutes conferring the power generally.

a. Upon what courts conferred.

b. For what crimes imposed.

c. Place of performance.

d. The term or duration.

VI. Imposition for nonpayment of costs.

VII. Necessity of strict compliance.

VIII. Delegation of the power.

IX. Hiring out convicts.

a. Power to hire out.

b. The contract.

c. Hiring by surety.

d. Leasing prisons.

e. Assignability of contract.

f. Custody and management of convicts.

g. Termination of contract.

h. Recovery of agreed compensation.

i. Disposition of proceeds.

X. Effect of delay in execution of sentence.

XI. Discharge because of inability to pay.

XII. Remedy for improper imposition.

I. The power generally.

The right to pass laws imposing hard labor as a part of the punishment for criminal acts is almost universally upheld and seldom questioned, except under constitutional provisions with which particular enactments on that subject have sometimes been supposed to conflict.

This is particularly the case in England, in which nearly if not all of the punishments provided for expressly include hard labor or penal servitude, and it has not been found that the question of the power to do so has ever been raised, though the cases in which such punishment has been inflicted have uniformly treated the statutes providing therefor as valid. The absence of judicial determination on the subject is probably due to the fact that England has no constitutional restrictions upon legislation similar to those under which the question has arisen in the American states.

In this country several of the states, distinctively California, North Carolina, and Vermont, have made provision by constitutional enactment for punishment by hard labor.

And the states acquire an ownership of the services of convicts sentenced to imprisonment for crime through the operation of constitutional provisions prohibiting involuntary servitude, except as a punishment for crime. *Comer v. Bankhead*, 70 Ala. 493.

This provision is found in the Federal Constitution, and in the constitutions of a large majority of the states.

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2. The city council of the city of Topeka has the power by ordinance to require the keepers of boarding houses, restaurants, and hotels to furnish the street commissioner the names of persons liable to poll tax boarding or lodging in their houses, and to impose a fine for refusal to do so.

3. A judgment duly rendered by the police court of a city cannot be held void because of a defense of which the prisoner did not avail himself.

4. Ordinance No. 91 of the city of Topeka, approved May 12, 1870, permitting prison-

But in *Holland v. State*, 23 Fla. 123, it was held that authorizing the employment at hard labor upon public works of all persons imprisoned in the jails under sentence upon convictions of crime or for failure to pay fines and costs, is purely a legislative act which violates no constitutional provision.

And the whole subject was said to be within the power of the legislature, subject only to the constitutional prohibition against cruel and unusual punishments, in *State v. McCauley*, 15 Cal. 420; *People v. Brooks*, 16 Cal. 11; *Mason & Ford Co. v. Main Jellico Mountain Coal Co.* 87 Ky. 463.

Nor is a statute authorizing county commissioners to employ at hard labor upon public works all persons imprisoned in the jails under sentence upon conviction of crime or imprisonment for failure to pay fine and costs rendered unconstitutional, or made the exercise of a judicial function, by the fact that it does not contemplate that its terms shall be pronounced as a part of or incorporated in the record of the sentence of the court, or that they were not so pronounced or incorporated. *Holland v. State*, 23 Fla. 123.

The power to impose such punishment is also inferentially upheld in numerous cases turning upon other questions, but in which punishment by the imposition of labor was incidentally involved. To set forth all such cases would involve the incorporation into this note of a large portion of the criminal law of many of the states, therefore a few only are given by way of example.

Thus in *United States v. Cobb*, 43 Fed. Rep. 570, it was held that an offense punishable by imprisonment not exceeding one year without hard labor is not an infamous offense which must be prosecuted by presentment or indictment.

And in *People v. Hawkins*, 10 Misc. 66, affirmed by the general term in 85 Hun, 43, N. Y. Laws 1894, chap. 698, requiring goods made by convict labor in another state to be branded, labeled, or marked as convict-made when exposed for sale in New York, was held to violate the interstate commerce clause of the Federal Constitution.

And in *Bronk v. Riley*, 50 Hun, 499, N. Y. Laws 1883, chap. 636, prohibiting the use of certain machinery for manufacturing purposes in any of the penal institutions of the state and the employment of the convicts therein at certain labor, was held to apply only to the state prisons and prisons and reformatories constructed by the state and not to a penitentiary erected by a county which was managed by a local board, and the moneys of which are subject to the control of the board of supervisors, though prisoners from other counties might be confined in it under contract with the state.

So in *State v. Martindale*, 47 Kan. 147, and *State v. Kirk*, Id. 151, it was held that a law providing that eight hours shall constitute a day's work for employes of the state, does not apply to the officers, guards, and employes in the penitentiary, for the

ers committed to the city prison for the violation of a by-law or ordinance of the city, necessary for the preservation of order and the welfare of society, to be employed by the city marshal at labor, either on the streets or public work of the city, or in a public or private place, being credited \$1 a day on the judgment for each day's work performed, is not in conflict with section 6 of the Bill of Rights of the Constitution of the state, or article 18 of the Amendments to the Constitution of the United States, prohibiting slavery and involuntary servitude.

5. The marshal and policeman of a city, and any persons aiding and abetting them, are liable in damages for unnecessary cruelties and indignities inflicted by them on prisoners in their charge.

(Allen, J., dissents from proposition 4.)

(February 9, 1894.)

reason that convicts therein are required by law to labor ten hours per day.

And in *State v. Charles*, 14 La. Ann. 650, a slave was held to have the right to appeal from a judgment in a criminal case sentencing him to corporal punishment but acquitting him of any capital offense on a prosecution for having struck a white man so as to cause the shedding of blood, under La. Const., art. 62, granting the right of appeal in all criminal cases punishable with death or imprisonment at hard labor.

And in *Smith v. State*, 8 Lea, 744, the county court was held to have no power in the absence of express legislative authority to adopt rules and regulations giving the superintendent of the guards authority upon his own determination of the facts to inflict corporal punishment upon county convicts sentenced to hard labor in the county workhouse.

And in *Porter v. Waters-Allen Foundry & Mach. Co.* (Tenn.) Feb. 2, 1895, it was held that an employé who voluntarily engages in labor with convicts in his master's employ does not thereby release him from liability for injuries sustained by reason of the master's failure to use the required caution in employing, controlling, and retaining the convicts.

II. Constitutional restrictions.

The constitutional prohibition against involuntary servitude was designed to prevent the re-establishment of slavery once prevailing in some of the states in any form, and does not apply to the punishment of offenders against the law by the imposition of labor. *Monroe v. Meuer*, 35 La. Ann. 1192.

And a misdemeanor is a crime which may be punished by imprisonment at hard labor within the meaning of this provision. *Re Bergin*, 31 Wis. 338.

Thus, requiring the father of a bastard child committed to the county jail in default of payment of the fine and costs adjudged against him to work upon the public roads does not contravene the constitutional provision of the United States and of North Carolina, prohibiting involuntary servitude except as a punishment for crime, as under N. C. Code, § 35, the begetting of a bastard child is a misdemeanor. *Myers v. Stafford*, 114 N. C. 234.

And statutes authorizing punishment for misdemeanors by imprisonment at hard labor do not violate constitutional provisions that no one shall be deprived of life, liberty, or property but by the judgment of his peers or the law of the land. *Durham v. State*, 30 Tenn. 723.

So imprisonment at hard labor is not of itself a cruel or unusual punishment within constitutional provisions prohibiting it. *State v. White*, 44 Kan. 514.

Nor is labor on the public streets a cruel or unusual punishment, or contrary to the policy of the law. *Ex parte Redell*, 20 Mo. App. 122.

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiff in an action brought to recover damages for false imprisonment. *Reversed.*

Statement by Allen, J.:

D. W. Boutwell brought suit in the district court of Shawnee county against the city of Topeka, D. C. Metsker, its mayor, John F. Carter, Joseph Reed, Pat. Wilson, J. W. Gardiner, Henry Bernard, John Ewing, and Ben. Williams, charging them with assault and battery, false imprisonment, and other wrongs and indignities connected with such imprisonment, for which he demanded damages. A demurrer on the part of the city of Topeka to the petition was sustained. Demurrers of the other defendants were overruled. Metsker, by his answer, denied gen-

usual punishment, or contrary to the policy of the law. *Ex parte Redell*, 20 Mo. App. 122.

The prohibition against cruel and unusual punishments applies only to those of a barbarous character unknown to the common law. *State v. McCauley*, 15 Cal. 429; *People v. Brooks*, 16 Cal. 11.

Thus imprisonment at hard labor for an offense of minor importance is not a cruel or unusual punishment within constitutional prohibitions merely because it is much more severe than the punishment imposed for similar offenses of much greater magnitude. *State v. White*, *supra*.

And Kan. Laws 1887, chap. 150, § 1 (Gen. Stat. 1889, par. 2152, § 41), making illicit intercourse with a female under eighteen years of age a felony for which any male person may be punished by imprisonment in the penitentiary at hard labor for a period not less than five nor more than twenty-one years, does not conflict with section 9 of the Bill of Rights prohibiting cruel and unusual punishments. *Ibid*.

Nor is one hundred dollars fine or the alternative of five months' work excessive punishment for an act of fornication by a young woman whose position, pecuniary or physical, is not shown to be special or peculiar. *Hunt v. State*, 31 Ga. 140.

And a sentence to imprisonment at hard labor for two years for obtaining \$3 by means of a fraudulent device imposed under a statute making two years the minimum and fixing no maximum penalty is not cruel or unusual within the constitutional prohibition. *State v. Williams*, 12 Mo. App. 415, affirmed 77 Mo. 310.

Nor is a fine of \$50 and imprisonment at hard labor in a house of correction for three months for maintaining without a license a tenement for the illegal keeping and sale of intoxicating liquors an excessive, cruel, or unusual punishment. *Pervear v. Massachusetts*, 72 U. S. 5 Wall. 473, 18 L. ed. 603.

The prohibition of the Federal Constitution against cruel and unusual punishments does not apply to state legislation but to national only. *Ibid*.

So a statute authorizing the imprisonment of the defendant in a criminal action in the county jail, or at the discretion of the court at hard labor for the county for failing to pay or confess judgment for the costs, does not contravene a constitutional provision prohibiting imprisonment for debt, as in criminal cases the costs are not a debt. *Morgan v. State*, 47 Ala. 84.

And imprisonment for the costs incurred by the state under sentence to hard labor for their satisfaction does not violate the constitutional prohibition, though the officers and witnesses have recourse for their fees against the fine and forfeiture fund of the county only. *Bailey v. State*, 37 Ala. 44.

And in *Nelson v. State*, 46 Ala. 125, it was said

erally the allegations of the petition. Carter alleged that he was the duly appointed and acting marshal of the city of Topeka; that on the 14th of September, 1887, the plaintiff was tried before one Joseph Reed, police judge of said city, upon a charge of unlawfully refusing to give, upon request, to the street commissioner of said city, the names of certain persons, liable to pay a poll tax, then lodging in a certain boarding house, of which said plaintiff was the keeper; that the plaintiff was found guilty of said charge, and sentenced to pay a fine of \$25, and committed to the city prison until such fine should be paid; that the plaintiff was also tried, on the same day, before said police judge, upon a charge of resisting an officer in the discharge of his duty, found guilty, and sentenced to pay a fine of \$75, and com-

mitted to the city prison for the nonpayment thereof; that it became his duty, as marshal, to confine and safely keep the plaintiff until he should comply with said judgments; that, the plaintiff being an able-bodied man, the defendant as marshal did, by virtue of Ordinance No. 91 of said city, command the plaintiff to work at breaking rock on the rock pile, which the plaintiff refused to do; that in his treatment of the plaintiff he used no more force than was necessary to execute the judgment of the court, and perform his duties as the custodian of such prisoner. The defendant Wilson alleges that he was a policeman of the city; that a warrant was duly issued by the police judge and placed in his hands, commanding him to arrest the plaintiff on a charge of unlawfully refusing to furnish the street commissioner the names

that a sentence to hard labor until the costs of the prosecution are paid at a designated rate per day is not equivalent to a sentence of imprisonment until the costs are paid, and does not violate the constitutional prohibition.

To hold a convict for any contractual liability for advances made by his surety, however, whether in money or in property, would be imprisonment for debt within the meaning of the Constitution. *Smith v. State*, 33 Ala. 40.

Nor is a statute authorizing the letting and hiring of labor of convicts to be performed at designated coal mines an *ex post facto* law as to convicts previously sentenced when they were required to be kept at hard labor at the prison previous to the enactment thereof. *Mason & Foard Co. v. Main Jellico Mountain Coal Co.* 87 Ky. 467.

But in *Ex parte Hunt*, 23 Tex. App. 361, it was held that a law reducing the rate per day allowed a county convict as credit on his fine and costs when working it out by manual labor does not apply to a judgment rendered prior to its enactment, as it would require the infliction of a greater punishment and therefore it would be *ex post facto*.

So the letting of the labor of convicts to a corporation under legislative authority in consideration of their being fed, clothed, and provided for by the hirer is not a donation or gratuity within the meaning of the Georgia constitutional provision requiring the concurrence of two thirds of each branch of the general assembly to the grant of a donation or gratuity. *Georgia Penitentiary Co. v. Nelma*, 56 Ga. 499, 38 Am. Rep. 798.

The constitutional prohibition against fixing the price of manual labor by law refers exclusively to contract labor and does not apply to a sentence imposing a fine for an offense and requiring the offender in default of payment to labor a designated rate per day until the same is paid. *Monroe v. Meuer*, 35 La. Ann. 1192.

Nor is Kentucky Act of April 10, 1878, under which penalties for misdemeanors in certain cases can be satisfied by requiring the accused to labor for the county for a designated period unconstitutional, as discriminating between the rich and poor because the rich are able to satisfy their fines with money. *Com. v. Sherley*, 11 Ky. L. Rep. 641.

And an act authorizing the courts of a county to sentence persons convicted of misdemeanors to confinement at hard labor in the house of correction is not unequal in its operation and therefore unconstitutional because it applies to that county only where by another statute all the boards of county supervisors in the state are authorized to establish houses of correction for the confinement at hard labor of persons convicted of similar offenses. *Re Bergin*, 31 Wis. 353.

Tennessee Act of 1814, chap. 83, however, provid-

ing that a convict shall be further held in the workhouse after working out the imprisonment and all the costs in the case, to work out all costs which may accrue after conviction for clothing and other necessities, violates Tennessee Bill of Rights, section 8, declaring that no man shall be taken or imprisoned or deprived of his liberty but by the judgment of his peers or the law of the land, as the duration of such imprisonment would be determinable alone by the superintendent or keeper of the workhouse. *Knox v. State*, 9 Baxt. 202.

And South Carolina Act of 1835 as amended by Act December 20, 1862, is unconstitutional under S. C. Const. 1868, art. 1, § 19, limiting the jurisdiction of justices in criminal cases to offenses for which the punishment does not exceed a fine of \$100 or imprisonment for thirty days, so far as when taken in connection with S. C. Gen. Stat., § 2615, it authorizes the addition to a sentence of imprisonment thereunder, a requirement of hard labor. *State v. Williams*, 40 S. C. 373.

And a trial justice has no power thereunder to sentence a person convicted of the offense of carrying concealed weapons to be imprisoned at thirty days' hard labor. *Ibid*.

Sentence to imprisonment with hard labor is an infamous punishment within the provision of the Federal Constitution requiring prosecution of infamous crimes by presentment or indictment. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89.

III. Necessity of express authority.

The rule that express statutory authority is necessary to the imposition of hard labor as a punishment for crime is almost universal.

The word "imprisonment" alone and unqualified, when used in criminal statutes, does not import imprisonment at hard labor. *State v. Hyland*, 36 La. Ann. 799; *State v. Ryder*, Id. 204.

Thus in *United States v. Cobb*, 43 Fed. Rep. 570, it was said that the only case in which a person can be sentenced to a jail or penitentiary not exceeding one year under federal statutes is where the statutes prescribe hard labor as part of the punishment and leave the term of imprisonment in the discretion of the court, citing *Robinson's Case* tried at a former term.

So a statute authorizing a city court to punish offenses by fine and imprisonment confers no authority to impose a sentence to labor on the streets as a punishment. *Ex parte Reynolds*, 37 Ala. 138.

And a sentence of imprisonment at hard labor in state prison for the term of one year upon conviction of a misdemeanor punishable only by imprisonment in a penitentiary or county jail for not more than one year or by a fine of not more than \$500 or by both is without authority and void. *People v. Kelly*, 97 N. Y. 212.

of persons, liable to poll tax, lodging in a boarding house of which he was keeper; that he proceeded to serve such warrant; that the plaintiff resisted arrest with deadly weapons; that he used no more force in making the arrest than was reasonably necessary. All of the other defendants justified under the processes referred to in the answers of Carter and Wilson. Ordinance No. 426, providing for the collection of poll taxes, contains this section: "Sec. 4. It is hereby made the duty of all proprietors, or keepers of all boarding houses, restaurants, or hotels in the city of Topeka, to furnish to the street commissioner, when required so to do, the names of all persons boarding or lodging in their houses, and any such person, who shall neglect or refuse so to do, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof

in the police court of said city, be fined in the sum of not less than \$5.00 nor more than \$25.00 for each offense." Ordinance No. 36, relating to misdemeanors, contains the following section: "Sec. 14. That any person conducting himself in a riotous or disorderly manner, or who shall resist or oppose any officer in the discharge of his duty, or who shall openly use profane or indecent language, or indecently expose his or her person, or commit any nuisance upon any street, sidewalk, alley, or other public place of the city, shall be fined in a sum not less than \$1.00 nor more than \$100.00." Ordinance No. 91 provides that persons committed to the city prison may be compelled by the marshal to work at hard labor, and, in case of refusal to so work, that they shall be kept in close confinement, and fed on bread and

And upon whom a fine is imposed with a direction that he be imprisoned in case of nonpayment under Cal. Penal Code, section 241, authorizing punishment by a fine or by imprisonment or by both, cannot be required while so imprisoned for nonpayment of the fine to perform labor on the streets or other public works. *Ex parte Kelly*, 85 Cal. 154.

So a judgment of imprisonment for contempt of court pursuant to California Code, § 1446, allowing imprisonment in the county jail until the fine imposed is paid or satisfied by such imprisonment or otherwise does not authorize or justify imprisonment at hard labor. *Re Fil Kl*, 80 Cal. 201.

And a sentence to imprisonment at hard labor under Pennsylvania Act of January 29, 1820, cannot be imposed on conviction for fraudulent insolvency and concealment of effects in order to derive future benefit, being denounced by Pennsylvania Act of March 18, 1818, for which the prescribed punishment is a term of imprisonment only. *Guldin v. Com.*, 6 Serg. & R. 554.

So a sentence to imprisonment in the county jail at hard labor is illegal under a statute imposing a punishment of imprisonment in the penitentiary or county jail in the discretion of the court, though hard labor is made an essential part of a sentence to imprisonment in the penitentiary by a prior statute. *Daniels v. Com.*, 7 Pa. 371.

And Purdon's Pennsylvania Digest, 645, empowering the court to extend the period of confinement in certain enumerated cases to seven years, does not include larceny, the punishment for which is specially fixed by statute and cannot exceed three years' imprisonment at hard labor. *Grimes v. Com.*, 15 Serg. & R. 74.

And stealing property not exceeding \$100 in value in a dwelling house in the night-time is punishable under Mass. Rev. Stat., chap. 126, as a simple larceny only, by imprisonment for not more than one year, and a sentence for that offense to solitary confinement in addition to one year's confinement at hard labor is reversible error. *Tully v. Com.*, 4 Met. 357.

Nor can a person convicted of a misdemeanor who is sentenced to the county workhouse to work out the fine and costs in default of paying or securing the same pursuant to Tennessee Act of 1825, chap. 83, be detained to work out the tax on litigation imposed by Milliken & Vertrees' Code, § 612, upon the party taxed with the costs or prosecutions by presentment or indictment, as it is not costs or collectible as such but a specific tax imposed for revenue purposes only. *Johnson v. State*, 85 Tenn. 325.

And a sentence for keeping a nuisance under Iowa Code, section 4082, providing that the person convicted may be imprisoned until the fine is paid, 27 L. R. A.

to imprisonment until fine and costs are paid by labor, is erroneous as Iowa Code, section 4508, limits the power of the court to direct imprisonment to one day per every three and one third dollars of the fine, and under section 4738 thereof one sentenced to labor is entitled to credit of one dollar and a half a day on the judgment. *State v. Jordan*, 80 Iowa, 387.

And a trial justice has no power to sentence a person convicted of the offense of carrying concealed deadly weapons to be imprisoned at thirty days' hard labor under A. C. Const. 1866, art. 1, § 12, limiting the jurisdiction of justices in criminal cases to offenses for which the punishment does not exceed a fine of \$100 or imprisonment for thirty days, and South Carolina Act, December 20, 1862, limiting the punishment for that offense to a fine of \$100 or to imprisonment for thirty days. *State v. Williams*, 40 S. C. 873.

So additional hard labor in default of the payment of a fine cannot be imposed under a statute declaring that the punishment for the offense shall not exceed a stated number of years with or without hard labor, also authorizing the imposition of a fine where the accused is sentenced to imprisonment at hard labor for the entire term and to the payment of a fine in addition thereto. *State v. Hyland*, 38 La. Ann. 709; *State v. Ryder*, Id. 294.

Nor can such additional labor be imposed where a fine has not been imposed as the penalty or a part of the penalty for the crime in question, under Louisiana Act No. 88 of 1878, section 1, providing for imprisonment at hard labor, and that the defendant may be charged with the costs of the prosecution, and that when a fine is imposed as a part of the penalty liquidation of such fine and costs may be enforced by sentence of additional labor. *State v. Brannon*, 34 La. Ann. 942.

In *Weaver v. Com.*, 29 Pa. 445, however, it was held that the word "hard" in a sentence to imprisonment at hard labor, following the language of a previous statute, will be treated as surplusage and not as vitiating the sentence when the later acts upon the subject exclude it.

And in *Hodge v. Queen* (Ontario), 5 Crim. L. Mag. 391, it was held that power to impose punishment by imprisonment for enforcing any law, conferred by the British North American Act No. 15, § 92, includes the power to impose its usual accompaniment hard labor.

IV. Exception when labor is a part of the prison discipline.

Where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is not in excess

water only, until they consent to work. On the issues so joined the case was tried. After the testimony was concluded, special questions for the jury to answer were filed and handed up to the court by the defendants' counsel, with the instructions asked by the defendants, but no announcement of the fact was made, and plaintiff's counsel did not know, at that time, that such special questions were presented. After the court had charged the jury, and after the opening argument for the plaintiff and the first argument for the defendants had been made, the court's attention was called to the special questions by the defendants' counsel just as the court adjourned for dinner. Thereupon the court handed the questions to counsel for plaintiff, which was the first knowledge they had of their existence, who, upon the opening of the

court at 2 o'clock, objected to the presentation of said special questions, and also asked an opportunity to be heard by the court respecting the legality, fitness, and relevancy to the issue of said proposed questions, to which counsel for the defendants objected. Thereupon the court refused to submit the special questions to the jury. The jury were charged that section 4, under which the original complaint was filed in the police court, was void, and plaintiff's arrest unlawful; that, such being the case, the plaintiff could not be guilty of any offense in resisting said officer in making said arrest; that the judgment of the police court was illegal, and the subsequent imprisonment of the plaintiff was unlawful and false. It was shown on the trial that on the 18th day of September, 1887, a complaint was filed by Wilson, charging

of the power conferred. *Ex parte Karstendick*, 96 U. S. 396, 23 L. ed. 889.

This ruling was cited with approval in *Ex parte Mills*, 126 U. S. 263, 34 L. ed. 107, and *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, but both cases turned on other questions.

Thus criminals sentenced by United States courts to the penitentiaries of a state under a statute making them subject to the same discipline and treatment as convicts sentenced by the state courts are subject to hard labor as a part of the imprisonment when by the laws of the state prisoners are subject thereto unless otherwise provided in the sentence, although hard labor was not made a part of the punishment by the terms of the sentence. *Ex parte Geary*, 2 Biss. 485.

And in *Millar v. State*, 2 Kan. 174, "penitentiary" was held to be an English word signifying a prison or place of punishment in which convicts sentenced to hard labor are confined by authority of law, and a sentence to hard labor in the penitentiary was sustained though no statute authorized punishment by confinement at hard labor.

So a sentence to imprisonment at hard labor where the statutory penalty for the offense is imprisonment only is not invalid or ineffectual where hard labor is made a consequence of the imprisonment by statute as the feature of hard labor would have been implied in a sentence of imprisonment only. *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, reversing 57 Fed. Rep. 200; *Brown v. State*, 74 Ala. 478; *Miles v. People* (N. Y.) 4 Cent. L. J. 507.

And a judgment sentencing a prisoner to the state prison need not expressly state that he be put to hard labor where hard labor is a component part of the confinement in such prison. *Gibbs v. State*, 45 N. J. L. 379, 46 Am. Rep. 782; *People v. Sadler*, 97 N. Y. 149; *State v. Dick*, 10 La. Ann. 461.

Such a sentence implies that the convict is to be subjected to the treatment prescribed for others confined at the same place for similar acts. *State v. Dick*, *supra*.

And a statutory provision that the convict is to be received, kept, and employed in the manner prescribed by law is simply directory to the keeper of the prison and not a part of the sentence, the omission of which would invalidate it. *People v. Sadler*, *supra*.

So a finding by the jury, on trial of a slave for murder, of guilty without capital punishment in accordance with the provisions of Louisiana Act of 1846, page 118, will be taken as intending that the defendant shall be sentenced to hard labor for life in the state penitentiary as provided in section 2 thereof. *State v. Dick*, *supra*.

V. Construction of statutes conferring the power generally.

An act upon which a summary conviction is 27 L. R. A.

founded, empowering justices to impose either fine or hard labor at their option, authorizes them to impose hard labor for default in the payment of a fine. *Queen v. Justices of Tynemouth*, L. R. 16 Q. B. Div. 647.

Under S. C. Gen. Stat., § 2615, it is within the discretion of the judge pronouncing a sentence for selling liquor without a license in violation of Gen. Stat., § 1734, whether it shall be in the penitentiary or the county jail and whether it shall be with or without hard labor. *State v. Boyd*, 35 S. C. 269.

And in *State v. Jack*, 14 La. Ann. 385, it was said that both corporal punishment and imprisonment at hard labor might be inflicted on a slave under Louisiana Act of 1837, p. 233, giving the court power to commute the sentence and inflict a lesser punishment where the crime charged is punishable with death or imprisonment at hard labor for life.

And in *State v. Turner*, 18 S. C. 103, it was held that South Carolina Act of 1878 (16 Stat. at L. 453) providing that where imprisonment is authorized by a statute a prisoner convicted thereunder might be sentenced to imprisonment in jail or penitentiary with or without hard labor is a general law applicable to statutes afterwards enacted as well as to those previously in force.

So article 74 of Texas Penal Code conferring power upon juries to direct that confinement may be solitary in whole or in part to labor at its discretion where the penalty for the offense committed is imprisonment in the penitentiary for life does not conflict with article 612 thereof as originally adopted providing that murder might be punished by death, solitary confinement in the penitentiary for life, confinement to labor for a term of years, etc. *Cockrum v. State*, 24 Tex. 304.

And imprisonment at hard labor as a punishment for misdemeanors is authorized by Milliken & Vertrees' Code, section 6250, which is not repealed by Tennessee Workhouse Law of 1875 providing for imprisonment at hard labor for fines and costs only, which does not purport to be a revision of the former law. *Durham v. State*, 39 Tenn. 723.

So La. Stat. April 6, 1843, § 7, authorizing juries to pronounce sentence of death, imprisonment at hard labor for life, or imprisonment for a shorter term in cases in which capital punishment or imprisonment at hard labor for life is inflicted for a crime committed by a slave, was not repealed by Louisiana Statutes of June 1, 1846, authorizing the jury in capital cases to qualify their verdict by adding "without capital punishment," as this was intended for the government of free persons alone. *State v. Lewis*, 3 La. Ann. 398.

And where a term of two years is fixed on conviction for forgery it is within the discretion of the court under Ala. Code 1876, §§ 4342, 4450, to elect whether it shall be hard labor for the county or

the defendant with a violation of section 4 of Ordinance No. 426, above quoted. A warrant was issued on such complaint, and placed in the hands of Wilson, who was a policeman, to serve. The plaintiff resisted arrest. Wilson called others to his assistance, overpowered the plaintiff, put him in a wagon, and took him to the city prison, where he was kept until the following day. On the 14th he was taken before the police judge for trial. He refused to plead. Thereupon a plea of not guilty was entered for him, witnesses were examined, he was found guilty and fined \$25, and ordered to stand committed until such fine should be paid. The same day another complaint was filed, under section 14 of Ordinance No. 36, above mentioned, charging the plaintiff with resisting an officer in serving a warrant on plaintiff. He was arraigned on this charge

also, and refused to plead. A plea of not guilty was entered for him. He was tried, convicted, and sentenced to pay a fine of \$75 for this offense, and committed to the city prison. The marshal kept him in custody under these commitments until the 17th day of September, when he was released from custody by giving a bond in a habeas corpus proceeding in the district court of Shawnee county, and afterwards, on the 8th day of November, 1887, was discharged under such proceedings by said court. The jury rendered a verdict in favor of the plaintiff against all of the defendants for \$2,100. The defendants bring the case here for review.

Messrs. Douthitt, Jones & Mason, for plaintiffs in error:

The court erred in this case in refusing to

imprisonment in the penitentiary. *Hobbs v. State*, 75 Ala. 1.

In Texas it is deemed to be the duty of the court in a trial for murder under the constitution and statutes to inform the jury by the charge that the punishment therefor might be commuted to imprisonment at hard labor for life, a failure to perform which is a ground for the reversal of a conviction. *Marshall v. State*, 33 Tex. 664.

And an instruction to the jury that if they find the defendant guilty of murder they will assess the punishment at death or at solitary confinement in the penitentiary for life, etc., intended to be in conformity to Texas Penal Code, article 74, is erroneous as it requires them to make the punishment of solitary confinement if they fix it at imprisonment for life and does not leave them the discretion contemplated by article 612 thereof to make the confinement solitary or the whole or a part of it at labor. *Cockrum v. State*, 24 Tex. 394.

So Tex. Const., art. 5, § 8, empowering the jury in a capital case to substitute imprisonment for life at hard labor in lieu of the death penalty, is not a repeal of the former law inflicting the death penalty or an amelioration thereof which will entitle a defendant whose offense was committed before the enactment thereof to elect whether he will be tried under the old or the new law as provided for in Texas Criminal Code, article 14. *Dawson v. State*, 33 Tex. 491.

a. Upon what courts conferred.

The power of the court to impose labor as a punishment usually if not universally depends upon its jurisdiction to try the offense for which such punishment is prescribed.

In *Ex parte McKivitt*, 55 Ala. 236, however, it was held that authority to sentence to hard labor for the county for the payment of costs was confined by the express words of the statute to county, circuit, and city courts, and did not extend to a justice of the peace.

But in *Re Long*, 37 Ala. 44, it was conceded by the court in argument that the amendment incorporated in Ala. Code 1886, § 4504, conferred it upon all courts having jurisdiction to try and convict of criminal offenses.

In South Carolina the jurisdiction of justices of the peace in criminal cases is limited to offenses for which the punishment does not exceed a fine of \$100 or imprisonment for thirty days, by article 1, section 19, of the Constitution of 1868, thus prohibiting the imposition of labor. *State v. Williams*, 40 S. C. 373.

b. For what crimes imposed.

The object of this subdivision is not to detail all 37 L. R. A.

the crimes and misdemeanors which have been made subject to punishment by the imposition of labor, which would seem to be impracticable, but merely to show what has been construed to be within and what not within such statutes in cases in which the question has been raised.

Thus Pennsylvania Acts March 7, 1789, April 5, 1790, and April 4, 1807, substituted punishment by imprisonment at hard labor in the place of whipping and the pillory as practiced at common law.

Under these statutes it was held that hard labor might be inflicted on persons convicted of altering, publishing and passing a bank note of another state with intent to defraud, in *Lewis v. Com.* 2 Serg. & R. 531.

And that conspiracy to alter forged notes of a foreign bank with intent to cheat and defraud is thus punishable, in *Clary v. Com.* 4 Pa. 210.

And the rule was applied to conspiracy to defraud by use of false bank notes, in *Collins v. Com.* 3 Serg. & R. 220.

And to publishing a counterfeit note of the Bank of America, in *Com. v. Searle*, 2 Binn. 332, 4 Am. Dec. 446.

So in *Com. v. Morton*, 1 Kulp, 276, it was held that Pennsylvania Code of 1860 does not repeal prior laws as to attempts to commit crimes and an attempt to commit burglary is punishable by seven years' imprisonment at hard labor.

And a sentence to imprisonment at hard labor in the county jail and to pay a fine of \$150 and cost of prosecution is proper in Pennsylvania, on conviction of a keeper of the common jail for voluntarily suffering three prisoners to escape who were charged respectively with arson, counterfeiting, and larceny. *Weaver v. Com.* 29 Pa. 445.

But an assault with intent to pick a pocket is not an offense for which infamous corporal punishment could have been inflicted at common law and cannot be punished by imprisonment at hard labor, under Pennsylvania Act of April 5, 1790. *Rogers v. Com.* 5 Serg. & R. 463.

In North Carolina the father of a bastard child who is committed to jail in default of payment of the fine and costs imposed upon him in bastardy proceedings may, under § 8448 of the Code empowering the county authorities to provide for the employment on its public highways of all prisoners confined within its jail, be required to work on such highways until the fine and costs are paid or he is otherwise discharged by law. *Myer v. Stafford*, 114 N. C. 234.

The offenses for which it was intended by the Kentucky Statute (Gen. Stat. chap. 29) to prescribe the punishment of hard labor, are such as may be punished thereunder by fine and imprisonment in the county jail and no offenses for which a greater

submit to the jury special questions asked for as appears in record.

Code Civ. Proc. par. 286; *Wichita & W. R. Co. v. Feckheimer*, 36 Kan. 45; *Wyandotte v. Gibson*, 25 Kan. 243; *Atchison, T. & S. P. R. Co. v. Plunkett*, Id. 198; *Bent v. Philbrick*, 16 Kan. 190.

Whether section 4 of Ordinance 426 is constitutional and legal or not, the warrant issued under the same was a protection for the police officer, if he proceeded to execute the same in good faith and in a reasonable manner.

Cooley, Torts, 459; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181, and full discussion and authorities in *note*, pp. 190, 209, 21 Am. Dec.

Mr. W. A. S. Bird, also for plaintiffs in error:

The warrants were regularly issued, and are

or other punishment can be inflicted are within its contemplation, and the punishment of hard labor cannot be imposed in addition to exclusion from office and suffrage. *Eldridge v. Com.* 87 Ky. 365.

So in Texas seduction is a felony, and one convicted of that crime cannot be hired out for the purpose of collecting the fine imposed upon him as a punishment therefor under Tex. Rev. Stat., art. 3605, providing that a person convicted of a misdemeanor or petty offense who shall be committed to jail in default of payment of the fine and costs adjudged against him may be hired out until the money received for his fine is sufficient to liquidate the same in full. *Ward v. White*, 86 Tex. 170.

And in California the power to provide for the working of prisoners is confined to such as are consigned to the county jail as a punishment and does not extend to cases in which the punishment inflicted is a fine and the punishment a means adopted for its collection. *Re Fil Kl*, 80 Cal. 201.

And a prisoner confined in a state prison who is held and imprisoned at hard labor solely for the purpose of collecting a fine imposed as part of his punishment after he has served the full term of imprisonment adjudged against him, will be discharged on habeas corpus, as he then ceases to be a convict and can be confined only without labor, and cannot be confined in an institution in which all prisoners are required to labor. *Ex parte Arras*, 78 Cal. 304.

So a contempt of court is not a misdemeanor within Cal. Stat. 1889, § 30, p. 239, authorizing the board of supervisors of a county to require a prisoner confined in a county jail for a misdemeanor to be put at work. *Re Fil Kl*, *supra*.

In *State v. Henderson*, 47 La. Ann. 642, a sentence of one year at hard labor for petty larceny was upheld under La. Rev. Stat., § 812, that section not having been repealed by Act No. 124 of 1874.

c. Place of performance.

What particular penitentiary or prison the labor is required to be performed in under the statutes conferring the right to impose it is all that is intended to be treated under this head; as to place of performance where the labor of the convicts has been leased or hired out, see *infra* heading: *Hiring out convicts*.

The place of imprisonment or hard labor is determined under the Alabama statutes, not by the discretion of the jury, but by the period of time for which it is imposed. If the term is more than two years it must be in the penitentiary, and if two years or less and more than one it may in the discretion of the judge, be either imprisonment in the penitentiary or in the county jail or to hard labor for the county, and if twelve months or less whether by imprisonment or by hard labor it must

fair on their faces, and are a complete protection to the officers.

Cooley, Torts, 2d ed. p. 533, and authorities there cited; Newell, Malicious Prosecutions, § 71, and authorities cited; *Cassier v. Fales*, 139 Mass. 461; *Stewart v. Hawley*, 21 Wend. 552; *Hann v. Lloyd*, 50 N. J. L. 1; *Henke v. McCord*, 55 Iowa, 378; *Trammell v. Russellville*, 84 Ark. 105, 36 Am. Rep. 1; *Leib v. Shelby Iron Co.* 97 Ala. 626; *Re Durant*, 60 Vt. 176; *Re Miles*, 52 Vt. 609.

Messrs. G. C. Clemens and D. Overmayer for defendant in error.

Allen, J., delivered the opinion of the court:

Many questions are discussed by counsel. We shall consider only such as are necessary for the disposal of the case. The defendants

be in the county jail or to hard labor for the county. *Gunter v. State*, 83 Ala. 94.

Thus Ala. Code 1886, § 3733, fixing the sentence for manslaughter in the first degree at not less than one nor more than ten years' imprisonment in the penitentiary, is qualified by § 4492 thereof, subsequently enacted, providing that when the sentence is to hard labor for twelve months or less it must be to imprisonment in the county jail or to hard labor for the county, so that when the jury wishes to fix one year as the term there is no alternative but to prescribe imprisonment in the county jail or at hard labor for the county. *Ex parte Brown* (Ala.) May 15, 1894.

And Ala. Code 1886, § 4492, authorizing imprisonment in the penitentiary, includes hard labor for the state and is not confined to hard labor for the county, so that a conviction of manslaughter with thirty months' hard labor will authorize a sentence of imprisonment in the penitentiary. *Gunter v. State*, *supra*.

So a convict liable to punishment by solitary confinement and imprisonment at hard labor in the state prison may, under Mass. Rev. Stat., chap. 143, § 19, be sentenced to the house of correction for a term not exceeding three years, but he is not liable to sentence for such term in the county jail for the same offense, the house of correction being a substitute for the state prison in such case but not for the county jail. *Stevens v. Com.* 4 Met. 800.

Alabama Code, section 3733, providing that a person convicted of manslaughter in the first degree must at the discretion of the jury be imprisoned in the penitentiary for not less than one nor more than ten years is amended by section 4492 thereof, subsequently enacted, providing that when the sentence is for twelve months or less it must be to the county jail, or to hard labor for the county by limiting the discretion of the jury as to the place of punishment in such cases. *Zaner v. State*, 90 Ala. 651; *Henderson v. State*, 98 Ala. 35.

And Ala. Code, § 4296, providing that any person convicted of murder in the second degree must be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than ten years at the discretion of the jury, is repealed by section 4450 thereof, subsequently enacted, providing that when the period of punishment or labor is more than two years the sentence must be to the penitentiary so far as the provision for hard labor for the county and for punishment for a longer period than two years is concerned. *Steele v. State*, 61 Ala. 213.

And imprisonment at hard labor in the county workhouse may be imposed as a punishment for a misdemeanor under Milliken & Vertrees' Code (Tenn.) § 6259, providing that where a person is by law liable to be imprisoned in the county jail for

stated, in writing, pertinent and material questions of fact to be submitted to the jury. These were filed with the clerk and handed to the court, together with special instructions asked, at the conclusion of the testimony. This was certainly in good time. It appears that the attention of plaintiff's counsel was not called to the fact that special questions were asked until after the opening argument by the plaintiff and one argument on behalf of the defendants, when the defendants' counsel again called the attention of the court to the questions. The court then refused to submit them. The only excuse hinted at in the record is that plaintiff's counsel asked leave to discuss the propriety of the questions, to which the defendants objected, and that they were not submitted

in time. In this the court erred. *Bent v. Philbrick*, 16 Kan. 190; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 196; *Wyandotte v. Gibson*, Id. 236; *Wichita & W. R. Co. v. Fockheimer*, 36 Kan. 45. When counsel for the defendants presented these questions to the court, and requested their submission, they had done all the law required of them. It might have been well for the court or counsel to have called the attention of the opposing party to them, but we cannot hold that a failure to do so deprived the defendants of their right under the statute. We also think, where there was no court rule prescribing the time within which such questions might be presented, that the defendants were still in time when they called the attention of the court and opposing counsel to

safe keeping or punishment, confinement in the workhouse, if one be provided, may in the discretion of the court or justice be substituted. *Durham v. State*, 88 Tenn. 722.

Under North Carolina Code, § 2443, the disposition of persons imprisoned for the nonpayment of costs rests in the discretion of the county commissioners and the court has no power in sentencing a defendant to a term of imprisonment to provide that he be confined in the workhouse of the county after his imprisonment has terminated until the costs are paid. *State v. Norwood*, 98 N. C. 573.

So in *Helton v. Miller*, 14 Ind. 377, it was said that if the legislature sees fit to authorize the working of convicts outside of the prison bounds no one but the convicts themselves can dispute the validity of the law and refuse to obey it while it remains upon the statute books.

But convicts in the state prison cannot be worked outside of the prison and adjoining state grounds under 2 Ind. Rev. Stat., § 59, p. 424, providing that persons sentenced to state prison shall be kept at hard labor therein, and Ind. Act of 1897, sections 10, 22, providing for letting of convict labor to the highest bidder and the continuance of existing contracts, but nowhere in terms authorizing such outside labor. *Ibid.*

And a convict lawfully subject to imprisonment in the penitentiary of the state, who is confined in a branch prison in charge of a deputy warden by authority of the board of prison inspectors and worked in a coal mine by a lessee, is not illegally confined and entitled to release on habeas corpus under Tennessee Act 1889, chap. 204, authorizing branch prisons and permitting the lessees of the penitentiary in such a case to work the convicts at any place subject to the rules prescribed thereby. *State v. Jack*, 90 Tenn. 614.

A prisoner under conviction for a misdemeanor who refuses to pay the fine and costs adjudged against him may be required by the commissioners' court of the county, under Tex. Rev. Stat., arts. 3591-3597, to labor on any public improvement in process of construction though there is neither a workhouse nor a farm in the county. *Ex parte Bogle*, 20 Tex. App. 127.

A sentence for a period not exceeding one year for an offense against the United States punishable by hard labor may be executed in a state penitentiary under U. S. Rev. Stat., § 5541, providing for such execution when the sentence is for a longer period than one year, and § 5542 thereof, providing for such execution where the sentence is to imprisonment and confinement at hard labor, as the former section applies only to imprisonment without labor while the latter applies to imprisonment with labor. *Ex parte Friday*, 43 Fed. Rep. 916.

See also, as to imprisonment in state penitentiaries for crimes against federal laws, United States 27 L. R. A.

cases cited *supra* under the heading: *Exception where labor is part of the prison discipline.*

The custody of prisoners ordered to work upon public roads may be awarded to a responsible person as overseer and custodian, under Cal. Penal Code, §§ 1613, 1614, providing that certain prisoners may be required to labor on the public works or ways of the county, and Cal. Laws 1891, p. 309, sec. 25, subsec. 30, requiring such work to be done under the direction of some responsible person, notwithstanding Cal. Pol. Code, sec. 4176, subsec. 6, providing that the sheriff must take charge of and keep the county jail and the prisoners therein. *Hicks v. Folks*, 97 Cal. 241.

d. The term or duration.

The duration of the period of labor is usually measured by the length of the sentence or by some designated portion thereof.

Thus the term of a convict sentenced to imprisonment in the penitentiary at hard labor for two years from the date of the sentence who is not transferred to the penitentiary until a later date because of an appeal taken by him, begins at and should date from the time he is actually transferred to it. *Ex parte Duckett*, 15 S. C. 210, 40 Am. Rep. 694.

And a prisoner sentenced to imprisonment at hard labor, who escapes and remains for a time at large, must serve at hard labor after his recapture for a period equal to that part of his sentence which had not expired at the time of the escape, as the terms of the judgment cannot be satisfied except by the service of the prisoner for the specified time at hard labor. *Re Edwards*, 43 N. J. L. 555, 39 Am. Rep. 610.

So a rule adopted by workhouse commissioners that when a prisoner is arrested he may at once go to work voluntarily in the workhouse and the time he so works will be credited upon his sentence is unauthorized and void and will not be allowed to shorten the term of service under a conviction under Tennessee Act 1875, section 1, providing that a person convicted of a misdemeanor who fails to pay or secure the fine and cost adjudged against him shall be confined in the county workhouse after the term of his imprisonment, if any, has expired until he works out such fine and costs, as the sentence can only date from its rendition. *Vanvabry v. Staton*, 88 Tenn. 337.

A prisoner cannot, under Massachusetts Revised Statutes, chap. 130, § 8, be sentenced to hard labor for the maximum term provided for by the statute designating the term of imprisonment without distributing it specifically into periods of solitary confinement and confinement at hard labor, and add thereto days of solitary confinement; the aggregate of both must be kept within the limit. *Stevens v. Com.* 4 Met. 300.

them before the noon adjournment, and before defendants' argument was concluded. The error committed in this particular compels a reversal as to all of the defendants. It is, therefore, unnecessary to consider errors urged by the defendant Metaker alone.

Upon a new trial the court will be required to pass on the validity of the ordinance, and the legal process issued thereon. It seems, therefore, to be necessary for us to also consider these matters. The trial court held section 4 of Ordinance 426 void. We fail to perceive any good reason for so holding. It is a provision to enable the officers of the city to learn the names of persons subject to poll tax. The ordinance of which it is a part was framed to require the performance of labor on, or the payment of money for the

improvement of, the city's streets. This is a necessary public purpose. All revenue laws have distasteful features. It is necessary, in their enforcement, that methods somewhat inquisitorial be pursued. All attempts of the public to gather statistics, either by taxing officers, census takers, or in any other manner, necessarily impose some burdens and inconveniences on the people. We see nothing unreasonable in requiring the keepers of boarding houses to make known to the officers of the law the names of their boarders. The conviction, therefore, under the complaint filed in this action was not void, nor was the warrant under which the first arrest was made. However this might be, there is no pretense that the second complaint did not charge an offense under

A judgment condemning a criminal to three years' imprisonment at hard labor, however, and to pay the costs of the prosecution or remain imprisoned one day longer, is not illegal where the three years and one day do not exceed the limit of punishment fixed by law. *State v. Nolan*, 8 Rob. (La.) 518.

So under Ohio Rev. Stat., § 1799, the court sentencing a person convicted of crime punishable by imprisonment in the penitentiary, is authorized and required to declare in the sentence for what period he shall be kept at hard labor and for what period, if any, he shall be kept in solitary confinement. *Ex parte Clark*, 50 Ohio St. 649.

But a sentence to seven years' penal servitude on each of two counts charging perjury which are not identical, the one to begin at the close of the other, was upheld though 2 Geo. II., chap. 25, § 2, as amended by subsequent acts, made seven years' penal servitude the maximum sentence for a single act of perjury, in *Castro v. Queen*, 6 App. Cas. 249, 14 Cox, Crim. Cas. 546, 50 L. J. Q. B. 507, 44 L. T. N. S. 867.

And one who has been sentenced to hard labor on a conviction for crime may on a second conviction before the expiration of the former term be again sentenced to imprisonment at hard labor to commence upon the day on which the former sentence will expire. *Russell v. Com.* 7 Serg. & R. 438.

So in Iowa one sentenced to pay a fine for the violation of a city ordinance in selling liquor without a license may be confined at hard labor, but under Iowa Code, § 4508, the term cannot exceed one day for every three and one third dollars, and he is entitled to a credit of one dollar and a half upon the judgment for each day's labor. *Keokuk v. Dressell*, 47 Iowa, 597.

And one sentenced to pay a fine on conviction for keeping a nuisance can only be imprisoned for a term of which the number of days shall be equal to one for every three and one third dollars of the fine, and if sentenced to confinement at hard labor he is entitled to a credit upon the judgment of one dollar and fifty cents for each day's labor. *State v. Anwerda*, 40 Iowa, 151.

But where a sentence is one of imprisonment and costs the credit of thirty cents a day under Florida act authorizing the employment of convicts at hard labor (Laws March 7, 1877, chap. 2090, §§ 1, 2) is applicable to costs alone and no credit given therein will operate to limit the power of the county commissioners to employ him during the period of his sentence. *Holland v. State*, 23 Fla. 123.

Alabama Revised Code, § 3760, providing that one convicted of an offense who does not pay or secure the fine and costs adjudged against him may be imprisoned therefor and the duration of his imprisonment is to be determined by the amount of the fine, is supplemented but not repealed by sec. 27 L. R. A.

tion 4081 thereof, subsequently enacted, under which the unpaid costs were also to be considered in determining the length of his sentence to imprisonment or hard labor. *Williams v. State*, 55 Ala. 166.

Where a county convict has worked on a county farm a sufficient number of days to discharge the fine and cost adjudged against him at the rate prescribed by law, he is entitled to be discharged from further confinement. *Ex parte Dampier*, 24 Tex. App. 561; *Ex parte Price*, 11 Tex. App. 538.

And this is the rule when the convict is hired out for their payment though the hirer and his sureties are insolvent and the judgment cannot be collected. *Ex parte Price*, *supra*. See also *infra* heading: *Hiring out convicts*.

But city authorities may but are not required to cause prisoners to work in the streets and public grounds of the city under Kan. Gen. Stat. 1889, chap. 19, § 63, and one who is confined for the nonpayment of a fine and costs adjudged against him is not entitled to credit thereon for the time of his confinement nor to his discharge after the lapse of such a period as would if computed at the rate of allowance for work provided by law, amount to as much as the fine and costs. *Re McCort*, 53 Kan. 13.

VI. Imposition for nonpayment of costs.

Sentence to labor for nonpayment of the costs of prosecution may also under proper authority be imposed on persons convicted of crime.

Thus in Alabama under section 4731 of the Code when hard labor is imposed the court may properly require additional hard labor for the county for a term sufficient to cover all costs and officer's fees. *Hobbs v. State*, 75 Ala. 1.

And whenever a person is sentenced to hard labor as a punishment for an offense of which he has been convicted, either in default of the payment of or of confession of judgment for the fine assessed as well as in execution of the original judgment, the court may impose additional hard labor under the provisions of Ala. Code, § 4504, for the payment of costs. *Ex parte State*, 81 Ala. 46.

And one who pays a fine adjudged against him but does not pay the costs or confess judgment therefor as required by the Alabama code may be sentenced to hard labor for the county in which the trial was had for a period necessary to pay the costs at the prescribed rate per day under Rev. Code, § 3759, providing for such sentence in case of nonpayment of costs and fine. *Nelson v. State*, 46 Ala. 184.

So where one has been convicted of an offense punishable by fine without imprisonment, and he pays the fine but refuses to pay the costs, payment thereof may be enforced by sentence to hard labor under Ala. Code, §§ 4503, 4504. *Ex parte Joise & Smith*, 88 Ala. 123.

a valid ordinance. There is no claim that a person who, in fact, resists an officer in the discharge of his duties may not be punished for so doing. The defendant had the privilege of showing, if he could, that he was not guilty of the offense, but if, on the trial, the court found him guilty and assessed a fine against him, a commitment clearly would not be void, even though he were in fact innocent of the offense charged.

The validity of Ordinance No. 91, authorizing the marshal to compel prisoners confined in the city prison to work at hard labor, is challenged, as being in conflict with section 6 of the Bill of Rights of this state, which reads as follows: "Sec. 6. There shall be no slavery in this state; and no involuntary servitude, except for the punish-

ment of crime, whereof the party shall have been duly convicted." The authority for the passage of the ordinance is contained in subdivision 37, section 11, chapter 18, of the General Statutes of 1859, by which the mayor and council are given power to enact ordinances "to regulate the police of the city, and to impose fines, forfeitures, and penalties for the breach of any ordinance, and to provide for the recovery and collection thereof, and in default of payment to provide for confinement in the city prison or to hard labor." The ordinance in question does not provide for a judgment sentencing the defendant to confinement at hard labor, but authorizes the marshal to require the prisoners in his custody to labor. The ordinances under which the convictions were had authorized punish-

ment may be required to discharge by hard labor. *Ibid.*

But an additional term of hard labor for the payment of costs, under Ala. Rev. Code, § 4061, sufficient to pay all the costs and officer's fees in the case, should not be imposed upon each of two defendants jointly indicted who have failed to pay them, as this would coerce double payment, but a sentence sufficient to satisfy one half thereof should be imposed on each, though either might be made to pay the whole. *Coleman v. State*, 55 Ala. 178.

So in Tennessee a prisoner convicted of a felony whose punishment has been commuted to imprisonment in the county jail, may under Tenn. Code, § 6204, providing for the working out of costs in misdemeanor cases, and Tenn. Act of 1881, chap. 105, providing that persons who have been thus convicted and whose punishment is thus commuted may be compelled to work out the term of imprisonment, be required to work the costs adjudged against him after his term of imprisonment has expired. *Eaton v. State*, 15 Lea. 200.

And Tex. Rev. Stat., art. 3602, providing for the hiring out of convicts, the proceeds of hiring to be applied to the payment of the costs and fine, but that in no case shall the county be liable to officers for their costs, is not unconstitutional, but it applies only where convicts have been hired out to individuals or companies and does not prevent the sheriff from recovering his costs from the county when they have been worked out by the convicts on the public roads or county farms. *Grayson County v. May* (Tex.), May Term, 1882.

It is only costs incurred by the state or to which the state, if it were liable for costs, could be subjected, however, for the payment of which a convict may be compelled to labor. *Bradley v. State*, 60 Ala. 318.

A defendant in a criminal case made liable to imprisonment at hard labor for the payment of the cost adjudged against him cannot be required to work out his own costs although he is liable therefor. *Knox v. State*, 9 Baxt. 202.

The fees of the defendant's own witnesses are not a part of the costs for the payment of which additional hard labor may be imposed upon him. *Hill v. State*, 78 Ala. 1; *Bradley v. State*, *supra*.

And the same rule applies to fees of the officers of the court for services rendered him in making his defense. *Bradley v. State*, *supra*.

But compensation of the sheriff for feeding a prisoner confined in jail to answer an indictment is a part of the costs taxable against him on conviction and for the payment of which hard labor may be imposed. *Ibid.*

And the word "costs" when employed with reference to criminal prosecutions includes "officer's fees" and the omission of the words "officer's fees" in an amendment to a statute providing for sentence to hard labor for payment of costs does not change the character of the liability which a con-

vict may be required to discharge by hard labor. *Ibid.*

See also *supra* heading, *The term or duration*, and *infra* heading, *Necessity of strict compliance*.

VII. Necessity of strict compliance.

Where the statute makes hard labor a part of the punishment it is imperative upon the court to include it in the sentence. *Ex parte Karstendick*, 98 U. S. 886, 23 L. ed. 889; *Ex parte Mills*, 136 U. S. 263, 34 L. ed. 107; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631.

While the above statement was mere dicta it has been adopted as authority in *Harman v. United States*, 50 Fed. Rep. 921, and *Re Johnson*, 46 Fed. Rep. 477, holding that a sentence to simple imprisonment of which hard labor is not made a part is void where the statute makes hard labor a part of the punishment.

And in such case the prisoner is entitled to release on habeas corpus. *Re Johnson*, *supra*.

So under Wis. Stat. (Act 1858, chap. 181, § 5) a direction for confinement at hard labor is an essential part of every sentence to imprisonment in the state prison, the omission of which will invalidate it. *Peglow v. State*, 12 Wis. 584; *Benedict v. State*, Id. 814.

And requires the remission of the record to the trial court for judgment upon the conviction according to law. *Benedict v. State*, *supra*.

But a judgment that the defendant be punished by confinement at hard labor in the state prison for the term of ten years and that ten days of each year thereof be passed in solitary imprisonment, though informal, is sufficient under the Wisconsin statute. *Franz v. State*, 12 Wis. 537.

And a sentence to separate or solitary confinement at hard labor is good under Pennsylvania Act of April 23, 1829, authorizing imprisonment at solitary labor. *Drew v. Com.* 1 Whart. 278.

But a sentence on conviction for perjury that the convict be confined, fed, clothed and treated as the law directs is erroneous, the prescribed punishment for perjury being fine and imprisonment at hard labor. *Kroemer v. Com.* 8 Binney, 577.

And the same rule applies to a sentence for an assault and battery with intent to kill for which a similar punishment is provided. *Scott v. Com.* 6 Serg. & R. 224.

So a sentence to imprisonment in a state prison must, under Mass. Rev. Stat., chap. 130, § 8, be partly to solitary confinement and partly to confinement at hard labor, and one which directs no solitary confinement is erroneous and reversible on appeal by the convict. *Stevens v. Com.* 4 Met. 860.

This statute, however, does not apply to additional sentences awarded upon information against

ment by fine. The police judge imposed a fine of \$25 under the first complaint, and \$75 under the second, and committed the defendant to the city prison until the fine and costs should be paid. In neither case was there any judgment imposing hard labor as a punishment for the violation of an ordinance. It was said by this court in *Re McCort*, 52 Kan. 18, in considering an ordinance of a city of the second class: "The law permits but does not require city authorities to cause city prisoners to work on the streets and public grounds of the city." In that case it was contended by the prisoner that it was incumbent on the city authorities to cause him to work, and that if they failed to do so he was entitled to the same credit per day on his fine that he would have had if kept at work.

The question as to the power of the city to compel the performance of hard labor was not raised. It was said in the opinion: "The punishment which the law authorizes is a fine and the costs. If the defendant pay the fine and costs, neither imprisonment nor compulsory labor can be imposed. For the purpose of enforcing the collection of the fine the law authorizes imprisonment, and for the same purpose it also authorizes the employment of prisoners on the streets." In order to uphold Ordinance 91, so far as it authorizes compulsory labor, it is necessary that it be imposed as a punishment for crime. If the prisoner is unwilling to work, clearly to compel him to do so would be to impose involuntary servitude. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89. In this case, and

persons who have been before convicted and sentenced. *Bump v. Com.* 8 Met. 533.

Nor can a prisoner who is sentenced by a court of competent jurisdiction to perform hard labor for the county during a specified term be punished by confinement in jail for that period but will be discharged therefrom on habeas corpus. *Ex parte Pearson*, 59 Ala. 654.

So, Ky. Gen. Stat., chap. 29, § 2, leaving it to the discretion of the jury fixing the amount of the fine to say in its verdict whether if the fine and costs are not immediately paid or replevied by the defendant he shall be put at hard labor in lieu of imprisonment for the nonpayment requires it to say in terms whether he shall be put at hard labor, and the mere use of the words in the verdict "the working statute applied" is not sufficient to sustain a judgment therefor. *Eldridge v. Com.* 87 Ky. 365.

And in Alabama a judgment and sentence in a criminal case in which the fine and costs are not presently paid nor a judgment confessed therefor should specify either the length of the additional term of hard labor for the costs or the rate per diem, under Ala. Act February 26, 1881, fixing the rate at not less than 30 cents per day and in cases of misdemeanors not less than eight months, and it will be reversed on appeal if it is only for such additional term as may be necessary to pay the court costs and officer's fees not to exceed eight months. *Armstrong v. State*, 53 Ala. 49.

So in imposing additional hard labor to cover costs and fees under the Alabama statute the court should determine before the adjournment of the term and specify in its judgment the exact number of days of the additional sentence. *Coleman v. State*, 55 Ala. 173.

And a sentence which in one part condemns the defendant to hard labor for the payment of the costs at the rate of forty cents per day the terms not to exceed eight months, and which in another part fixes the time at more than eight months and for a period more than sufficient to pay the costs, is inconsistent, uncertain, and erroneous, though the latter clause is in excess of the court's jurisdiction and therefore void. *Bradley v. State*, 60 Ala. 318.

In *State v. Dick*, 10 La. Ann. 461, however, it was held that an omission by a magistrate in imposing a sentence to insert the words "at hard labor" cannot be assigned by the convict as error even if it exonerates him from that part of the penalty.

A sentence of an accessory to six months in the chain gang with a money alternative of \$200 after the principal had been sentenced to the chain gang for a life term with a money alternative of \$20 does not violate Georgia Code, section 4428, providing that an accessory shall receive and suffer the same punishment as would be inflicted upon the principal it being within the limit of 37 L. R. A.

what might have been imposed on him. *Anderson v. State*, 63 Ga. 675.

And a judgment imposing hard labor for the county for the payment of costs at a specified rate until they are paid without specifying the amount or number of days will not be held erroneous under the Alabama statute, but the precise amount, the number of days to be served, and the time allowed each day's service should be specified therein. *Walton v. State*, 62 Ala. 197; *Walker v. State*, 58 Ala. 398; *Hill v. State*, 73 Ala. 1.

A sentence to hard labor on nonpayment of costs "for such a period not exceeding eight months at a rate of not less than thirty cents per day" as may be necessary to pay the costs is sufficiently definite and certain where it afterwards recites the amount of the costs and specifies the number of days for which hard labor is adjudged. *Gady v. State*, 83 Ala. 51.

And so is a judgment specifying the exact duration of the additional hard labor imposed for costs where the record does not show that the bill of costs includes any for the payment of which the defendant cannot be legally imprisoned. *Croom v. State*, 71 Ala. 14.

See also *supra* headings: *The term or duration, and Imposition for nonpayment of costs.*

VIII. Delegation of the power.

Authority to sentence to imprisonment at hard labor cannot be delegated by the court or judge upon which it is conferred.

Thus a judge cannot delegate to the county commissioners authority to change a sentence of imprisonment to the county jail for an assault with a deadly weapon under N. C. Code, § 987, to imprisonment in the workhouse of the county. *State v. Norwood*, 98 N. C. 578.

A resolution of a board of county commissioners authorizing two of its members to take such action as in their judgment is necessary to utilize the labor of county prisoners on public works, however, is not an illegal delegation by the board of its powers under the Florida statute relating to the employment of convicts (Laws March 7, 1877, p. 820) as it shows a determination by the board that the statute shall be enforced leaving the details to the two members whose action is not put beyond the supervision and control of the board. *Holland v. State*, 23 Fla. 123.

But power to provide for punishment by confinement at labor for violations of its by-laws and ordinances may be conferred upon municipal bodies.

Thus authority in the provincial legislature of the province of Ontario to impose punishment by imprisonment with or without hard labor includes the power to delegate such authority to municipal bodies created by it called the license commis-

in the *McCort Cas.* on payment of the fine the defendant would have been entitled to discharge, and could neither have been confined in prison nor required to labor. The provisions of the ordinances authorizing imprisonment and compulsory labor are mere means of collecting the fines. Neither is imposed as a punishment. It is wholly unnecessary to discuss the question as to whether section 5, which guarantees the right of trial by jury, has been violated. For authorities on that point, see *State v. Topeka*, 38 Kan. 76, 59 Am. Rep. 529; *Re Rolfe*, 80 Kan. 758; *Emporia v. Volmer*, 12 Kan. 622; *Neitzel v. Concordia*, 14 Kan. 446. The conclusion is inevitable that hard labor was not imposed on the plaintiff as a punish-

ment for crime whereof he had been duly convicted, but that the attempt to cause him to labor was made in pursuance of the ordinance as a means of collecting the fines, and was therefore in violation of the bill of rights.

It is claimed by the plaintiff that, in making the arrest, in taking him to prison, and while in confinement, he was beaten and treated with harshness and cruelty. The policeman who made the arrest had the right to use such force as was reasonably necessary under the circumstances to overcome the plaintiff's resistance, and where resistance is made with deadly weapons, like a hatchet or hammer, the officer would not be held to that degree of nice and scrupulous care in

sioners. *Hodge v. Queen* (Ontario) 5 Crim. L. Mag. 391.

And offenders against the penal by-laws and ordinances of a city may be imprisoned in the workhouse and confined at hard labor until the fine and costs adjudged against them are discharged at the rate per day provided by law where such imprisonment is authorized by the city charter. *Berry v. Brielan*, 86 Ky. 5.

But such authority, like that conferred directly upon the courts, must be express and like all other delegated power must be strictly construed and substantially if not literally pursued.

Thus a judgment consigning the accused to the city chain gang in case of his failure to pay a fine imposed on him for violation of an ordinance is void unless expressly authorized, and general power to prescribe, impose, and exact reasonable fines, penalties, and imprisonments does not include such authority. *Carr v. Conyers*, 84 Ga. 287.

And county supervisors have no authority to put a person imprisoned for the purpose of collecting a fine to hard labor under Cal. Const., art. II, § 11, providing that any county, city, or town may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws. *Re Fil Ki*, 80 Cal. 201.

And one who violates an ordinance of a town cannot be required to work out his fine under Ill. Act 1879, p. 117, providing for the working out of fines, as that act is limited to misdemeanors in violation of the criminal code, and does not apply to offenses under ordinances of a town unless the authorities thereof shall have so provided by ordinance. *Kanouse v. Lexington*, 12 Ill. App. 518.

Nor can a money fine and a sentence to labor be imposed in the same case under a municipal charter authorizing the mayor and city council to fine or imprison, or to sentence to labor on conviction for violation of an ordinance and in the event the fine and costs are not paid to require the offender to work them out, unless the labor is added only for the purpose of enforcing payment of the fine. *Ex parte Anniston*, 84 Ala. 21.

So a municipal ordinance providing for punishment by fine or imprisonment, or by fine and imprisonment, or by hard labor upon the streets or public works of the city for violation of a by-law or ordinance of the municipality does not authorize the imposition of a money fine and a sentence to hard labor for the same offense though hard labor may under another ordinance be imposed for non-payment of the fine. *Ex parte Montgomery*, 79 Ala. 275.

And an ordinance authorizing the mayor or president of a municipality to commit to the city prison or workhouse or place of correction for a period to be determined by him not to exceed sixty days any convict who fails to pay a fine penalty or forfeiture imposed under any city ordinance does not author-

ize a sentence to pay a fine of a designated sum or perform sixty days' work in the public streets of the city. *Ex parte Martini*, 28 Fla. 343.

This case distinguishes *Ex parte Hunter*, 16 Fla. 575, *infra*, set forth under heading, *Remedy for improper imposition*, on the ground that in that case there was improperly and inaccurately inserted in the judgment a consequence legally flowing from it under the statute whereas in the case at bar the ordinance is not enforceable unless there is a judgment in accordance with it.

IX. Hiring out convicts.

The hiring out of convicts to persons or corporations desiring their services in the execution of private enterprises or otherwise as contradistinguished from working them in the penal institutions or upon public works is practiced by a number of the states.

Convicts are none the less hired out by the county, however, within the meaning of Ala. Code 1886, § 4501, prescribing the duties of state inspectors with relation thereto, because hired out under contract to work certain public roads of the county. *Jefferson County v. Truss*, 86 Ala. 486.

a. Power to hire out.

The constitutionality and validity of the Kentucky Act (Stat. May 10, 1884) authorizing the hiring out of convicts by the state, is directly upheld in *Mason & Ford Co. v. Main Jellico Mountain Coal Co.* 87 Ky. 487.

And the power of the legislature to authorize contracts for the leasing out of the labor of convicts was also sustained, in *State v. McCauley*, 15 Cal. 429, and *People v. Brooks*, 16 Cal. 11,—the court by Field, J., in *State v. McCauley*, *supra*, saying that it had never been questioned.

California, however, has since forbidden the letting of convict labor by contract by constitutional provision and statutes conferring the power have generally hedged it with restrictions and limitations designed to avoid injurious effects and to prevent abuse.

Thus New York Act of May, 1885, with relation to state prisons was designed to prevent the employment of convicts in those trades in which the mechanics of the country were engaged, except so far as such convicts had already been instructed in such trades, and to regulate the making of contracts so as to produce a fair competition. *Young v. Beardsley*, 11 Paige, 93, 5 L. ed. 68.

And the intent of the Arkansas statute (Mansf. Dig. §§ 1226, 1245) authorizing the county court to contract for the safe keeping of persons committed to the county jail, is that the contractor shall keep his prisoners in the county where they were convicted, except only where the county court is unable to contract with any person in the county it might contract with the contractor of any other county. *Re Burrow*, 56 Ark. 275.

affecting the arrest that would be required in ordinary cases; but, having overcome such resistance and having the prisoner fully in his power, the officer is then liable for any unnecessary harm or indignity done to the prisoner. It is the duty of all keepers of jails and prisons to treat their prisoners humanely. Keepers of city prisoners have no warrant or authority in law to be harsh and brutal in the management of those in their custody. For all needless sufferings and indignities which they impose they are accountable in damages to the party injured, and all persons aiding or assisting in such wrongs are liable with them.

For the errors mentioned, the judgment must be reversed, and a new trial awarded.

And under Ala. Sess. Act 1888, § 5, p. 134, and Ala. Code 1876, § 4468, the same requirement exists, unless the court of county commissioners shall be of the opinion that the interests of the county require them to be hired outside it. *Ex parte Small*, 81 Ala. 66; *Ex parte Crews*, 78 Ala. 457.

So in *Traak v. State*, 32 N. J. L. 478, it was said that no contract could legally be made for the labor of the prisoners without the limits of the state, as it would require the prisoners to go beyond its jurisdiction and control, nor could any contract be made for labor without the prison walls as that would conflict with the statute requiring the keeper to keep the prisoners within the prison, nor could they be employed at labor injurious to the health of the prisoners.

A convict whose service and safe keeping have been contracted for under Mansf. Ark. Dig., § 1245, providing that in case the county court is unable to make a contract with any person in the county it may contract with the contractor of any other county, however, is not entitled to relief on habeas corpus, on the ground that the person thus contracting was not the contractor of another county where the county court had determined though erroneously that he was such contractor, as such determination is not subject to collateral attack. *Re Burrow, supra*.

And an order of the court of commissioners in Alabama for the hiring of convicts outside of the county involves a finding that the interests of the county require such hiring and the record or order need not recite the fact. *Ex parte White*, 81 Ala. 60; *Ex parte Small*, *Id.* 85.

So the power when conferred is strictly confined within the limits prescribed by the statutes conferring it and cannot be extended by implication.

Thus orders passed by the court of county commissioners authorizing the probate judge to adopt such measures as to him may seem best as to the letting out of contracts for the hire of county convicts is not a compliance with Ala. Code 1876, section 4465, requiring the court itself to determine in what manner and on what particular works the labor shall be performed. *Ex parte Crews*, 78 Ala. 457.

And the probate judge has no power to make a contract for the hire of a convict under the Alabama statute in the absence of action on the part of the commissioner's court determining in what manner and on what particular works the labor of convicts shall be performed, as required by Ala. Code 1876, §§ 4465, 4468, and in such case the agreement to pay for the convict's services would be void as against public policy. *State v. Metcalfe*, 75 Ala. 42.

New York Act of May, 1835, section 9, providing that in branches of business in which the consumption of the country is chiefly supplied without foreign importation the number of convicts to be 27 L. R. A.

Horton, O. J., concurring specially:

I do not assent to all that is stated in the foregoing opinion. I supposed that the power of a city to require city prisoners, committed to the city jail, to work was no longer a subject of contention in this state, but it is questioned again in this case. *Re Dasser*, 85 Kan. 678; *State v. Topeka*, 86 Kan. 76; *Re McCort*, 52 Kan. 18. In the latter case, it was expressly held by this court that "the law permits, but does not require, city authorities to cause city prisoners to work on the streets and public grounds of the city." In the opinion prepared in the *McCort Case* by Allen, J., it was observed: "The punishment which the law authorizes is a fine and the costs. If the prisoner pays

employed or let shall be limited by the number of convicts who had learned a trade before coming to prison limits the number to such as had learned the particular trade to which the contract or employment relates and not to the number who had learned any trade whatever. *Young v. Beardley*, 11 Paige, 93, 5 L. ed. 68.

And a court imposing a sentence has no power at a subsequent term to make an order authorizing the county commissioners to farm out the services of the prisoners sentenced under N. C. Code, § 3443, providing that it shall not be lawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine or as a punishment for an offense unless the court before whom the trial is had shall in its judgment so authorize. *State v. Pearson*, 100 N. C. 414.

So the court has no power under N. C. Code, § 3484, to direct that a defendant under sentence of imprisonment shall be hired out by the county authorities. It can only authorize it to be done under such rules and regulations as may be prescribed by the commissioners. *State v. Johnson*, 94 N. C. 363.

It may in its discretion fix the term of imprisonment and authorize the board of county commissioners to farm out the convict as provided in N. C. Code, § 3443, or employ him in the work-house as provided in § 736 thereof, but the imprisonment cannot extend beyond the time fixed. *State v. Williams*, 97 N. C. 414.

And in *Lunenburg v. Smith*, 24 N. S. 104, it was held that a contract by which a municipal council hires out persons sentenced to imprisonment at hard labor to work for private parties under an arrangement by which half of the wages is to go to the municipality and the remainder to the prisoners is illegal and no recovery can be had for such wages.

The duty rests with the sheriff under the Arkansas statute, upon the conviction of a defendant for a misdemeanor who is present at the trial to retain him in his custody and to hire him out as directed by the judgment if the fine and costs be not immediately paid, and voluntarily permitting him to go at large is a misdemeanor. *Griffin v. State*, 37 Ark. 437.

And one convicted of a misdemeanor may be hired for as much as can be got for him, not less than 75 cents per day under Arkansas Act of March 10, 1877, but the court cannot require a greater hire per day than the minimum fixed by statute, nor direct that the hiring be for a less number of days than one for every seventy-five cents of the fine and cost. *State v. Barnea*, 37 Ark. 448.

In *Smith v. State*, 76 Ala. 69, an indictment against the hirer of a county convict for a negligent escape was sustained and the bond given by him and recitals therein held admissible to prove the fact of hiring.

the fine and costs, neither imprisonment nor compulsory labor can be imposed. For the purpose of enforcing collection of the fine the law authorizes imprisonment, and for the same purpose it also authorizes the employment of prisoners on the streets. The statute gives the city council the power to fix the rate per day to be allowed a prisoner who is working out his fine, without any limitation. The city may or may not have work on which it would be profitable or desirable to employ city prisoners. If the city authorities see fit to put the prisoner at work, he must be credited on the fine and costs at the rate of one dollar per day for the time he is so employed; and, if they do not see fit to have him work, he will get

no credit for the time he remains in jail, but can be discharged at any time on payment of the fine and costs. This court has already decided that fines and costs are not debts, within the meaning of the constitutional provision forbidding imprisonment for debt. Therefore, when it is stated that imprisonment and labor imposed under the provisions of a statute or the ordinances of a city are "solely the means of collecting a debt," such language is misleading, as the word "debt" is construed in the constitution. A fine is not the kind of a debt referred to in the organic law. *Re Wheeler*, 34 Kan. 96; *Re Boyd*, Id. 570. If, however, we re-examine the power of cities of this state to compel persons committed to city prisons to work,

Mississippi Code 1892, chap. 23, however, providing that one sentenced for a misdemeanor must remain in jail for the full term of his sentence and cannot be delivered to the county contractor or hired out is not applicable to contracts between a contractor or county board made before its enactment as section 814 thereof expressly provides that that chapter shall not apply to existing contracts. *Ex parte Hill* (Miss.) May 1, 1893.

And Minn. Stat., March 8, 1887, prohibiting the farming out of convict labor, does not prevent the relation of master and servant from existing between one who has contracted with the state for the erection of a state prison and a convict whose services were availed of by arrangement with the prison authorities who was injured while engaged in such work by the fall of a scaffold upon which he was standing, where the contractor knowingly received the benefit of his labor. *Dalheim v. Lemon*, 45 Fed. Rep. 225.

So an order of the court of commissioners for the hiring of convicts sentenced to hard labor need not determine in what manner and on what particular work the convicts shall be employed as required by Ala. Code 1876, section 4465, where it merely authorizes the hiring to a particular person and does not establish a system of hard labor for the county. *Ex parte White*, 81 Ala. 80.

And an order of such court declaring it best and necessary to hire convicts out of the county purporting to apply to convicts for the current year and the succeeding year cannot be objected to on the ground that it was valid for twelve months only by a convict sentenced the next year when at the expiration of the first year and before his conviction the court had made a similar order for the second year. *Ex parte Small*, 81 Ala. 85.

Nor is the validity of an order for the hiring of convicts sentenced to hard labor for the county impaired by a failure to transcribe it on the final records of the court as required by Ala. Code 1876, § 4468, where a written memoranda thereof is made at the time by the probate judge. *Ex parte White*, *supra*.

So the commissioners of a county have the power under N. C. Laws 1876-77, chap. 196, authorizing them to provide for the employment of convicts on public works or other labor for individuals or corporations to hire a man imprisoned for fornication and adultery to his wife upon her giving bond with surety for the price. *State v. Shaft*, 78 N. C. 464.

b. The contract.

The rule requiring strict conformity to statutory authority is particularly applicable to steps preliminary to the execution of the contract.

Thus a contract by which the agent of a prison hires a convict to another without giving notice in a newspaper for sealed proposals for letting con-

tracts as required by Mich. Sess. Laws 1842, p. 180, is void as the mode of letting prescribed by the statute is a limitation upon the power to let and not merely directory as to method. *Agent of State Prison v. Lathrop*, 1 Mich. 488.

And a contract by the commissioners for the letting of the labor of convicts under the Illinois Penitentiary Act, § 25, 26, notwithstanding as a mere temporary arrangement, is not valid unless made upon sealed bids or proposals after such letting is advertised as required by law pursuant to section 26 thereof, and when not so made it will be treated as a temporary arrangement only. *People v. Dulaney*, 96 Ill. 503.

Nor are the commissioners authorized under Illinois Penitentiary Act, § 25, 26, to act upon a bid or proposal of one wishing to employ convicts who has authorized the submission thereof to them in due form and season unless it was so in fact submitted as a sealed bid or proposal. *Ibid*.

So an offer to give as much or more than any other who shall send in proposals for the hire of convict labor is not the offer of any price within the intent of New York Laws, May, 1835, requiring the publication of notice and sealed proposals therefor, as the necessary effect of such an offer would be to prevent fair competition for the contract. *Jones v. Lynda*, 7 Paige, 301, 4 L. ed. 165.

And directors of a prison having power under Ohio Act of April 23, 1854, section 14, to hire out convicts in such manner as in their judgment will best conserve the interests of the state, who give notice pursuant thereto that they will receive bids for a specified kind of work and that bids will be considered for other work and other kinds of business reserving the right to select such bids as would least conflict with the mechanical interests of the state cannot be compelled by mandamus to accept a bid for the work specified in the notice which was the highest bid. They are at liberty to reject such bid and accept another for a different kind of work. *State v. Ohio Penitentiary*, 5 Ohio St. 234.

A contract for the employment of from fifty to one hundred convicts for three years with the privilege to the contractor of extending the period to five years is valid, however, under N. Y. Laws 1847, chap. 460, § 77, concerning the labor of convicts in state prisons providing that the notice of the time and place of letting every contract for the labor of convicts shall specify the length of time for which their services are to be let not exceeding five years and the number of convicts to which the contract is limited. *Horner v. Wood*, 23 N. Y. 360, reversing 15 Barb. 871.

So a contract with the warden of a prison for the labor of prisoners need not be in writing under Mass. Stat. 1827, chap. 113, providing that all contracts on account of the state prison shall be made with the warden and when approved by the

I think the validity of Ordinance No. 91 of the city of Topeka, approved May 12, 1870, may be sustained upon two different lines of decisions, either of which is amply sufficient for its support. The ordinance authorizes persons committed to the city prison for the nonpayment of fines or penalties to be employed by the city marshal at labor, either on the streets or public work of the city, or in a public or private place, until the fine and costs are paid; a credit of \$1 being allowed on the judgment for each day's work performed. This ordinance was passed in conformity to subdivision 27, section 11, chapter 18, Gen. Stat. 1889, conferring general powers upon the mayor and council of the cities of the first class. Paragraph 555,

Gen. Stat. 1889. A similar statute permits confidence men, vagrants, or strolling vagabonds to be set to work. Paragraph 571, *Id.* Another statute authorizes county commissioners, when they deem it advisable so to do, to put to work prisoners committed to the jails of their respective counties, for failing to pay fines and costs. Paragraphs 2510, 5425, *Id.* Similar statutes exist in almost every state of the Union.

Article 18 of the Amendments to the United States Constitution, prohibiting "involuntary servitude," is substantially the same as section 6 of the Bill of Rights of the State Constitution. Korstendick was convicted May 1, 1876, in the circuit court of the United States for the district of Louisiana for con-

tractors shall be binding in law and the approval may be by implication from acts as well as by express vote and need not appear on the inspector's records. *Austin v. Foster*, 9 Pick. 841.

And one transferring convicts to private individuals and leasing the labor of future convicts purporting to be between the state acting by the commissioners under California Act of March 1, 1855, of the one part and the lessee of the other, is not rendered invalid by the fact that it was signed by the commissioners in their individual names and not with the name of the state. *State v. McCauley*, 15 Cal. 429.

And one for the hire of a convict reciting the county in the heading, by which the hirer agrees to keep the convict at hard labor "doing any kind of farm work in said county on his premises," sufficiently expresses the kind of labor and the place of performance as required by Ala. Code 1886, § 4597. *Fuller v. State*, 97 Ala. 27.

So the prohibition of the Alabama statutes against employing convicts upon railroads is an implied condition of a contract hiring them out and need not be expressed in it. *Ex parte White*, 81 Ala. 80.

Sentences for three separate misdemeanors imposed upon the same day and a contract letting the person convicted to hire for a period covering all the sentences are not rendered illegal by a failure to refer to Ala. Code 1886, § 4588, declaring the order in which the several sentences shall take effect and be operative, and that the labor under the second and third shall commence at the termination of the punishment under the previous conviction. *Fuller v. State*, *supra*.

And the omission of the stipulation provided for by Arkansas Act of March 2, 1881, as amended by Act of 1883, page 125, and Acts of 1883, page 208, requiring the contractor to pay the costs of prosecution is not a jurisdictional defect which will render a contract for the hire of prisoners void. *Ex parte Adams* (Ark.) Dec. 22, 1894.

But a petition for a mandamus to compel the performance of a contract with penitentiary commissioners praying that they be compelled to assign to the relator 200 convicts of the kind and quality called for and specified in the agreement is uncertain and indefinite, not showing the act sought to be coerced where the agreement contains inconsistent provisions with reference thereto. *People v. Dulaney*, 96 Ill. 508.

A contract for the employment of convict labor cannot be rendered illegal by a statute enacted subsequent to its execution if it was in substantial compliance with the law as it existed at the time it was made, and the legislature has no power to make the opinion of the attorney-general as to the validity of a contract for the employment of convict labor previously made, conclusive upon the

contractor. *Young v. Beardsley*, 11 Paige, 93, 5 L. ed. 68.

c. *Hiring by surety.*

Some of the states, notably Alabama and Texas, have provided by statute for the hiring of a convict sentenced to pay a fine and costs to one who becomes his surety for their payment, to enable him to work them out imposing penalties for an escape or a breach thereof, or making it a misdemeanor.

Such a statute making it a misdemeanor for a convict to leave or escape from the service of his surety, with whom he has confessed judgment for the fines and costs adjudged against him in consideration of his agreement to serve him and subjecting him to fine and imprisonment therefor does not violate the constitutional prohibition against imprisonment for debt. *Lee v. State*, 75 Ala. 22.

And infancy is no defense to a prosecution against a convict for breach of contract of service with his surety for the fine and costs imposed upon him. *Wynn v. State*, 82 Ala. 55.

And a contract by which a convict is hired out for the payment of a fine and costs adjudged against him under which he has performed sufficient labor to discharge them cannot be varied by parol evidence by the hirer on habeas corpus for the release of the convict showing that the hiring was not for the full amount. *Ex parte Price*, 11 Tex. App. 538.

But a contract by a convict under Ala. Code, § 3882, authorizing one convicted of an offense to enter into a contract of service with his surety for the payment of the fine and costs imposed, and providing penalties for the violation thereof, is void where it includes an obligation for sums other than such fine and costs. *Ex parte Davis*, 95 Ala. 9.

And advances made to a convict by his surety, though included in the contract of service between them, are not within the purview of Ala. Sess. Acts 1882-83, p. 166, making it a misdemeanor for a convict to leave or escape from the service of his surety, and in such case he cannot be prosecuted criminally for a breach thereof. *Smith v. State*, 82 Ala. 40; *Wynn v. State*, *supra*.

So a contract between a convict and his surety by which they engage in farming on shares under the direction of the surety who furnishes the land and tools and is to apply the convict's share to the repayment of the costs and fines paid by him, and if that is insufficient he is to work with his surety either on reasonable wages or on shares until they are fully paid, does not create the relation of employer and employé between them and a breach thereof by the convict is not a criminal offense under Ala. Crim. Code 1886, § 3882, providing for cou-

spiracy, and sentenced to pay a fine of \$2,000, and to be confined for sixteen months in the penitentiary at Moundsville, W. Va. The statute under which he was convicted did not make hard labor a part of the punishment, and labor was not imposed by, or included in, the sentence. After his conviction, Korstendick was confined in the penitentiary at Moundsville, and was compelled by the authorities in charge to perform hard labor. He objected, and commenced his proceedings in the Supreme Court of the United States to obtain his discharge by habeas corpus. His contention was that, "where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed

as a consequence of the imprisonment is in excess of the power conferred." His writ was denied. *Chief Justice Waite*, in delivering the opinion in that case, stated that "as early as 1834 congress enacted that, whenever any criminal convicted of any offense against the United States shall be imprisoned in pursuance of such conviction, or of the sentence thereon, in the prison or penitentiary of any state or territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated," and then observed: "Where the statute requires imprisonment alone, the several provisions which have just been re-

tracts of service between a convict and his surety and imposing a penalty for the breach thereof. *Winslow v. State*, 99 Ala. 68.

d. Leasing prisons.

Some of the states have provided for the leasing of their prisons together with the labor of the convicts therein confined.

Such a contract is not affected by the subsequent repeal of the act under which it was made. *People v. Brooks*, 16 Cal. 11.

And a covenant in a lease of convicts with the prison shops and prison grounds to furnish such shop room and grounds as might be necessary for the use of the convicts leased, made by the inspectors and warden of the prison in excess of their authority, may be ratified by the legislature, but the intent to ratify must plainly appear. *Dieta, Reed v. Seymour*, 24 Minn. 273.

So an act appropriating money to defray the expenses of a prison, passed after a contract leasing it and the labor of the convicts therein had been transmitted to the senate which provided that no prison should receive any pay for supplies furnished under any contract with the directors of the prison until he surrender such contract and release the state from all liability for such supplies furnished after the leasing of the prison under a designated act, is a legislative recognition of the validity and existence of such contract. *People v. Brooks, supra*.

Mansf. Ark. Dig., § 1232, placing the management, control, and hiring of county convicts under the jurisdiction of the county courts and authorizing them to let the contract to keep and work them to some suitable person or persons, however, does not give such power to the county judge in vacation, and a contract thus made by the county judge is void. *Greer v. Critz*, 53 Ark. 247.

And Minn. Laws 1866, chap. 10, authorizing the inspectors and warden of the state prison to lease the prison shops and such vacant ground as the inspectors deem proper and to let to service all able-bodied convicts confined in the prison, empowers them to lease only such shops and grounds as the state possesses at the time of the execution of the lease or during its continuance, and does not authorize a covenant intended to bind the state to furnish all necessary shop room and grounds for the use of the convicts leased. *Reed v. Seymour, supra*.

But such a covenant in such a lease is void only as to the excess and does not invalidate the whole lease. *Ibid*.

Wrongs to the state from the mismanagement of a prison in disregard of a contract leasing the same with the labor of the convicts therein are to be redressed by proceeding upon the bond given by the lessee as required by law as security for the §: L. R. A.

performance of the contract. *People v. Brooks*, 16 Cal. 11.

e. Assignability of contract.

A contract with the agent of a prison for the services of convicts under N. Y. Laws 1847, chap. 460, is assignable by the contractor, as his position is not quasi official or fiduciary in its character. *Horner v. Wood*, 23 N. Y. 350.

And a lease of convict labor made pursuant to California Act of March 21, 1856, which prescribes no specific form therefor and contains no restrictions as to the assignment thereof, which is assignable in form, is not forfeited by the assignment thereof and cannot be objected to on that ground when no objection to the form was taken at the time it was made and it had been adopted, approved, and acted upon by both parties, but the liability of the assignor personally and upon his bond is not affected by the assignment. *State v. McCauley*, 15 Cal. 429.

But an assignee of a contract for the employment of convict labor takes it subject to all the equities that attached to it in the hands of his assignor and must do everything his assignor would have had to do if it had not been assigned to entitle him to a specific performance thereof unless the other party thereto has relinquished his rights as against him. *Jones v. Lynda*, 7 Paige, 301, 4 L. ed. 165.

So a hirer of convicts who sublets them may recover of his lessee for their services. *Mason & Foard Co. v. Main Jellico Mountain Coal Co.* 87 Ky. 467.

But *Mansf. Ark. Dig.*, §§ 4861, 4894, 4890, providing for the leasing of the state penitentiary making it the duty of the lessee to feed, clothe, and provide for the convicts and maintain discipline among them, imposing a penalty for failure to perform any of the duties thereby imposed upon him and making no provision for the hiring of convicts to other persons, does not authorize such hiring and convicts held in restraint under an agreement for such hiring will be delivered upon habeas corpus to the custody of the lessee. *State v. Neel*, 48 Ark. 232.

The assignee of a contract for the labor of a designated number of convicts for a term of years in which it was stipulated that the contractor should have the privilege of a renewal for a further term of years provided he offered as favorable terms as any other responsible person, the assignment of which was assented to by the agent of the prison on condition that the assignee put in proposals under a notice then being published under the provisions of a statute passed subsequent to the execution of the original contract and pay the balance due the state from his assignor, is not entitled to a renewal thereof where his offer over and

ferred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution, or not, as it pleases." *Ex parte Karstendick*, 93 U. S. 896, 23 L. ed. 889. In *Ex parte Mills, Petitioner*, 185 U. S. 263, 34 L. ed. 107, Harlan, J., remarked that "there are offenses against the United States for which the statute, in terms, prescribes punishment by imprisonment at hard labor. There are others the punishment of which is 'imprisonment' simply. But, in cases of the latter class, the sentence of imprisonment, if the imprisonment be for a longer period than one year, may be executed in a state prison or penitentiary, the rules of which prescribe

hard labor." Both of these cases fairly decide that persons sentenced to imprisonment only may be subject to hard labor, if the rules of the jail or prison exact of the inmates such discipline and treatment.

Therefore, if it be conceded that hard labor was not imposed in this case, as a punishment, yet, within the decisions of the United States Supreme Court, the sentence of imprisonment may be executed in the city prison, the rules of which prescribe hard labor for discipline and treatment. Further, we have industrial and reform schools in the state, where incorrigible girls and boys who disregard the commands of their parents, or resort to immoral places or practices, may be confined. Labor, to a reasonable degree, is

above what was due from his assignor was not as advantageous as that of another and the new law does not permit the agent of the prison to make a contract in the terms of that provided for by the renewal agreement. *Jones v. Lynds, supra*.

f. Custody and management of convicts.

The power of the board of prison directors under the California statute to enter into contract for the employment of prison labor is limited by the requirement of the act creating the board and prescribing its powers and duties and does not extend to any contract which would deprive it in any degree of full and exclusive control of the prisoners, prison labor, grounds, buildings and property. *Porter v. Haight*, 45 Cal. 631.

And N. Y. Laws 1847, chap. 610, providing for contracts for the employment of convict labor, clearly contemplates that the convicts while laboring under contracts as well as at all other times shall be under the charge of the keepers and the discipline is at all times under the general supervision of the warden, and the discipline of the prison cannot be subordinate to the convenience of the contractor. *Horner v. Wood*, 23 N. Y. 860.

So the North Carolina statutes authorizing the working of persons convicted of criminal offenses upon the public roads under the supervision of the county authorities do not contravene article 11, section 1, of that state authorizing such employment and the farming out of convict labor provided by the government and discipline of convicts so farmed out shall be under control of a state officer. *State v. Weathers*, 98 N. C. 625.

And Ala. Special Laws, Sess. Acts 1884-85, p. 709, 1886-87, p. 818, authorizing the county commissioners to hire out the convicts of Jefferson county to the contractor for the working of public roads requiring the employment of all male convicts sentenced to hard labor for the county and authorizing the appointment of a superintendent of public works who is required to inspect and supervise such convicts are not repugnant to and do not supersede the general statute (Code, § 4561) authorizing the state board of inspectors to visit convicts and examine into their treatment and condition and authorizing the governor to annul any contract of hiring on the report. *Jefferson County v. Trues*, 85 Ala. 436.

So contractors for the labor of prisoners under Mansf. Ark. Dig., § 1223, providing that the contractor may work the prisoners under the same rules and regulations as convicts are worked by the lessees of the state penitentiary, which rules and regulations are prescribed by the board of prison commissioners, cannot inflict corporal punishment by the lash upon them unless such board has prescribed the use of the lash for the discipline of prisoners in the penitentiary. *Werner v. State*, 44 Ark. 123.

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And the manager of the lessee of county convicts cannot of his authority inflict corporal punishment upon a convict for a violation of orders and a refusal to work, notwithstanding Tennessee Act of 1876, chap. 86, authorizing convicts to be hired or leased out giving to the persons hiring them all the rights, powers, and privileges of the superintendent of the workhouse. *Cornell v. State*, 6 Lea, 624.

So where the court of county commissioners determine on letting to hire as the mode of inflicting punishment of hard labor for the county there must, under Ala. Sess. Acts' 1882-83, § 5, p. 135, 1884-85, § 85, pp. 187, 136, be independent letting of the two classes, persons convicted of offenses involving moral turpitude and those which do not, and the two classes cannot be worked together and should not be let to one hirer, and the one class can be put at labor much more onerous and hazardous than the other. *Ex parte Crews*, 78 Ala. 457.

One convicted of assault and battery and sentenced to imprisonment at hard labor cannot be let to fine under rules adopted for persons convicted of crimes involving moral turpitude and required to work on railroads or in mines, or hired out of the county. *Ibid*.

But it is not necessary under Ala. Code 1886, § 4668, providing that convicts sentenced for felonies shall not be worked or confined with those who are sentenced for misdemeanors not involving moral turpitude that the order of court letting them to fine should so declare, but the statute operates upon the contract and the manner of its execution by the contractor. *Ex parte Buckalew*, 84 Ala. 460.

One order and one contract embracing the two classes of convicts is sufficient when the terms as to each class are specified and distinguished. *Ex parte White*, 81 Ala. 80.

g. Termination of contract.

Neither the warden nor the inspectors of the penitentiary nor both can make a contract for convict labor which will preclude the legislature from adopting a different system which will necessarily interfere therewith, as the right of the legislature to change its policy with reference to the penal system must be taken as implied in the contract. *Hancock v. Ewing*, 55 Mo. 101.

In entering into a contract for the employment of prison labor the contractor must be held to bargain in view of the rights of the directors acting in behalf of the state, to annul the contract whenever the paramount obligation to execute the powers conferred upon them by the legislation may require it." *Porter v. Haight*, 45 Cal. 631.

The right of a lessee of the labor of convicts is subordinate to the right of the governor to pardon and thereby discharge the convicts from custody, and to such modifications in the extent of punish-

properly exacted from such girls and boys as a part of the discipline and treatment of these institutions. It is not imposed in all such cases as a punishment for crime; yet I do not believe it will be contended that the labor so exacted can be denominated "involuntary servitude," within the meaning of the Constitution. Pub. Doc. 1891-92, vol. 2, "Report of State Board of Charities," pp. 4, 53, 86, 124. Many of the inmates in the deaf and dumb institution are required to work at printing, cabinetmaking, shoemaking, and harnessmaking, and even in the asylum for imbecile youth children are compelled to perform physical labor. Pub. Doc. 1891-92, vol. 2, "Report of State Board of Charities,"

pp. 4, 5. If the trustees and superintendents of charitable institutions have no authority to compel any boy or girl confined therein to perform labor contrary to his or her will, such a ruling would forbid all reasonable rules for the discipline or good health of the inmates. It is a trite saying that "laziness begins in cobwebs and ends in iron chains," and, therefore, it is not favored, either in our reformatory or penal institutions. Of course, all labor imposed as discipline, or as a measure of health, must be reasonable and suitable for the age, the sex, and the condition of the person from whom it is exacted. If not of this character, the courts may interfere and correct any abuse. In the *McCort Case*,

ment as may be made by future legislation. *State v. McCauley*, 15 Cal. 429.

So an order of the governor based upon a report of the board of inspectors annulling a contract of hiring of the labor of convicts and directing their removal from the custody of the hirer under Ala. Code 1893, § 4501, is matter of discretion not requiring the judgment of any court, and not subject to review by any judicial tribunal. *Jefferson County v. Truss*, 65 Ala. 486.

And under the California statute the board of prison directors may terminate a contract for the employment of convict labor whenever in their judgment the proper exercise of the powers conferred upon them require it. *Porter v. Haight*, *supra*.

The board acts judicially, in determining whether the circumstances of a particular case require the annulment of such a contract made by them and when the members act without fraud or malice they incur no personal responsibility. *Ibid*.

So a contract for the labor of prisoners, made by a keeper of the state prison for a term which will continue beyond the term of his official existence, under Nix. New Jersey Dig., 815, § 7, providing that the keeper of the state prison may contract for the labor of the prisoners, is not binding either upon his successor or the state as the statute authorizes any keeper to contract. *Trask v. State*, 32 N. J. L. 473.

And the courts will not interfere by way of an injunction on behalf of one to whom the warden of the penitentiary leased convicts for a period lasting longer than his official term where the legislature declined to ratify it as to the period beyond his term but adopted a new system inconsistent therewith. *Hancock v. Ewing*, 55 Mo. 101.

Nor will a contract for the hire of convicts, made by the warden of the penitentiary in his official capacity, containing a stipulation against personal liability which is approved by the governor, be specifically enforced against his successor in office, as the action for that purpose would be essentially a suit against the state. *Comer v. Bankhead*, 70 Ala. 483.

The warden of the penitentiary is the agent of the state and a contract made by him in his official capacity for the hire of convicts as authorized by law which is approved by the governor is the contract of the state and not of the warden personally, especially when it expressly exempts him from all personal liability thereon. *Ibid*.

The state cannot have relief from a contract for the leasing of convict labor which has been properly assigned to another by the lessee, however, because some of the covenants of the lease do not bind the assignee; she is entitled to no greater exemption than an individual from the consequences of an unwise contract. *State v. McCauley*, 15 Cal. 429.

Nor can she rescind a contract for the leasing of 27 L. R. A.

convict labor for breaches of the covenant of the lease by the lessee and his assignee while she herself is in default in the performance thereof. *Ibid*.

Or where it has been in part performed and the parties cannot be restored to their original position. *Ibid*.

So in *Bronk v. Riley*, 50 Hun. 499, it was held that an injunction would lie to restrain the termination by the commissioners of a penitentiary of a contract by which they employed the plaintiff as manager to oversee and conduct a manufacture carried on therein and leased his machinery therefor at a specified rental for a fixed period where the termination thereof would work irreparable injury.

And in *People v. Brooks*, 16 Cal. 11, it was held that a state entering into a contract leasing a prison and the labor of the convicts thereon can only resume possession of the prison and control of the convicts by making compensation as is required where private property is taken for public use.

b. Recovery of agreed compensation.

One who hires convicts and receives the benefit of their labor cannot contend that the kind and place of labor were not stated in the contract as required by law, or that he did not give bond, as such requirements were designed for the security of the county and the welfare of the convicts and not for his benefit. *Trammell v. Lee County*, 94 Ala. 194.

And neither the escape of a convict nor his release by pardon will relieve a person to whom he has been delivered for labor under contract with the county to pay his costs and fine under the Mississippi statute providing therefor, from liability for such costs and fine, as the only ground upon which he is relieved from liability is the death of the convict as provided in Mississippi Code, § 3160. *State v. Banks*, 66 Miss. 431.

Evidence that some of the convicts escaped is inadmissible in an action against a hirer of convicts for their hire where he has bound himself to pay for the full term of their sentences less the services lost to him by death, making no provision for abatement in case of escape. *Trammell v. Lee County*, *supra*.

Contractors for convict labor against whom judgment has been rendered cannot restrain a suit brought for the collection of such judgment on the ground that the contract was not in conformity with law when they have violated the contract by neglecting to pay for the services of the convicts the benefits from which have been received by them the amounts falling due from time to time subsequent to the rendition of the judgment. *Young v. Beardsley*, 11 Paige, 93, 5 L. ed. 63.

A contract leasing a prison and the labor of the convicts therein for an entire term of five years for the maintenance of which the state was to pay \$10,000 per month in consideration of which large claims against the state were relinquished and

supra, the prisoner complained because he was not permitted to work for the city, so that his fine might be discharged.

Again, the ordinance may be upheld along the line of those decisions which make imprisonment and hard labor a part of the punishment or penalty, or "the means of enforcing the collection of fines" imposed for the preservation of order and the welfare of society. The statute expressly provides that "it shall be part of the judgment that the defendant stand committed till the judgment be complied with." Paragraph 609, Gen. Stat. 1889; *Re McCort*, *supra*; *Re Lewis*, 31 Kan. 71; *Re parte Bedell*, 20 Mo. App. 125; *Berry v. Brislan*, 86 Ky. 5; *State v. Peterson*, 88 Minn. 143; *Huddleson v. Ruffin*, 6

Ohio St. 604; *Re Long*, 87 Ala. 46; *Gady v. State*, 83 Ala. 51; *Ex parte Sing Ah Tong*, 84 Cal. 165; *Preston v. Louisville*, 84 Ky. 118; *Slaughter House Cases*, 83 U. S. 16 Wall. 68, 21 L. ed. 406; *Vanabry v. Staton*, 88 Tenn. 334. In the last case it was stated that "the fine and costs imposed in a misdemeanor case are imposed as punishment. If the prisoner cannot pay or secure them, then he must pay them by his labor in the workhouse, at the rate of twenty-five cents per day, in addition to his jail fees. This is the process of the law for the payment of such fines and costs."

In answer to the suggestion that the sentence of the police judge did not impose or include "confinement at hard labor," and, therefore that it cannot be exacted, the case

buildings were erected and other improvements made is entire and incapable of apportionment, and the measure of damages for a breach thereof by the state is the full sum of \$10,000 per month including a period during which the lessee and his assignee were forcibly and unlawfully kept out of possession. *People v. Brooks*, 16 Cal. 11.

A state may demand compensation from the federal government for entertaining federal convicts in its prisons, although it so employs them as to derive returns from their labor. Opinion U. S. Atty-Gen. Jan. 5, 1887, 8 Ops. Atty-Gen. 239.

1. Disposition of proceeds.

Moneys arising from the fine of convicts sentenced to hard labor under the Alabama statute go into the fine and forfeiture fund and not into the general fund of the county. *State v. Coleman*, 78 Ala. 550.

And under the North Carolina code the proceeds of the labor of a convict must be applied to the payment of the fine and costs adjudged against him. *State v. Williams*, 97 N. C. 414.

A fund produced by hiring out convicts sentenced for misdemeanors as provided for in Georgia Code, § 4214, however, cannot be applied by the solicitor general to the payment of his insolvent costs without express statutory authority, whether the costs accrued in the particular cases in which the convictions were had or not. *Black v. Fite*, 88 Ga. 238.

And a solicitor general or attorney at law, who with the consent of the board of county commissioners voluntarily hired out certain misdemeanor convicts, is not entitled to payment out of the hire for his services, either in hiring or collecting the hire. *Fite v. Black*, 92 Ga. 363.

X. Effect of delay in execution of sentence.

Imprisonment in jail cannot be substituted in the place of a sentence to hard labor, and under such a sentence where the commissioner's court fails for unreasonable time to establish a system of hard labor the convict is entitled to his discharge on habeas corpus. *Kirby v. State*, 63 Ala. 51; *Ex parte King*, 82 Ala. 50; *Ex parte Crews*, 78 Ala. 457.

But a reasonable time depending upon the circumstances of the case must be allowed for the delivery of a person sentenced to hard labor for the county to the proper authority who is to carry out the sentence and the sheriff may confine him in the county jail during such time. *Kirby v. State*, *supra*.

What is a reasonable time depends upon the facts of each particular case. *Ex parte King*, *supra*.

Thus a convict sentenced to hard labor for the county under the Alabama statute, who is detained in the custody of the sheriff for twenty days because of a failure to provide for his reception, is entitled, where his sentence had not been suspended, to be discharged on habeas corpus though 97 L. R. A.

the time granted him to file his bill of exceptions for appeal had not expired. *Ex parte Goucher* (Ala.) May 17, 1894.

And a person convicted and sentenced to hard labor for the county who is ordered to be delivered to the commissioner of hard labor within five days after the adjournment of the court, is entitled to his discharge on habeas corpus where no such delivery is made after waiting twelve days after the expiration of the five days before making his application. *Ex parte Crews*, *supra*.

So a woman sentenced to hard labor who has a nursing infant and who is rejected on account thereof by a contractor who had hired all convicts capable of performing hard labor, and no steps had been taken for the disposition of persons incapable of performing hard labor, cannot be detained in jail by the sheriff to whom she had been turned over for delivery to the hirer, but is entitled to release on habeas corpus. *Ex parte Stewart*, 36 Ala. 66.

XI. Discharge because of inability to pay.

Some of the states have provided for the discharge of certain convicts under specified conditions in case of their inability to pay the fines and costs adjudged against them.

Thus where a county has provided no workhouse for the employment of misdemeanor convicts and cannot utilize their labor by any of the means provided for by law, a convict who is unable to pay the fines and costs adjudged against him may demand an opportunity to discharge them by labor as provided for by Tex. Code Crim. Proc., arts. 604, 645, and if no such opportunity is tendered he is entitled to his discharge without payment. *Ex parte Stubblefield*, 1 Tex. App. 737.

But he is entitled to discharge under Tex. Code Crim. Proc., art. 816, only where there is no workhouse or farm or public improvement upon which he can be put to work and the county authorities fail to hire him out. *Ex parte Bogle*, 20 Tex. App. 127.

So a misdemeanor convict who is also imprisoned on a charge of felony cannot obtain his discharge under Tex. Code Crim. Proc., art. 816, providing that a misdemeanor convict may work out the fine and costs adjudged against him and obtain his discharge after making the prescribed affidavit of insolvency. *Ex parte Godfrey*, 11 Tex. App. 84.

So in North Carolina a prisoner held for nonpayment of a fine and costs is not deprived of his right to obtain a discharge by showing that he is unable to pay, as provided in N. C. Code, § 2907, by the fact that a workhouse has been established by the county commissioners. *State v. Williams*, 97 N. C. 414.

Texas Act of August 21, 1876, providing for the employment and hiring of county convicts, does not repeal Tex. Code Crim. Proc., arts. 604, 645, pro-

of *Holland v. State*, 23 Fla. 128, is directly in point. The syllabus of that case reads: "A statute authorizing the county commissioner to employ at hard labor upon public works all persons imprisoned in the jails of the several counties, under sentence upon conviction of crime or imprisonment for failure to pay fine and costs, is not rendered unconstitutional or made the exercise of a judicial function by the fact that it does not contemplate that its terms shall be pronounced as a part of, or incorporated in the record of, the sentence of the court, or by the fact that they are not so pronounced or incorporated." *Mr. Justice Raney*, in delivering the opinion, observed: "Whenever any express sentence of imprisonment in the county jail, or any sentence of fine and costs, for the nonpayment of which a prisoner will be confined in the county jail, is rendered, such prisoner becomes as much subject to the enforcement of the provisions of the act in question as if the provisions were set out in the sentence. The judgment of the law is, as a result and legal consequence of the sentence of imprisonment, that he is liable to the provisions stated, if the county commissioners see fit to so employ him, and, as a legal consequence of the sentence of fine and costs, that he will, if he does not pay them, be liable to the enforcement of such provisions upon being put in the county jail. That the legislature can provide that persons

who may be so convicted of crime shall be sentenced and made to labor is not denied, and we know of no reason why the legislature cannot provide that a legal sentence shall have, as to offenses committed subsequently to its enactment, a certain legal effect, although the effect is not declared in the body of the sentence." See also *Foster v. Territory*, 1 Wash. 411; *People v. Deguen*, 54 Barb. 105, 6 Abb. Pr. N. S. 87.

In this case the police judge sentenced the defendant to the city prison for the nonpayment of the fines assessed against him. Ordinance No. 91, authorizing prisoners committed to the city prison for nonpayment of fines or penalties to work, was then in force, and a part of the city by-laws. The provisions of this ordinance ought, in my opinion, to be construed in connection with the sentence imposed. The sentence rendered carried with it all the effect which the ordinances of the city then in force gave to it, and the sentence, by its legal effect, made the provisions of the ordinance requiring labor to be performed a part thereof. Both the police judge and the defendant understood, within the provisions of the statute and the ordinances, that the sentence had this effect. In this connection I refer to the following language of Lurton, J., in *Durham v. State*, 39 Tenn. 723: "The imposition of labor as a means of discipline and a measure of health is neither cruel nor unusual. It

viding for the discharge of pauper convicts. *Ex parte Stubblefield*, *supra*.

And Fla. Act March 7, 1877 (McClell. Dig. §§ 1, 2), authorizing county commissioners to employ persons imprisoned in jail under sentence upon conviction for crime, or for failure to pay fine and costs imposed upon such conviction at labor as therein provided, is not repealed by Fla. Act of May 25, 1898, providing that no person sentenced to pay a fine not exceeding \$300 or such fine and costs shall be confined longer than sixty days for the nonpayment thereof, where he is unable to pay. *Ex parte Pella*, 28 Fla. 67.

XII. Remedy for improper imposition.

Habeas corpus is the proper remedy when a void sentence to imprisonment or hard labor has been imposed. *Ex parte McKivett*, 55 Ala. 238; *Ex parte Pearson*, 56 Ala. 654; *Ex parte State*, 87 Ala. 48; *Re Johnson*, 46 Fed. Rep. 477.

Thus a sentence to hard labor for a term in excess of that authorized by statute is not merely irregular but void authorizing the discharge of the defendant on habeas corpus. *Ex parte State*, *supra*.

And a sentence to confinement at hard labor in the state prison for a period of years is invalid and a ground for the reversal of the judgment of conviction where no period of solitary confinement whatever is fixed as required by Wis. Rev. Stat., chap. 180, § 5. And it is immaterial that the sentence pronounced is milder than that prescribed by law. *Fitzgerald v. State*, 4 Wis. 385.

So a prisoner sentenced to hard labor in the state prison who upon writ of error obtains a new trial while performing such labor and the contractor or the state retains him in custody after the issue of the mandate ordering the new trial, will, on habeas corpus, either be remanded to the jailor of the county where his cause was tried, or released on bail if the case is bailable. *Ex parte Davis*, 23 Fla. 54.

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And a fine with imprisonment in case of nonpayment, coupled with an unauthorized direction that the prisoner be required to perform labor on the streets or other public works, is a unit and cannot be rescinded on habeas corpus as to the unauthorized portion leaving the remainder to be carried into execution. *Ex parte Kelly*, 65 Cal. 154.

But see *State v. Dick*, 10 La. Ann. 461, cited *supra*, under heading: *Necessity of strict compliance*, holding that the convict himself cannot take advantage of the improper omission to impose labor.

And in *Reddill's Case*, 1 Whart. 445, it was held that a person confined in a prison at hard labor who was transferred upon the sale thereof to another prison where he was kept in solitary confinement was not entitled to release on habeas corpus though under the statutes he should have been removed to another prison there to be kept at hard labor, but should be remanded to the latter prison.

And a person imprisoned under sentence to hard labor who upon the sale of the prison is removed to another and there kept without being put to hard labor pending the completion of another prison where he could be punished according to law and his sentence, is not entitled to discharge on habeas corpus, but should be removed to the new penitentiary as soon as it is ready for the reception of convicts. *Pember's Case*, 1 Whart. 430.

So a sentence, on conviction for burglary, to hard labor for the county for a period in excess of two years, though irregular under Ala. Code, § 4450, providing that a sentence in excess of two years must be to imprisonment in the penitentiary, is not a nullity and does not entitle the prisoner to discharge on habeas corpus. *Ex parte Simmons*, 62 Ala. 416.

Nor is a failure to incorporate a stipulation binding the contractors to pay the costs in a contract for the employment of persons committed to jail as provided for in the Arkansas statute an irregularity which can be reviewed on habeas corpus. *Ex parte Adams* (Ark.) Dec. 22, 1894.

And a prisoner who is unlawfully put at hard

operates, when rightly regulated, as a mitigation rather than an aggravation of the punishment involved in imprisonment. The prisoner may be disgraced and degraded by his punishment, but he cannot ascribe his degradation to his labor. To a certain degree it compels crime to support itself, and in many ways the power to require convicts to labor is a valuable addition to the forces of law and order." This case is not within the decision of *Jaramillo v. Romero*, 1 N. M. 190, where compulsory service exacted from a "peon" or a servant for the payment of an ordinary debt to his master is denounced and forbidden. About all decided in *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, is that a crime punishable by imprisonment under the Constitution and laws of the United States for a term of years at hard labor is an infamous one, and that no person can be lawfully convicted therefor except upon the presentment or indictment of a grand jury.

In conclusion, it is perhaps unnecessary for me to say, in view of what is stated in the principal opinion, that the constitution of the

state forbids cruel or unusual punishments, and the courts have ample power to prevent such punishments from being inflicted. In making arrests and in the treatment of prisoners, in or out of city prisons, no police or other officer is justified in using unnecessary harshness or excessive violence. If any policeman, to magnify his office, or to exaggerate his importance, or for any other insufficient reason, transcends his power in this respect, he may be mulcted in damages and also criminally punished, but a person who has been lawfully arrested is bound to submit himself peaceably and go quietly with the officer.

Johnston, J.: I concur in the views expressed by the Chief Justice, and also in all said by *Justice Allen*, except that part of the opinion which holds that the ordinance authorizing the employment at labor of prisoners committed to the city prison for non-payment of fines to be invalid.

Rehearing denied.

labor and discharged from such unlawful imprisonment on *habeas corpus* is not thereby discharged from the custody of the sheriff or from lawful imprisonment to which he was sentenced. *Re Fil* *Ki*, 80 Cal. 201.

And a sentence to hard labor for the county for a period sufficient to pay all the costs and officers' fees not exceeding a designated rate per day will not be disturbed on appeal in the absence of objection in the court below. *Hall v. State*, 53 Ala. 463; *McIntosh v. State*, 52 Ala. 355.

Nor will such a sentence to the county jail under Iowa Laws 1870, chap. 69, be set aside on appeal on the ground that that act authorizes imprisonment at hard labor only in case of an able-bodied male over the age of sixteen and under the age of fifty years unless the appellant affirmatively shows that such facts were not made to appear on the trial in the court below. *State v. Winstrand*, 37 Iowa, 110.

So a sentence to hard labor for the payment of costs for a period longer than that authorized by law may be corrected on appeal from the judgment, and the judgment as corrected may be affirmed where the record shows no other error. *Bradley v. State*, 69 Ala. 318; *Vaughan v. State*, 83 Ala. 55.

And in *Ex parte Hunter*, 16 Fla. 575, it was held that a commitment upon the imposition of a fine directing that the defendant be employed at labor at the county jail not exceeding ninety days under a statute limiting the term of imprisonment to sixty days is not thereby rendered illegal so as to entitle the defendant to a discharge, but so much thereof as authorizes imprisonment for ninety days will be treated as surplusage.

See also *Benedict v. State*, 12 Wis. 314, set forth *supra*, under heading: *Necessity of strict compliance*.

And in *Ex parte Adams* (Ark.) Dec. 22, 1894, it was held that *habeas corpus* will not lie to release a 27 L. R. A.

prisoner hired out to the contractor under Ark. Act of March 22, 1881, and amendments thereto on the ground that the hiring was for only ten cents per day, where it does not appear that a more advantageous contract could have been made and he could not, be held under any contract to exceed one day for every fifty cents of fine and costs, although a contract for a greater rate would lessen his term.

In *Herrington v. State*, 37 Ala. 1, however, it was held that the statutes lodge the power to pass sentence with the trial court and not with the appellate court and on reversal in a criminal case it must be remanded to the trial court for that purpose.

One who is convicted and sent to the penitentiary without authority and there required to perform hard labor by the warden for the benefit of the lessee of the penitentiary, may waive the tort and maintain an action against him for such services as upon an implied assumpsit, but such an action could not be maintained against the warden as he was a party to the confinement and received no benefit from the labor. *Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367.

And a convict whose services have been farmed out without authority may recover of the hirer the value thereof. *Greer v. Critz*, 58 Ark. 247.

An assignment of an account for labor performed by a person convicted of an offense over which the court had no jurisdiction under which he was confined in the penitentiary at hard labor is good, and the assignee can recover in an action in his own name against the lessee of the penitentiary as upon an implied contract for work and labor done with his knowledge and at his request, though his assignor was then a prisoner under the control of the warden of the prison. *Patterson v. Crawford*, 13 Ind. 241.

F. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SYNDICATE INSURANCE CO. OF
MINNEAPOLIS, *Pff. in Err.*,

v.

William G. BOHN *et al.*NEW HAMPSHIRE FIRE INSURANCE
CO., *Pff. in Err.*,

v.

SAME.

NEW HAMPSHIRE FIRE INSURANCE
CO., *Pff. in Err.*,

v.

NATIONAL LIFE INSURANCE CO. OF
MONTPELIER, VT.SYNDICATE INSURANCE CO. OF
MINNEAPOLIS, *Pff. in Err.*,

v.

SAME.

(66 Fed. Rep. 165.)

1. Sole owners of the capital stock of a corporation have not the sole and unconditional ownership of the corporate property within the meaning of an insurance policy, which is void unless they have such ownership.
2. Neither inquiry nor statements before the issue of policies is necessary to the validity of a provision making sole and unconditional ownership essential.
3. One who makes sworn proofs of loss stating that he owned the property in fee simple cannot claim that the insurer is estopped from denying it by continuing to act for a short time on the assumption that the oath was true, after hearing a rumor to the contrary.
4. A mortgage clause declaring that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, nor by any change in title or possession without the mortgagee's notice, make a new contract between the insurer and mortgagee which is unaffected by the false statements of the mortgagor as to his title or ownership of the property of which the mortgagee is ignorant, whereby the insurance never became valid as to the mortgagor.

(December 3, 1894.)

WRITS of error by defendants to review judgments of the Circuit Court of the United States for the District of Nebraska in favor of plaintiffs in actions brought to recover the amounts alleged to be due on policies of fire insurance, in which the National Life Insurance Company claimed an interest as mortgagee of the destroyed property. *Reversed as to the property owners.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Mr. A. S. Churchill for plaintiffs in error.

Mr. B. G. Burbank for the property owners.

Messrs. Charles Offutt and James B. Meikle, for the mortgagees:

The policies sued upon were written without any inquiry being made of, or information given by, the Bohns as to the condition of the title to the land on which the insured building stood.

They demanded and accepted the premiums, retained them two years and until after the property was destroyed, delivered the policies without asking any questions or calling attention to the invalidating clauses. By so doing the plaintiffs in error waived all clauses in their policies which provided for their avoidance for any then existing conditions.

Clark v. Manufacturers Ins. Co. 49 U. S. 8 How. 235-250, 13 L. ed. 1061-1067; *Jolly v. Baltimore Equitable Soc.* 1 Harr. & G. 295, 18 Am. Dec. 238; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 192, 40 Am. Dec. 345; *Philadelphia Tool Co. v. British American Assur. Co.* 182 Pa. 236; *Gilman v. Duelling House Ins. Co.* 81 Me. 488; *Peter Mfg. Co. v. St. Paul Fire & Marine Ins. Co.* 41 Fed. Rep. 271; *Duelling House Ins. Co. v. Hoffman*, 125 Pa. 626; *Com. v. Hide & Leather Ins. Co.* 112 Mass. 136, 17 Am. Rep. 72; *Hall v. People's Mutual F. Ins. Co.* 6 Gray, 185; *Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co.* 7 Gray, 261; *Blake v. Exchange Mut. Ins. Co. of Philadelphia*, 12 Gray, 265; *Sibley v. Prescott Ins. Co.* 57 Mich. 14; *Vankirk v. Citizens Ins. Co. of Pittsburgh*, 79 Wis. 627; *Peet v. Dakota Fire & Marine Ins. Co.* 1 S. Dak. 462; *Wytheville Ins. & Bkg. Co. v. Stultz*, 87 Va. 629; *Castner v. Farmers Mut. F. Ins. Co. of Van Buren*, 46 Mich. 15.

If an insurance company elects to issue a policy without an application, or any representations concerning title, it cannot, after loss, complain that insured's interest was not correctly stated in the policy, or that an existing incumbrance was not disclosed.

Western Assur. Co. v. Mason, 5 Ill. App. 141; *Hartford Ins. Co. v. Haas*, 2 L. R. A. 64, 87 Ky. 581; *Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co.* 135 Mass. 508; *Trade Ins. Co. v. Barraciff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Agricultural Ins. Co. v. Yates*, 10 Ky. L. Rep. 984; *Guest v. New Hampshire F. Ins. Co.* 66 Mich. 98; *O'Brien v. Ohio Ins. Co.* 52 Mich. 181; *Rauis v. American Mut. L. Ins. Co.* 36 Barb. 357; *Alkan v. New Hampshire Ins. Co.* 53 Wis. 186; *Gristock v. Royal Ins. Co.* 87 Mich. 428; *Morrison v. Tennessee Marine F. Ins. Co.* 18 Mo. 263, 59 Am. Dec. 299; *Hall v. Niagara F. Ins. Co.* 18 L. R. A. 185, 93 Mich. 184; *Usoos v. Prescott Ins. Co. of Boston*, 11 L. R. A. 340, 84 Mich. 809.

If a company, fire, life, accident or other kind, accepts an application for a policy of insur-

NOTE.—For other cases defining the rights of a mortgagee under a clause providing that his interest in an insurance policy shall not be invalidated by any act or neglect of the mortgagor or owner of the property, see *Phoenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 25 L. R. A. 679, and *Eddy v. London* 27 L. R. A.

Assur. Corp. (N. Y.) 25 L. R. A. 686. See also note to former case on effect of mortgage slip on insurance policy.

That a stockholder has an insurable interest in corporate property, see *Riggs v. Commercial Mut. Ins. Co. (N. Y.)* 10 L. R. A. 684.

ance and issues the policy while any question or questions in the application remain unanswered, such company waives the information called for by such question.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 188-197, 80 L. ed. 644, 649; *Dunbar v. Phenix Ins. Co. of Brooklyn*, 72 Wis. 492; *Lorillard F. Ins. Co. v. McCulloch*, 21 Ohio St. 179, 8 Am. Rep. 52; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Bardwell v. Conway Mut. F. Ins. Co.* 123 Mass. 90; *Armenia Ins. Co. v. Paul*, 91 Pa. 520, 86 Am. Rep. 676; *O'Neill v. Ottawa Agr. Ins. Co.* 80 U. C. C. P. 151; *Dodge County Mut. Ins. Co. v. Rogers*, 12 Wis. 337; *Tiefenthal v. Citizens Mut. F. Ins. Co. of Kent*, 53 Mich. 306; *Carson v. Jersey City Ins. Co.* 48 N. J. L. 800, 89 Am. Rep. 584; *Jersey City Ins. Co. v. Carson*, 44 N. J. L. 210; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 61, 20 Am. Rep. 451.

Conceding that the policies were invalid as to William G. and Conrad Bohn, the mortgage clauses attached to and made a part of the policies contracted all this insurance directly with the mortgagee, the National Life Insurance Company, and under the terms of these mortgage clauses the mortgagee's rights were not affected by any act of either of the Bohns either prior or subsequent to the issue of the policies in suit.

Ormsby v. Phenix Ins. Co. of Brooklyn (S. Dak.) March 3, 1894; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165; *Phœnix Ins. Co. v. Floyd*, 19 Hun, 287; *Foster v. Equitable Mut. F. Ins. Co.* 2 Gray, 216; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507; *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646; *National Bank of D. O. Mills & Co. v. Union Ins. Co.* 88 Cal 497; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 167, 5 Am. Rep. 115; *Lebanon Mut. Ins. Co. v. Leathers* (Pa.) 16 Ins. L. J. 977; *Fayette County Mut. Ins. Co. v. Neel* (Pa.) 8 Ins. L. J. 285; *Brady v. Northwestern Ins. Co.* 11 Mich 425.

Sanborn, Circuit Judge, delivered the opinion of the court:

Are the sole owners of the capital stock of a corporation, who have procured policies of insurance against fire, running to themselves, in their individual names, upon a building, the title to which was in the corporation, debarred from any recovery on the policies by the provisions therein to the effect that the policies shall be void if the interest of the assured is not the sole and unconditional ownership of the property described, or if that interest is not truly stated to the companies, or in the policies or in the indentments thereon? If so, is a mortgagee whose interest is insured by the "union mortgage clause" attached to such policies also debarred from any recovery by these provisions of the policies? These are the principal questions presented in these cases. They were raised by separate exceptions to the refusal of the court below to instruct the jury to return a verdict in favor of either of the plaintiffs in error in any of these cases

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at the close of the trial, when the evidence established the following undisputed facts:

In 1888 the defendants in error William G. Bohn and Conrad Bohn were the owners in fee simple of the building destroyed, and the lot on which it stood. Mr. Doud, the agent of the plaintiff in error the Syndicate Insurance Company, solicited their insurance, and William G. Bohn, one of the defendants in error, told him that he and Conrad Bohn were the owners of the building, and directed him to insure it in the companies he represented, in their names. Thereupon he issued to them a policy of the Syndicate Insurance Company, for the sum of \$5,000, for the term of one year, covering this building, and delivered it to the Bohns. In October, 1888, they mortgaged the insured property to the defendant in error the National Life Insurance Company, for \$25,000, and covenanted in the mortgage to keep it insured for that amount for the benefit of the mortgagee. Thereupon the policy of the Syndicate Insurance Company was presented to its agent, and, at the request of the Bohns and the mortgagee, he attached to this policy the union mortgage clause, and delivered it to the mortgagee. That mortgage clause reads as follows:

"It is hereby agreed that any loss or damage that may be ascertained and proved to be due under this policy to the assured shall be held payable for the account of said assured to the National Life Insurance Co., mortgagee or beneficiaries, or its assigns, subject to the following stipulations: (1) It is agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary, or its assigns, only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer, or conveyance of the premises, or for nonoccupation of the premises: provided, that the mortgagee or beneficiary shall notify this company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee or beneficiary, and shall have permission for such change of ownership or such increased hazard, as shall come to his notice, duly indorsed on this policy: and provided, further, that every increase of hazard not permitted to the mortgagor or owner shall be paid by the mortgagee or beneficiary, on reasonable demand, and after demand made by this company upon and refusal by the mortgagor or owner to pay, according to the established scale of rate; the company reserving the right to cancel the policy at any time on the terms in said policy provided, on giving to the mortgagee ten (10) days' notice of their intention so to do, and after such ten (10) days the policy and this agreement shall be void. The foregoing stipulations, however, shall not be held, under any circumstances, to modify the terms of contribution provided in the printed conditions of this policy, in case of

other insurance on the same property; it being expressly understood that this insurance is upon the interest of said mortgagor or owner, or assigns, and that other insurance on the interest of said mortgagor or owner, or assigns, is to contribute according to said conditions. (2) It is also agreed that whenever this company shall pay to the mortgagee or beneficiary any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or this company may, at its option, pay to said mortgagee or beneficiary the whole of the debt so secured, including such sums as said mortgagee or beneficiary may then have paid for taxes or fire insurance upon the property described in such mortgage or trust deed, pursuant to the terms thereof, with all interest that may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payments shall be made an assignment and transfer of said debt, with all the securities held by said party on the property in question for the payment thereof. If the above-named mortgagee should assign this mortgage, the above agreement shall be binding between said insurance company and the assigns without notice to said insurance company of said assignment."

The original policy of the Syndicate Insurance Company, and the policy here in suit, insured the Bohns against loss or damage by fire to "their four-story brick warehouse . . . situated on tax lot 12, Omaha, Neb., . . . not exceeding the sum insured, nor the interest of the assured therein," and contained the following provisions:

"The assured, by the acceptance of this policy, hereby covenants and agrees (1) that any application, plan, survey, or description referred to in this policy is true, and shall be and form a part of this policy; that no fact material to the risk, or relating to its condition, situation, or ownership, has been concealed; and that the interest of the assured therein has been truly stated to this company. If the interest of the assured be other than the unconditional and sole ownership of the property, or if the building insured stands on leased ground, it must be so expressed in the policy." "This policy shall become void and of no effect (1) by the failure or neglect of the assured to comply with its terms, conditions, and covenants; (2) by the sale or transfer, or any change in the title or possession of the property insured (except in case of succession by reason of death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance."

In May, 1889, the Bohns conveyed the building insured, and the lot on which it stood, by warranty deed, subject to the

\$25,000 mortgage, to the Bohn Sash & Door Company, a manufacturing corporation, the capital stock of which they owned; but this fact was unknown to all the other parties to these actions until after the fire. About the 1st of September, 1889, Mr. Doud, the agent of the Syndicate Company, inquired of the Bohns whether he should renew the policies he had issued on this building, and they directed him to do so; and thereupon he issued a new policy of the Syndicate Company for the term of one year, and delivered it to the mortgagees. He told the Bohns that he had lost the agency of one of the companies that had issued a policy to them the year before, and that he was not the agent of the New Hampshire Fire Insurance Company, but that he proposed to place \$2,500 with that company, and they authorized him to do so. He then told the agents of that company that the Bohns owned the building, and directed them to issue in their name a policy of that company, for \$2,500, for one year, and to attach the union mortgage clause to it. They did so, and the policy was delivered to the mortgagees. About the 1st of September, 1890, Mr. Doud again inquired of the Bohns if he should renew the policies. They authorized him to do so, and he issued the policy of the Syndicate Company, and procured the issue of the policy of the New Hampshire Fire Insurance Company, here in suit. The policy of the plaintiff in error the New Hampshire Fire Insurance Company declares that that company insures William G. and Conrad Bohn against loss or damage by fire, except as hereinafter provided, to an amount not exceeding \$2,500, "on their four-story brick warehouse, situate on tax lot 12, Omaha, Neb.," and provides that, "this entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein." "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The building insured was destroyed by fire May 12, 1891. It was then worth \$34,000. The amount of insurance upon it under these and similar policies, payable to the mortgagees under the mortgage clause we have set forth above, was \$25,000, but payments had been made upon the mortgage debt until there was only about \$21,000 owing upon it. The two policies here in suit contained the usual contribution clause. The mortgagees, the National Life Insurance Company, and the Bohns, brought separate actions upon each of these policies. These actions were consolidated by order of the court, and tried to the same jury. The mortgagee recovered a judgment against each of the plaintiffs in error for such a proportion of the amount owing on the mortgage debt as the amount of its policy bore to the \$25,000 insurance, and the Bohns recovered a judgment against

each of them for the remainder of the amount of the face of their policies respectively. These are the four judgments before us for review. Can they be sustained? Let us first look at the judgments in favor of the Bohns.

By the provisions of these policies which we have quoted, the Bohns made plain contracts with the insurers that they had truly stated their interest in the property insured, and that if that interest was not the sole and unconditional ownership of that property the policies should be void. At the time these policies were issued, and at the time of the fire, they were neither the sole and unconditional owners of this property, nor had they any legal title to it, or any equitable title that they could convert into a legal title. The legal title was in a corporation, and they were mere stockholders in that corporation. They could not convey or incur the title to this property by their deed or mortgage, nor could the title to it be passed or affected by any sale of their interest in it under judgment and execution against them. Stockholders of a corporation are entitled to a distributive share of its profits while it continues in operation, and, at its dissolution, to a just proportion of the proceeds of the corporate assets remaining, if any, after all the corporate debts are paid, but they are far from being the unconditional owners of the property of the corporation. The title and ownership of such property is vested in the corporation itself,—in an entity as distinct and separate from its stockholders as is any individual trustee from his *cestui que trust*. The corporation itself can sell, convey, mortgage, and deal with the corporate property as its own, subject only to the restrictions of its charter, while its stockholders can do none of these things. These stockholders were not, therefore, the sole or unconditional owners of the property described in these policies. *Riggs v. Commercial Mut. Ins. Co.* 125 N. Y. 7, 10 L. R. A. 684; *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. The Assessors*, 70 U. S. 3 Wall. 573, 18 L. ed. 229; *McCormick v. Springfield Fire & Marine Ins. Co.* 66 Cal. 361; *Philips v. Knox County Mut. Ins. Co.* 20 Ohio, 174, 184.

It is not unworthy of notice here that one of the errors assigned in this record is that the court below excluded evidence of the insolvency of the Bohn Sash & Door Company at the time of the fire. This would have been a fatal error, if it could be conceded that the interest of the Bohns, as stockholders, was insured by these policies. The insurance companies were not liable, in any event, to pay to the Bohns any more than the loss that resulted to their interest from this fire. The extent of that loss was much less if the corporation was insolvent, if the amount of its debts was greater than the value of its assets, and if its stock was consequently worthless, than if the value of its assets exceeded its debts by the par value of its stock, as the court seems to have conclusively presumed.

But we are unable to conclude that the interest of the Bohns, as stockholders of this corporation, was insured by these policies.

These are not cases in which the assured has fully stated the condition of his title at the time the policies issued, and an inadequate or incorrect description of that interest has been made, through some fault or neglect of the agent of the insurance companies. When the policy of the Syndicate Company was issued, in 1888, one of the Bohns informed the agent of the company that they were the owners of the building, and directed him to issue the policies in their names. The policies were so issued and delivered to them. The Syndicate policy then issued contained the same provisions found in that now in suit, and the Bohns must be conclusively presumed to have read and to have assented to the contracts these provisions contained. The order that they gave in 1889 to renew their policies, and to procure a new policy from the New Hampshire Company, without giving any notice of the conveyance of the property they had made, or of any change in their interest or title, was an order to procure the new policy, and to issue the renewals on the faith of the original representation they had made, and on the same terms upon which the original policies were issued. The subsequent order for renewals in 1890 was of like character. These orders were in effect reiterations in 1889 and 1890 of the original statement that they were the owners of the property, and as they gave no notice of their conveyance of it, or of any change in their interest, the agent and the companies were clearly entitled to rely upon that statement.

These contracts are neither novel nor peculiar. Contracts practically identical in legal effect are, and have been for many years, common to nearly all policies upon buildings. Their terms are so familiar to insurers and insured that a policy upon a building, that did not contain some of them would be nearly as unique as a decree of an English court in Norman French in this decade. Nor are they unjust, unreasonable, or unfair contracts. They rest upon a sound policy of the business of insurance,—a policy founded in reason, and in accord with an enlightened public policy; the policy of reducing the moral hazard to which the underwriter is exposed. "Moral hazard," in insurance, is but another name for a pecuniary interest in the insured to permit the property to burn. Statistics, experience, and observation all teach that the moral hazard is least when the pecuniary interest of the insured in the protection of the property against fire is greatest, and that the moral hazard is greatest when the insured may gain most by the burning of the property. Take the case at bar. The property described in these policies that was destroyed by fire was worth \$34,000. It was insured for \$25,000, payable to a mortgagee whose interest was but \$21,000. If the Bohns had been the owners of this property, and had recovered the entire \$25,000 insurance, they would have lost \$9,000 by the fire. But suppose that the corporation that owned the property was insolvent, as the plaintiffs in error offered to prove, and that the stock of the Bohns was worthless. In that event, if they could re-

cover on all of these policies, they would make a clear profit of \$4,000 by the burning of this building, after their mortgage debt was paid. It goes without saying that the moral hazard—the danger that the property would burn—was vastly greater in the latter than in the former case, and the fact that the Bohns were not the owners of the property insured, but were mere stockholders of a corporation that did own it, was very material to this risk. If there could be any doubt of this fact, the evidence in this record is full and undisputed that the risk was greater, and the rate of insurance higher, for the insurance of stockholders against the destruction of corporate property than it was for the insurance of the owners of that property.

It is contended that the contracts in these policies, which exclude the Bohns from insurance under them upon any interest but that of unconditional ownership, are without binding force, because no inquiry respecting their title was made by the companies, and no statement concerning it was made by the Bohns, when these policies were issued. But neither inquiry nor statement before the issue of the policies was requisite to the validity of these contracts. The policies themselves, containing, as they did, the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described, and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss to that interest only, and that they expressly excluded every other interest from the insurance unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into or indorsed upon the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies, that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity. *Columbian Ins. Co. of Alexandria v. Lawrence*, 27 U. S. 2 Pet. 25, 49, 7 L. ed. 335, 344; *Waller v. Northern Assur. Co.* 10 Fed. Rep. 232; *Coltins v. St. Paul Fire & Marine Ins. Co.* 44 Minn. 440; *Lasher v. St. Joseph Fire & Marine Ins. Co.* 86 N. Y. 423, 427; *Weed v. London & L. F. Ins. Co.* 116 N. Y. 106, 113; *Diffenbaugh v. Union F. Ins. Co.* 150 Pa. 270; *Fuller v. Phenix Ins. Co.* 61 Iowa, 350; *Waller v. Northern Assur. Co.* 64 Iowa, 101; *Mers v. Franklin Ins. Co.* 68 Mo. 127, 132; *McPettridge v. Phenix Ins. Co. of Brooklyn* 84 Wis. 200; *Henning v. Western Assur. Co.* 77 Iowa, 319; *Liberty Ins. Co. of New York v. Boulden*, 96 Ala. 508; *Pelican Ins. Co. v. Smith*, 92 Ala. 423.

Finally it is said that the plaintiffs in error

are estopped from enforcing, and have waived, these provisions of the policies, because, after they had heard a rumor that the Bohns had conveyed the property, and after the latter had furnished proofs of loss under the policies, the insurance companies demanded that they should submit to an examination under oath, as provided by the policies, and that they should produce papers, vouchers, and plans and specifications for the building destroyed, and pursuant to these demands the Bohns incurred the expense of employing an attorney to attend such an examination, that was never had. This position is untenable, for two reasons: First, because there is no evidence in this record that would warrant a finding by a jury that when the companies made these demands they knew that the Bohns were not the unconditional owners of the property at the time of the fire, and no estoppel or waiver could arise from any action of theirs in ignorance of that fact; and, second, because in proofs of loss, which were required by the terms of the policies to be verified by the oath of the assured, and which were sworn to April 8, 1891, and were furnished to the companies under the provisions of the policies, the Bohns falsely stated "that the property insured was owned in fee simple by the said William G. Bohn and Conrad Bohn." After such a statement under oath, it does not lie in the mouths of these men to say that the companies are estopped from enforcing these contracts, or that they waived them, because they hesitated for a time to believe that this oath was false, or were induced by it to proceed for a time as though it was true. There was no estoppel or waiver here.

The contracts contained in the provisions of these policies we have been considering were, then, such as it was customary to make in cases like those before us. The Bohns themselves had made such contracts twice, before the policy in suit was issued, with one of the plaintiffs in error, and once with the other. The object of these contracts was one fit to be attained. It was the reduction of the moral hazard in fire insurance, and the consequent reduction of the unnecessary destruction of property. The contracts were fair, plain, and unequivocal. By their very terms, they excluded the Bohns from all insurance under these policies unless they were the sole and unconditional owners of the property they described. They were not the owners of it at all. They had neither the legal title, nor any equitable title that they could convert into a legal title. It is not the province of the court to abrogate, to modify, or to refine away these contracts, nor to make new contracts for the parties; and these contracts, as they stand, form an impregnable defense to the actions against these insurance companies brought by the Bohns. The court should so have instructed the jury.

Our conclusion is that provisions in policies of insurance to the effect that the policies shall be void if the interest of the insured is not the sole and unconditional ownership of the property described in the policies, or if that interest is not truly stated to the companies, or in the policies, or in

the indorsements thereon, constitute a complete defense to actions by the sole stockholders of a corporation upon policies issued to themselves, as owners, upon property owned by the corporation.

Let us now turn to the judgments in favor of the mortgagee. Are these provisions of the policies alike fatal to any recovery in its behalf? The plaintiffs in error insist that they are. They say that the only interest insured here is that of the mortgagors; that the mortgage clause simply makes the proceeds of that insurance payable to the mortgagee to the extent of the mortgage debt; that the facts that the balance of the proceeds belong to, and all of these proceeds, if the debt is paid by the mortgagors, revert to, the mortgagors, and the very terms of the first sentence of the mortgage clause, viz., "It is agreed that any loss or damage that may be ascertained and proved to be due under this policy to the assured shall be held payable for the account of the assured to the National Life Insurance Company, mortgagee, or beneficiaries, or its assigns, subject to the following stipulations," limit the mortgagee's right to recover to such amounts as became due or payable to the assured, the Bohns, for damage to their interest in the property; and that inasmuch as they had no interest insured, and no amount ever became due or payable to them, nothing ever became due to the mortgagee. It is not difficult to dispose of this argument. It proves too much. If it were sound, the mortgagee could not recover if, after a valid policy, with the mortgage clause attached, had been delivered to the mortgagee, the mortgagors had conveyed or burned the property or violated any of the material provisions of the policy as to the occupancy or use of the premises. But one of the "following stipulations," to which the first sentence of this mortgage clause is "subject," is that this insurance, as to the interest of the mortgagee only, "shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured;" and it is too clear and too well settled to admit of discussion that no act or neglect of the mortgagors, done or permitted after the policies and mortgage clauses were delivered to the mortgagee, although fatal to the mortgagor's recovery, could deprive the uninformed mortgagee of its indemnity. *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 123 Mass. 165; *Phoenix Ins. Co. v. Floyd*, 19 Hun, 287; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 489, 455. But the plaintiffs in error say that, although the indemnity of the blameless mortgagee is protected by this contract against any act or neglect of the mortgagors subsequent to the issue of the mortgage clause, yet any prior act or neglect of theirs, which excludes their interest from insurance under the policies, precludes the mortgagee from obtaining any indemnity under this mortgage clause. Before we assent to a construction of this contract so narrow and subtle, it will not be unconstructive to notice the history and purpose of this clause, and the situation of these parties when they made it their contract. We all know that twenty years ago a con-

tract between a mortgagee and an insurance company, like that before us, was novel and rare. At that time the customary method of indemnifying the mortgagee against loss by fire was to indorse upon the policy the words, "Loss, if any, payable to ———, mortgagee, as his interest may appear," or words of similar import. To-day such an indorsement is rare, and a contract similar to the mortgage clause before us is in general use. Why this change? The reason is not far to seek. The old indorsement made the mortgagee a simple appointee of the mortgagor, and put his indemnity at the risk of every act or neglect of the mortgagor that would avoid the original policy in his hands. *Baldwin v. Phoenix Ins. Co.* 60 N. H. 164; *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, 20 Am. Rep. 372; *State Ins. Co. v. Maackens*, Id. 564. Indemnity so precarious, so liable to be destroyed by the ignorance, carelessness, or fraud of the mortgagors, was not satisfactory to the mortgagees; and they proceeded to make contracts with the insurance companies similar to that before us, for the purpose of securing indemnity to their interests that should not be affected by any act or negligence of the mortgagors.

In 1878 one of these contracts came before the court of appeals of the state of New York in *Hastings v. Westchester F. Ins. Co.*, 78 N. Y. 141, 150, 154, for judicial interpretation. It was a mortgage clause attached to an original policy running to the mortgagor, and, so far as the question we are now considering is concerned, the terms of that clause were identical with those contained in the contract before us. It provided that "this insurance, as to the interest of the mortgagee only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." The original policy contained a contribution clause to the effect that, if there was any other insurance on the property, whether prior or subsequent to the issue of the policy, the assured should be entitled to no greater proportion of the loss sustained than the sum thereby insured bore to the whole amount of insurance on the property. The mortgage clause contained no such provision. Before either the policy or the mortgage clause was issued, the mortgagor had procured \$4,000 insurance on the same property in another company, but neither the insurance company nor the mortgagee was aware of this fact until after the loss. The question presented was whether or not the mortgagee's insurance was reduced, under the contribution clause of the original policy, by the prior insurance obtained by the mortgagor. The court held that it was not; that the mortgage clause constituted a new and independent contract between the mortgagee and the insurance company, and effected a separate insurance of his interest, unaffected by any act or neglect of the mortgagor, of which he was ignorant, whether that act or neglect was prior or subsequent to the issue of the mortgage clause. In 1882, in *Meriden Sav. Bank v. Home Mut. F. Ins. Co.*, 50 Conn. 396, the question arose whether or not a mortgagee, who had made a collateral agreement with the insurance company, similar in terms

to the mortgage clause before us, as to all the insurance policies of that company which the mortgagee held, could maintain an action on that agreement, and a policy referred to therein, without joining the mortgagor; and the supreme court of Connecticut held that it could, cited *Hastings v. Westchester F. Ins. Co.*, *supra*, with approval, and declared that, while they would not then hold that the collateral agreement was a distinct and independent contract of insurance, it was "an agreement relating to an existing policy, by which certain conditions are dispensed with, and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance." In 1883, in *Davis v. German American Ins. Co.*, 135 Mass. 251, a case arose in which a mortgagor, whose policies provided that they should become void if the property was sold or transferred, had sold and conveyed the property insured during the term of his policies, and the mortgagees had subsequently entered and taken possession of it for default in the payment of the mortgage debt. The mortgagees knew that the mortgagor had conveyed away the property, and without stating this fact to the insurance company, and upon a statement of their entry for default and possession only, and without paying any additional premiums, they procured indorsements on the policies substantially identical with the mortgage clause in question, with this exception, viz. these indorsements commence with this recital: "Davis, Taylor, and Demmon, the parties to whom this policy is payable in case of loss, being mortgagees, have entered for breach of the conditions of their said mortgage." The supreme judicial court of Massachusetts held that this recital indicated that it was not the intention of the parties to these indorsements to insure the interest of the mortgagees, as such, but to insure to the mortgagees, as owners, the interest the mortgagor originally had, on the supposition that the entry and possession had transferred that interest to the mortgagees in the same way that a sale of the premises by the mortgagor while he owned them, and the assignment of the policies, would have done, and that inasmuch as the mortgagor had no interest in the property, and no insurance upon it, at the time the mortgagees entered and took the possession, the mortgagees obtained none. That court further held that, if the indorsements could be construed as an insurance of the interest of the mortgagees, they were without consideration, and did not bind the insurance company.

We have reviewed the two cases last adverted to at some length, because they are the only cases which treat of this mortgage clause that have been called to our attention by the counsel for the insurance companies in support of his contention, or that are claimed by him to be in conflict with the decision of the New York court of appeals in *Hastings v. Westchester F. Ins. Co.* *supra*. As we have seen, these two cases are not in conflict with that decision. The courts that rendered these decisions neither considered nor decided the question presented in the New York case.

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On the other hand, the decision in that case has been uniformly cited with approval in every case in which any question concerning the construction of this mortgage clause has arisen, from 1878 to the present time. *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 123 Mass. 165; *Phenix Ins. Co. v. Floyd*, 19 Hun. 287; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439, 455. And it has lately been followed upon the precise question here at issue by the supreme court of South Dakota in *Ormsby v. Phenix Ins. Co. of Brooklyn*, 58 N. W. Rep. 301, 302. What, now, was the situation and relation of the parties to this contract in the case at hand when this mortgage clause was issued? During the ten years which followed the announcement of the decision in *Hastings v. Westchester F. Ins. Co.*, *supra*, the old form of indorsement, "Loss, if any, payable to —, mortgagee, as his interest may appear," gradually disappeared from the face of insurance policies, and this mortgage clause, or a similar contract, took its place. That decision had settled that in New York, at least, such a clause protected the mortgagees against any act or neglect of the mortgagor, whether prior or subsequent to its issue. That decision had been repeatedly approved by courts of high rank, and never disapproved. Under these circumstances, the Bohns, in 1888, mortgaged the building insured, and the lot on which it stood, to the defendant in error the National Life Insurance Company, for \$25,000, and, in part consideration for the loan thus procured, covenanted to keep the building insured, for the benefit of the mortgagee, in such companies, and by such a mortgage indemnity clause, as the mortgagee should select. Pursuant to that covenant, the mortgagors did procure and deliver to the mortgagee in October, 1888, policies of insurance, in their own names, to the amount of \$25,000, with this union mortgage clause attached, for the benefit of the mortgagee. One of these policies, together with this mortgage clause, was issued by the plaintiff in error the Syndicate Fire Insurance Company. This insurance was valid in its inception. It ceased, however, to insure the mortgagors in May, 1889, because they then conveyed the property insured to the corporation; but, as to the mortgagee, it remained in force until the fall of 1889, when these contracts of indemnity expired by limitation. The mortgagors then procured a renewal policy from the Syndicate Company, and a new policy from the plaintiff in error the New Hampshire Fire Insurance Company, for the term of one year, with this mortgage clause attached to each, and delivered them to the mortgagee, and at the end of that year they procured and delivered to the mortgagee the policies and mortgage clauses here in suit. It is true that the Bohns paid the premiums for this insurance, but a promise to pay or indemnify is no less binding when the consideration is paid by a third party than when it comes directly from the payee or the insured. *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439, 454, and cases there cited. The agreement evidenced by this mortgage clause was therefore a valid contract between the

mortgagee and the insurance companies, made upon sufficient consideration, for the evident purpose of protecting the indemnity guaranteed to the mortgagee by these companies against destruction by any act or neglect of the mortgagors. Was it that contract that the indemnity of the mortgagee should not be protected against any prior act or negligence of the mortgagors? There is no such restriction in the contract. It provides that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagors, by any occupancy or vacancy, or by any change of title or possession of the premises, provided that the mortgagee shall notify the insurance company of any change of ownership or increase of hazard that may come to its knowledge, shall have permission therefor indorsed on the policy, and shall pay for it. It provides that when the insurance company pays to the mortgagee any loss under the policy, for which it claims that no liability to the mortgagors existed, it shall be legally subrogated to all the rights of the mortgagee, in subordination to the mortgagee's claim for the balance of its debt, or that it may, at its option, pay the entire debt of the mortgagee, and take an assignment to itself of all the securities. And it finally provides that, if the mortgagee assigns the mortgage, the agreement contained in the mortgage clause shall be binding between the insurance company and the assigns, without notice to the insurance company of the assignment. What after terms could be chosen to effect a separate insurance on the interest of the mortgagee, to free that insurance from any possible influence of any act or neglect of the mortgagor, and to make it dependent solely on the course of action of the mortgagee and the insurance company? None occur to us. And these terms are found in a contract between the mortgagee and the insurance company. They secure to the insurance company certain rights in the contemplated contingency that the mortgagee's contract of insurance may be valid when that of the mortgagor is void, and they expressly provide that this contract shall run with the mortgage. When this mortgage clause was attached to the policies in suit, it had been introduced and generally adopted by insurance companies and mortgagees to secure indemnity to the latter. The purpose of its introduction and adoption had been to protect that indemnity against every act and neglect of the mortgagors, whether prior or subsequent to the issue of the mortgage indemnity clause. Ten years before, the highest judicial tribunal of the state of New York had declared that a mortgage clause which contained these provisions accomplished that purpose, and every court whose attention had been called to the question had approved that decision. Under these circumstances, the mortgagee and the insur-

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ance companies in these cases selected a mortgage clause that contained these identical provisions, and made it their contract. The inference is irresistible that they intended to, and that they did thereby, agree that no act or neglect of the mortgagor, unknown to the mortgagee, whether prior or subsequent to the date of this contract, should avoid it. Moreover, these insurance companies cannot now be heard to say that these contracts were void in their inception, as to the interest of the mortgagee. They tendered to this mortgagee their own policies running to third parties, and their contracts with the mortgagee that these policies should not be invalidated by any act or neglect of those parties. The policies had been issued by themselves, and any third party had the right to rely upon their statement as to the validity of their own policies. The policies certainly could not be invalidated unless they were then valid, and the tender of them to this mortgagee as contracts of insurance of its interest as mortgagee, with promises that they should not be invalidated, was a clear representation to the latter that those policies were then valid. The mortgagee undoubtedly relied upon this representation, and on the faith of it accepted the policies and the mortgage clauses as binding agreements of indemnity. If the insurance companies had notified this mortgagee at any time before the loss that the original policies were or might have been invalid at the inception of the contracts between them, the latter would undoubtedly have surrendered the contracts, and sought insurance elsewhere. They waited until the loss had occurred, and it is now too late for them to retract their representations. They are estopped to deny the truth of their statement, to the manifest injury of the mortgagee.

Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause.

In view of this conclusion, a careful examination of the records discloses no prejudicial error in the trial of the cases between the mortgagees and the insurance companies, and the judgments in those cases must be affirmed.

The two judgments in favor of William G. Bohn and Conrad Bohn against the plaintiffs in error, respectively, must be reversed, and the cases remanded, with directions to award a new trial, and it is so ordered.

NEBRASKA SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Plff. in Err.,

v.
CALL PUBLISHING CO.

(.....Nov.....)

1. A telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers.
2. Section 7, article 11, of our Constitution limits the legislature in the regulation of telegraph companies to the correction of abuses and prevention of unjust discrimination.
3. Not all discrimination in rates is unjust. In order to constitute an unjust discrimination, there must be a difference in rates under substantially similar conditions as to service.
4. Chapter 89a, Comp. Stat., regulating telegraph companies, prohibits—First, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in rates for similar services; third, partiality or discrimination as to terms of payment or delivery; and, fourth, all discrimination in favor of persons transmitting dispatches to the greater distance.
5. In so far as the act referred to forbids unjust discrimination, and disregarding the penalties imposed by the act, it merely declares principles recognized by the common law.
6. Either under the common law or the statute, a telegraph company must charge for its services no more than a reasonable rate; under like conditions it must render its services to all patrons on equal terms; and it must not so discriminate in its rates to different patrons as to give one an undue preference over another.
7. It is not an undue preference to make to one patron a less rate than to another, where there exist differences in conditions affecting the expense or difficulty of performing the service which fairly justify a difference in rates.
8. Where it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. A jury cannot be permitted to find such disproportion without evidence.

(March 8, 1895.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover back charges paid by plaintiff to defendant for the transmission of telegraph messages, which

*Headnotes by IRVINE, C.

NOTE.—The question involved in the above case is somewhat novel. But for the kindred question of the right of a common carrier at common law to discriminate in rates, see *note* to Louisville, E. & St. L. Consol. R. Co. v. Wilson (Ind.) 18 L. R. A. 106, also Cowden v. Pacific Coast SS. Co. (Cal.) 18 L. R. A. 221.

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were alleged to have been an illegal discrimination against it. *Reversed.*

The facts are stated in the opinion.

Measrs. H. D. Estabrook and John H. Ames, for plaintiff in error:

An individual cannot make a discrimination in rates a foundation for an action in damages, unless he can show that in some way it has been made at his own expense, or, in other words, tends to create a monopoly in the favored party or parties.

Interstate Commerce Commission v. Baltimore & O. R. Co. 8 Intern. Com. Rep. 193, 43 Fed. Rep. 37; *Nicholson v. Railway Co.* Nev. & McN. 47; *Hosier v. Railway Co.* Id. 80; *Bayles v. Kansas Pac. R. Co.* 5 L. R. A. 490, 2 Intern. Com. Rep. 643, 18 Colo. 181; *McNees v. Missouri Pac. R. Co.* 23 Mo. App. 224; *Hays v. Pennsylvania R. Co.* 12 Fed. Rep. 309; *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846; *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306; *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 8 Intern. Com. Rep. 387, 126 Ind. 348; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731.

By the act of congress the regulation of the rates of compensation and tolls for the transmission of dispatches over the lines of the plaintiff in error is withdrawn from state jurisdiction, and as this action is an attempt at such regulation, it should for that reason be dismissed.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Intern. Com. Rep. 134; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Intern. Com. Rep. 31; *Western U. Teleg. Co. v. Pendleton*, 123 U. S. 349, 30 L. ed. 1189, 1 Intern. Com. Rep. 306.

Irvine, C., filed the following opinion:

The Call Publishing Company is a corporation publishing a daily newspaper in the city of Lincoln. It brought this suit against the Western Union Telegraph Company, alleging that since July 1, 1888, it had been receiving from the telegraph company the dispatches of the Associated Press collected by that organization at Chicago and transmitted daily from Chicago to Lincoln, as well as to other cities; that there existed between the Associated Press and the telegraph company a contract which prevented the Call Company from procuring its news otherwise than over the lines of the telegraph company; that during said period the telegraph company had charged and collected from the Call Company \$75 per month for transmitting such dispatches, nor exceeding 1,500 words each day; that the State Journal Company published in the city of Lincoln a daily newspaper, which had been during the whole of such period, and prior thereto, receiving

For reasonable discriminations, see *Lough v. Outerbridge* (N. Y.) 25 L. R. A. 674; *Hoover v. Pennsylvania R. Co.* (Pa.) 22 L. R. A. 263; *Bayles v. Kansas Pac. R. Co.* (Colo.) 5 L. R. A. 490; *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754.

the same dispatches; that during the whole of said period the telegraph company unjustly discriminated in favor of the State Journal Company, and against the Call Company, and gave to the State Journal Company an undue advantage, in that it charged the State Journal Company for the same, like, and contemporaneous services as were rendered to the Call Company only the sum of \$1.50 per 100 words daily per month; that the amount charged and collected by the telegraph company from the Call Company was excessive and unjust to the amount of the excess of the charge to it over that to the State Journal Company; that, immediately upon discovering such discrimination, the Call Company demanded repayment of such excess, which was refused. Damages were alleged on this account in the sum of \$1,962, for which judgment was prayed. The telegraph company admitted the charges made to the Call Company, and admitted that it charged the State Journal Company for its dispatches \$125 per month, but denied that it had given the State Journal Company any undue advantage, or that it had unjustly discriminated in favor of the State Journal Company. It further alleged that the Call Company published an evening paper, and received over the telegraph company's lines dispatches not exceeding 1,500 words per day, all transmitted and delivered in the daytime, and that this charge was fair and reasonable, and was no greater than was charged other persons for similar services. It further alleged that it had accepted the provisions of the act of congress of 1888 in regard to telegraph companies, and pleaded that the subject-matter of the action was within the exclusive jurisdiction of the federal courts; and it further pleaded that it at all times had been ready to transmit all dispatches with impartiality in the order in which they were received, and had ever been willing to offer the same and equal facilities to the plaintiff and all publishers of newspapers, and to furnish dispatches for publication to all newspapers on the same conditions as to payment and delivery. The reply was a general denial. There was a verdict for the plaintiff for \$975, upon which judgment was rendered, and the telegraph company prosecutes error. The errors assigned relate to the instructions given and refused, and to the sufficiency of the evidence. The assignments of error in regard to the instructions group themselves in the same manner as in the case of *Hiatt v. Kinkaid*, 40 Neb. 178. One assignment is directed against the instructions given by the court *en masse*. Another is directed against those asked by the telegraph company and refused. Some of those given by the court were manifestly correct, and at least one asked by the telegraph company was substantially covered by the court's charge. These assignments must therefore be overruled, and we are remitted, in an examination of the case, to a consideration of the sufficiency of the evidence.

The evidence shows, without substantial conflict, that prior to July, 1888, a newspaper had been published in the city of Lincoln known as the "State Democrat." This paper

had acquired what is styled a "franchise" in the Northwestern Associated Press, and had been receiving the dispatches of that organization, paying to the Associated Press \$30, per month therefor, and paying to the telegraph company for transmitting and delivering the dispatches \$75 per month for a maximum of 1,400 words per day. The manner in which this contract was brought about was that Mr. Calhoun, the proprietor of the State Democrat, negotiated with the manager of the press association for procuring its news, and was by the manager informed that he should first make terms with the telegraph company for transmitting the messages. Negotiations were entered into between Mr. Calhoun and the telegraph company, resulting in an offer by the telegraph company to transmit 1,400 words per day for \$75 per month, and this offer was accepted by Mr. Calhoun. About July 1, 1888, Mr. Calhoun sold his paper to the Call Company, and assigned to that company the franchise which he had acquired in the Northwestern Associated Press. No new contract is disclosed between the Call Company and the telegraph company, but the telegraph company continued to deliver and the Call to receive the dispatches in the same manner as they had been transmitted and received to and by the Democrat before sale, and the Call Company paid the rate of \$75 per month. The paper published by the Call Company was an evening paper, published between 3 and 4 o'clock in the afternoon. The State Journal Company published a morning paper. It was also a member of the Associated Press, and received over the wires of the telegraph company dispatches not to exceed 5,600 words a day, for which it paid, during this period, the sum of \$125 per month. It also was a member of the United Press, another association for the collection of news, and received through that association, over the wires of the Postal Telegraph Company, from 7,500 to 8,000 words per day, for which it paid to the Postal Company \$200. The Associated Press transmits its news in two groups, called "reports." The day report is transmitted between 11 A. M. and about 2:30 P. M., and is for the especial benefit of evening papers. It is this report which the Call Company received. The night report is usually transmitted at night, and generally between 7 P. M. and 8 A. M., and is for the especial benefit of morning papers. The Journal Company's contract strictly included only the night report, but for many years it has in fact received both day and night reports. Prior to the acquisition by the Democrat of its franchise in the Associated Press, the day report to the Journal was relayed at Omaha, whence it was usually transmitted to Lincoln by wire, but sometimes by mail. The Journal Company sent to the office of the telegraph company for this report, and usually obtained it, about 4 P. M. After the Democrat's acquisition of the franchise, the day report was transmitted from Chicago directly, except when the weather or other influences required a relay at Omaha. It was sent in time for use by the afternoon paper, was committed to writing on manifold paper, one

copy delivered to the Democrat, and, after its sale, to the Call, and the other to the Journal. The Journal was not permitted to use this report until after it had been published in the Call. It was also shown that in order to be of any service to the Call the day report must be delivered to it not later than 8 o'clock in the afternoon, while the night report to the Journal might be transmitted at any time prior to about 8 o'clock in the morning. Prior to the contract between the Democrat and the telegraph company for the day report, the telegraph company used but one wire between Omaha and Lincoln. In order to promptly transmit the day report to the Democrat, the telegraph company was required to erect another wire, and employ an additional operator at Lincoln. Neither this wire nor this operator was employed exclusively for transmitting the report. Other business between the two cities demanded additional facilities, and this wire and this operator, when not engaged in transmitting the press report, were used for commercial business. But the necessity of transmitting this report was one of the elements, and evidently a large one, in requiring the telegraph company to so increase its facilities. During the hours within which the day report must be transmitted, the facilities of the telegraph company are taxed with a great burden of commercial business, and during those hours certain wires are leased to individuals to accommodate their business. After 4 o'clock in the afternoon these leased wires are free, and can be used by the telegraph company for other purposes. During the night, when the night report is transmitted, not only are these leased wires free for use by the telegraph company, but there is not the same pressure of commercial business generally, and it is the established usage of telegraph companies, on account of these circumstances, to transmit messages during the night at less rates than in the daytime. There is also evidence tending to show that there were more morning papers to divide the aggregate cost of transmitting the night report than there were evening papers to divide the aggregate cost of transmitting the day report. There was some question made as to whether or not the Call and the Journal were in any sense competitors in such a way that either could be affected by the relative rates charged. On this point we have no doubt that a state of competition was shown. One was a morning paper, the other an evening paper, and the same persons frequently buy or subscribe to both. It was shown that the advertising rates of a newspaper depend chiefly upon its circulation, and that its circulation depends largely upon its ability to supply the news to its patrons; that a paper with good facilities for obtaining and publishing the news will, other things being equal, exceed in circulation a paper with poorer facilities, and that these influences operate, as between newspapers having the same field of circulation, although one be published in the morning and the other in the evening. Indeed, it would hardly require evidence to establish such patent fact.

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From the foregoing statement of the evidence it will be seen that the following propositions were established: First. That the actual rate charged to the Call was much greater than the actual rate charged to the Journal. Second. That the two papers were in such sense competitors that if one, for a given sum, could not obtain the same news facilities as the other for the same sum, the difference would operate to the disadvantage of the former. Third. That from the requirements of the two papers, based upon their respective hours of publication, there was a marked and substantial difference in conditions affecting the convenience and expense of the telegraph company in transmitting to each its dispatches. Fourth. That there was no evidence of any character showing to what extent this difference in conditions affected the telegraph company; there was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff, without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates, without regard to conditions, was insufficient to ground a right of action, or a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate.

The action was evidently begun under section 8, chap. 89a, Comp. Stat., providing that: "It shall be unlawful for any telegraph company, association or organization, engaged in the business of forwarding dispatches by telegraph, to demand, collect, or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges or collects from the publisher or proprietor of any other newspaper for a like service, . . . and . . . such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination." Our constitution contains an express grant of authority to legislate upon this subject. Article 11, section 7, of the Constitution is as follows: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." In the absence of such a provision in a state

constitution, there could be little doubt of the power of the legislature in the premises. But "*expressio unius est exclusio alterius*," and, the constitution containing this express grant of power, the provision quoted must be taken as establishing the limits of legislative authority upon this subject. We refer to the constitutional provision because it simply grants the right to prevent by legislation "unjust discrimination." This phrase has been frequently used by the courts and legislatures, and has obtained a well-settled construction. It is not every discrimination which is unjust. So many cases illustrate this principle that it would be difficult to collate them. But the general nature of the decisions may be readily seen from an examination of the *note to Root v. Long Island R. Co.*, 11 Am. St. Rep. 643, 114 N. Y. 800, 4 L. R. A. 381, 2 Inters. Com. Rep. 576. In construing our statute it is necessary to bear in mind the constitutional limitation quoted, and the statute bears a just and reasonable construction within that limitation. It provides in its fifth section that all telegraph companies shall transmit all dispatches with impartiality in the order in which they are received, and use due diligence in their delivery, without discrimination as to any person or party to whom they may be directed. This section evidently refers to the duty of the telegraph company as to the mode of conducting its business, and not to the charges therefor, and forbids partiality or discrimination in the transmission of messages. Section 7 is very similar in its terms to what is known as "the long and short haul clause" of the interstate commerce act, and forbids the charging of a greater sum for the transmission of a message over a given distance than it charges for a similar message over a greater distance, but adds this significant proviso: "That dispatches transmitted during the night and dispatches for publication in newspapers may be forwarded and delivered at reduced rates; such rates must, however, be uniform to all patrons for the same service." Section 8 we have already quoted, so far as it is material. Section 9 provides that: "Every telegraph company and every press association engaged in the transmission, collection, distribution or publication of dispatches shall afford the same and equal facilities to all publishers of newspapers, and furnish the dispatches, collected by them for publication in any given locality, to all newspapers there published, on the same conditions as to payment and delivery." An analysis of these provisions discloses that the legislature sought, by the act referred to, to prohibit—first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination in regard to rates for similar services; third, all such partiality or discrimination as to terms of payment or delivery; and, fourth, all discrimination in favor of persons transmitting dispatches to the greater distance. Without violence to the language of the act, and without giving it an interpretation beyond the constitutional grant of power, it cannot be construed so as to require a telegraph com-

pany to transmit messages to two patrons under different conditions at the same rate. So interpreted, we do not think that the act, in so far as it affects civil actions, and disregarding the penalties it imposes, is anything more than declaratory of the common law. In the present state of civilization it would be idle to assert that a telegraph company is not charged with a public function. The telegraph company in this case does not so assert. It is now the established law that a telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers. The law regulating the duties of railroads and other carriers is, therefore, largely applicable to telegraph companies. The act of congress known as the "Interstate Commerce Act" contains few new features, and was chiefly designed to carry into statutes of the United States (the United States, as such, not having any common law) the principles of the common law already enforced by the states in their domestic affairs. England and many of the states have adopted similar statutes, not so much to ingraft new principles upon the law as to make certain and more readily enforce principles already established.

It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreasonable and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound in fixing its rates to observe two rules: First, its rates must be reasonable; and, second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.* 1 I. C. C. Rep. 215, 1 Inters. Com. Rep. 608; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 809; *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Indianapolis, D. & S. R. Co. v. Eavin*, 118 Ill. 250; *Messenger v. Pennsylvania R. Co.* 86 N. J. L. 407, 13 Am. Rep. 457; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 548; *McDuffee v. Portland & R. Railroad*, 52 N. H. 480, 13 Am. Rep. 72; *Houston & T. O. R. Co. v. Rust*, 58 Tex. 98; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684. But it is not unjust discrimination—it is not contrary to the common law, and it is not contrary to our statute—to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable. Many of the cases already cited illustrate this principle. In addition thereto

there may be cited *Interstate Commerce Commission v. Baltimore & O. R. Co.* 43 Fed. Rep. 37, 3 Inters. Com. Rep. 192; *Bayles v. Kansas Pac. R. Co.* 13 Colo. 181, 5 L. R. A. 480, 2 Inters. Com. Rep. 643; *Root v. Long Island R. Co.* *supra*; *Savitz v. Ohio & M. R. Co.* 49 Ill. App. 815; *Id.* 150 Ill. 208. With the general rule announced in the latter cases we concur, but we do not wish to commit ourselves to its application in all of them. Some cases justify a discrimination merely on account of the quantity of business transacted. In the language of *Hays v. Pennsylvania Co. and Scofield v. Lake Shore & M. S. R. Co.*, *supra*, such a discrimination in favor of the patron having the larger business tends to create monopoly, destroy competition, and is contrary to public policy. The same objection can be urged to the giving of privileged rates for the purpose of obtaining the business of a particular patron, and a discrimination on this ground is, we think, very justly condemned by the house of lords in the case of *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029. Many of the cases cited construe statutes, but they were statutes declaring what we think to be common-law rules, so that, whether this case be viewed as one under our statute relating to telegraph companies or one based upon the common law, we think the principles governing it are the same. These are that the telegraph company was bound—First, to charge for services no more than what was reasonable; second, that under like conditions it must render services to all patrons on equal terms; third, that it must not so discriminate in its rates to different patrons as to give one an undue preference over another; but, fourth, it is not an undue preference to make to one patron a less rate than to another when there exist differences in conditions, as to the expense or difficulty of the services rendered, which fairly justify such a difference in rates. As we have already stated, a considerable difference in the absolute rates charged the Call Company and the Journal Company was shown, but there were also shown differences in conditions affecting the expense and difficulty of rendering the services, which, at common law, would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call Company was unreasonably high, there was no evidence to show that the rate charged the Journal Company was unreasonably low, there was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury, without evidence upon which to base their verdict. How can it be said that a jury acts upon the evidence, and reaches a verdict solely upon a consideration thereof, when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other,

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or to what extent it is permitted to measure one against the other, and to say that to the extent of \$1 or to the extent of \$1,000 the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that, whatever may be the difficulties of the proof, a verdict must be based upon the proof; and a verdict must be founded upon evidence, and not upon the conjecture of the jury, or its general judgment as to what is fair, without evidence whereon to found such judgment.

The chief justice takes a different view, and thinks there is found in the evidence a basis for the verdict. This conclusion is arrived at by considering the service performed for the Journal, so far as the day report is concerned, as similar in its conditions to that performed for the Call. We agree with him that it is the fair inference for the evidence of the witness Hathaway that the sum of \$125 per month paid by the Journal is intended to include compensation for both day and night reports, but we do not think that any basis of comparison is thus formed. The chief justice argued that because the day report is now taken from the wires on manifold paper, and one copy given to the Call and the other to the Journal, the conditions of service as to this report are the same. In this we think there is overlooked the fact that it is only on account of the Call's contract that the telegraph company is required to deliver the report to either paper at the time or in the manner in which it is now delivered. At the risk of some repetition, we shall point out what are conceived to be the differences in the conditions affecting the two papers. Before the Call, or, rather, its predecessor, the Democrat, began to take the report, the day report was delivered to the Journal at the convenience of the telegraph company. The Journal had no contract requiring the delivery of this report at any particular time. This is shown by the testimony both of Mr. Calhoun and of Mr. Horton. The Journal makes use of this day report only to assist it in editing the night report, and did not then have, nor has it now, any use for the day report until evening. Indeed, now that there is an evening paper in Lincoln, for the purposes of the Journal it might wait until the Call appeared, and use the dispatches published in that paper, without depending upon the telegraph company at all. Under the former conditions, therefore, commercial business was given the right of way on the wires, and the day report was transmitted during lulls in the commercial business, without any requirement that it should go to Lincoln before evening. In taking advantage of this right to give commercial business the preference, there was then a delay of several hours at Omaha. According to the testimony on behalf of both parties, the day report is of no use to the Call unless it is all received by 3 o'clock, or within a few minutes thereafter, and this report now has the right of way during the hours of its transmission, as against commercial business.

In order to accommodate this business, the telegraph company was compelled to increase its facilities between Omaha and Lincoln. The evidence is undisputed upon this. Mr. Horton says, in answer to a question as to what the telegraph company did to enable it to make this day report: "I put up an additional wire between Omaha and Lincoln, over the Missouri Pacific Railway. We had to employ an additional operator at Lincoln to take the afternoon reports. A portion of his time, of course, was utilized in other business. Q. What portion of the time was devoted to this exclusively? A. From 11 o'clock to 8:30. Q. How much was his salary per month? A. \$60." On cross-examination the same witness was asked whether it was not the growth of commercial business that made it necessary to put in a new wire for this report. His answer was: "That was partly it. Certainly we would not have built a wire on purpose to accommodate one newspaper at \$75 a month." From this we think it appears, not that the wire was erected chiefly on account of the commercial business, but that it was the necessity of supplying the day report to the Call which was the immediate cause of erecting the wire. Under the old conditions the Journal paid the same rate which it does now for its report. Those conditions were then, and are now, sufficient for the purposes of the Journal. The fact that it gets the day report on manifold paper as early as the Call is a matter of no consequence to the Journal, as it is not allowed to use the report until after the Call is published. Both Mr. Cox and Mr. Calhoun testify to this. To hold that the conditions are now similar, and that the Journal and Call must have the same rate, would require either that the telegraph company make its rate for the increased service as low as it was for the former service, or else that it increase the rate charged the Journal, although the Journal is in no wise interested in the increase of service. We think, therefore, that the conditions of service which the Call requires and which the Journal requires are so different as to leave no basis for a comparison.

Reversed and remanded.

Norval, Ch. J., dissenting:

I do not concur in the conclusion reached by *Commissioner Irvine*, that there is no evidence in the bill of exceptions to sustain the verdict and judgment. The record shows without controversy that for nearly three years prior to the bringing of this action the Call Company paid the telegraph company the sum of \$75 per month for transmitting in the daytime the dispatches or reports of the Associated Press, containing not exceeding 1,500 words each day, and during this period manifold copies of the dispatches were likewise delivered by the telegraph company to the State Journal Company, and the last-named company also, in addition to said day reports, received each night from the Associated Press, over the wires of the telegraph company, dispatches not exceeding 5,600 words; that the State Journal Company paid for transmitting the dispatches received

by it during said time the sum of \$125 per month, and no more. Whether the last-named sum was paid for both the day and night reports or messages, or for night reports alone, the evidence is conflicting. Mr. C. B. Horton, the assistant superintendent of the telegraph company, in his testimony says no compensation was received for transmitting the day messages, but the sum of \$125 was paid for the night dispatches alone; that no charge was made for the day reports, but the same were furnished the State Journal Company without compensation, as a mere gratuity. Mr. J. D. Calhoun testified that the State Journal Company paid \$125 for the transmission of both the day and night reports received by it. Mr. H. D. Hathaway, the manager of the State Journal Company, being interrogated, while upon the witness stand, whether anything was paid for the day reports, answered: "No, sir, except, as we paid, it might be included in the whole arrangement." The fair inference to be drawn from the testimony of the last-named witness is that no specified amount was collected for the day reports alone, but that the sum collected—\$125 per month—was for both reports. The record discloses that the usual rate charged for night reports or messages is four times less than that paid for sending the day reports of the same number of words. This being true, it is not reasonable to suppose that the State Journal Company would pay \$125 per month for the night dispatches merely, when the Call Company was paying \$75 per month for the day reports received by it. According to the customary difference between the day and night rates, the State Journal Company, if we adopt as a basis the sum the Call Company was charged for its dispatches, should have paid but \$75 per month, had the night reports contained 6,000 words each, instead of paying \$125 per month for the transmission of dispatches of 6,500 words each, as is claimed by the telegraph company.

In my views, the plaintiff was entitled to a verdict for some amount, whether the State Journal Company paid \$125 for both the day and night dispatches, or for the night reports alone. If, as contended by the telegraph company, nothing was charged the State Journal Company for the day reports, and the evidence before the jury was sufficient to authorize them in so finding, then it is patent that the plaintiff in error did not render the services to the Call Company on the same terms it did to another patron, but unjustly and unlawfully discriminated in its rates against the defendant in error. The evidence shows that the State Journal Company had been receiving the day reports on the Associated Press for a long time prior to the date the Call Company commenced taking them, and no additional trouble, costs, and expense were incurred by the telegraph company in furnishing the reports to the defendant in error, inasmuch as the day reports were taken off the wires on manifold paper, and one copy thereof was delivered to the State Journal Company and the other copy to the defendant in error. It is true that after the Call Company began taking the dis-

patches the plaintiff in error put up another wire between Lincoln and Omaha, but the evidence shows that this was done chiefly to provide additional facilities for taking care of the rapid increase of its commercial business. Prior to the time the Democrat, the predecessor of the Call, commenced taking the dispatches, the day reports were usually delivered to the Journal Company about 4 o'clock in the afternoon, which was no later than they are now received. These reports were sometimes forwarded to the Journal Company by mail, but the common practice, as well as the most convenient mode for the telegraph company, was to send them over the wire. Now there is no relay at Omaha, but the day reports are received at Lincoln at the same time as in Omaha; but, so far as the proofs show, the trouble and expense to the telegraph company were not increased by the change, but lessened. That formerly it was under no contract to deliver the day reports at a particular hour is unimportant, inasmuch as the fact remains that there has been no substantial change in the time of delivery since the contract with the publishers of the Democrat was made. Nor is it material that the Call is an evening paper, and the Journal is published in the morning, and that the latter has no use for the day report until late in the afternoon or night. There is a total lack of evidence to show that these facts, or any of them, in the least affected the expense or difficulty of performing the service. It also appears by the testimony of Mr. Cox, one of the proprietors of the Call, and Mr. Calhoun, formerly managing editor of the Journal, that the day dispatches appear regularly and in full in the last-named paper. It is said, however, that the Journal Company, without any extra cost to it, might have taken the dispatches from the Call, instead of depending upon the telegraph company. This could have been done only to the extent the Call uses them. Mr. Cox testifies, and it is undisputed, that the Call did not always contain the full report, or even half of it. Sometimes it is received too late for use in the evening paper. We have not overlooked the fact that the Call contract contains a clause to the effect that the telegraph company should not deliver the day report to any other paper in Lincoln until after the Call goes to press. This provision is of no validity. A telegraph company is a common carrier, and must treat all persons alike. It cannot discriminate against its patrons, or give one paper a monopoly of the Associated Press dispatches. It could no more do that than a railroad company could contract with A. to carry his stock from Lincoln to South Omaha, and provide therein that the stock of B., consigned to the same place of destination, and carried on the same train, shall not be delivered until A's stock has been delivered and sold. Again, the stipulation in the Call contract did not affect the Journal Company, for the reason that the latter had no use for the day report until in the evening. We are convinced that the services rendered the defendant in error, the State Journal Company, as to the day dispatches, were under like conditions as to

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costs and expense; therefore, upon the testimony of Mr. Horton alone, the plaintiff was entitled to recover. The rule is, where a telegraph company charges one person a higher rate than it exacts from another for the transmission of dispatches under like conditions, the difference between the charges is the measure of damages the one who has been discriminated against is entitled to recover. *Cook v. Chicago, R. I. & P. R. Co.* 81 Iowa, 551, 9 L. R. A. 764, 8 Inters. Com. Rep. 383; *Scotfield v. Lake Shore & M. S. R. Co.* 48 Ohio St. 571, 54 Am. Rep. 846; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 182 Ind. 517, 18 L. R. A. 105; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Samuels v. Louisville & N. R. Co.* 81 Fed. Rep. 57, 4 Inters. Com. Rep. 420. The plaintiff below was entitled to a verdict, even though the State Journal Company paid \$125 per month for both the day and night reports.

It will be observed that the Call Company was required to pay for the transmission of its dispatches at the rate of \$5 per month for each 100 words, while the State Journal was charged for the messages received by it a little over \$1.76 per month per 100 words. There is no room for doubt that this difference in rates would constitute an unjust discrimination against the Call Company, for which it would be entitled to recover the difference between the amount paid by it and the more favorable rates granted the State Journal Company, were it not for the fact that all the messages to the two companies were not transmitted by the plaintiff in error under like conditions as to service. What were the differences in conditions which affected the costs or expense of the transmission of the messages? The day reports, as we have already seen, were sent to each of the two patrons under practically similar conditions, and at the same time. As to the day reports, as we have seen, there could be no difference in the costs or expense of the service. The night and day messages or reports were transmitted under conditions materially different. It was shown that such difference in conditions necessarily made the tolls charged for the night reports less than the rates received for the service rendered in transmitting the day messages of the same number of words. I do not agree with my associates that there was no evidence of any character showing to what extent the difference in conditions affected the telegraph company. On the contrary, I am fully persuaded that there is such evidence in the record, and that it shows the difference in the rates charged was not proportionate to the difference in the conditions which affected the expense of performing the service. Mr. C. B. Horton, the witness already mentioned, testified upon this branch of the case as follows: "Q. What, if any, difference is there in the cost of operating or handling news at night and during the day,—what difference in cost and in the convenience? State wherein it is. A. In the daytime, as everybody knows, our wires are loaded with important business,—board of trade grain messages,—and we have wires leased during those hours, and they are filled and occupied. At night we have idle

wires, and we utilize them. A lower rate has always been made in the night service. On press reports, it is about one to four,—one of day to four at night. Q. One word at day to four at night? A. Yes, sir. I believe that is the rule in all of our contracts. Q. Whether it is by the word or by the job? A. Yes, sir." The foregoing evidence was sufficient to authorize the jury in finding the difference in rates between the day and night reports. The Call Company should not have been charged more than four times the rates charged for the night messages. The difference between the rates paid and the tolls which should have been charged for service rendered the defendant in error was fully established by the evidence. It paid \$5 for each 100 words daily per month, when the rate should have been not exceeding \$4.

There was therefore an unjust discrimination of \$1 per 100 words per month, which amounted to \$15 per month. This sum was overpaid each month for 84 months, making an aggregate of \$510, to which should be added interest at 7 per cent on each payment, from the date thereof until the rendition of the judgment in the court below, amounting to \$83.80. So, under this view of the case, the Call Company was entitled to a verdict for at least the sum of \$593.80, while if, as the telegraph company contends, and there is some evidence in the report tending to show, the Journal Company paid nothing for the day reports, the verdict is none too large. The judgment should be affirmed, or at least it should be allowed to stand upon the defendant in error entering a remittitur for the amount the verdict is in excess of \$593.80.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

TRAVELERS' INSURANCE CO. of Hartford, Conn., *Plff. in Err.*,

v.

Samuel M. MELICK, Admr., etc., of Leonard H. Robbins, Deceased.

(65 Fed. Rep. 178.)

1. The cause of death is a question for the jury where one witness testifies that it was a cutting, another that it was tetanus, and the third that it was both.
2. A pistol wound causing tetanus, with great bodily pain and delirium or fever, may be found to be the proximate cause of death where a person insured against accidents, excluding suicide, sane or insane, and intentional injuries, cuts his throat in a period of delirium or state of frenzy which is uncontrollable.
3. Statements made as to the cause of death in proofs of loss are not conclusive, although they have the probative force of solemn admissions under oath against interest.

(December 3, 1894.)

ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, *Circuit Judges.*

Mr. Charles Offutt, for plaintiff in error:

The court erred in not rendering judgment for the insurance company on the "special verdict."

On this policy there could be no judgment for the beneficiary unless the facts found established that the insured did in fact die from an accidental injury.

It was incumbent upon the plaintiff to show, from all the evidence, that the death of the in-

sured was the result, not only of external and violent, but of accidental means.

Travelers Ins. Co. of Hartford, Conn. v. McConkey, 127 U. S. 668, 32 L. ed. 811; *Merritt v. Preferred Masonic Mut. Acc. Asso.* 98 Mich. 888.

The finding that the "pistol-shot wound was the proximate cause" of death should have been entirely disregarded on the hearing of the motion for judgment.

The finding was a conclusion of law.

Indianapolis, P. & C. R. Co. v. Bush, 101 Ind. 584; *Dixon v. Duke*, 85 Ind. 424; *Pittsburgh, C. & Ct. L. R. Co. v. Spencer*, 98 Ind. 189; *Miller v. Shackelford*, 4 Dana, 264; 7 Bacon, Abr. *Verdict*, letter E; *Toledo, St. L. & K. C. R. Co. v. Tapp*, 6 Ind. App. 804; *Thompson, Trials*, § 2653; 2 Tidd, Fr. 897; *Queenberry v. Artis*, 1 Duvall, 80; *Poorman v. Mills*, 85 Cal. 118, 95 Am. Dec. 90; *Boydston v. Giltner*, 3 Or. 118; *Van Wert v. Webster*, 3 Ohio St. 420; *People v. Lothrop*, 3 Colo. 428; *Smith v. Lockwood*, 13 Barb. 200.

The facts otherwise found by the jury clearly show that the pistol-shot wound was not the proximate cause of death.

The evidence shows that the insured committed suicide. The finding that the pistol-shot wound was the "proximate cause" of death was contrary to the evidence.

The test of the duty to direct a verdict is whether the court would be bound to set a verdict aside as against the evidence if rendered against the party in whose favor it was directed.

Schuykill & D. Imp. & R. Co. v. Munson, 81 U. S. 14 Wall. 442, 20 L. ed. 867; *Pleasant v. Fant*, 89 U. S. 22 Wall. 120, 22 L. ed. 782; *Marion County Comrs. v. Clark*, 94 U. S. 284, 24 L. ed. 61; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 498; *Bulger v. Rosa*, 119 N. Y. 460; *Longley v. Daley*, 1 S. Dak. 257.

Not one decision can be found of any English or American court of last resort in which the clause excepting "suicide, sane or insane" has been held insufficient to relieve the insurer from

NOTE.—As to proximate cause of death, see note to *Freeman v. Mercantile Mut. Acc. Asso. (Mass.)* 17 L. R. A. 753; also *Manufacturer's Acc. Indemnity Co. v. Morgan (C. C. App. 8th C.)* 22 L. R. A. 620, 27 L. R. A.

liability for self-killing because of the insured's delirious or otherwise uncontrollable condition of mind.

Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 28 L. ed. 918; *Travelers Ins. Co. of Hartford, Conn. v. McConkey*, 127 U. S. 661, 32 L. ed. 808; *Chapman v. Republic L. Ins. Co.* 4 Ins. L. J. 511; *Riley v. Hartford Life & Annuity Ins. Co.* 25 Fed. Rep. 815; *Degogorza v. Knickerbocker L. Ins. Co.* 65 N. Y. 282; *Billings v. Accident Ins. Co. of North America*, 17 L. R. A. 89, 64 Vt. 78; *Searth v. Security Mut. L. Soc.* 75 Iowa, 346.

The pistol-shot wound could not, under any possible circumstances, as a matter of law, have been the proximate cause of the cutting of the throat, whether in a period of delirium or state of frenzy, uncontrollable because of the great pain and bodily suffering caused by the lockjaw.

Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 252, 26 L. ed. 1070, 1071; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Hadley v. Bazendale*, 9 Exch. 841; *Lawrence v. Accidental Ins. Co. L. R.* 7 Q. B. Div. 221; *Pike v. Grand Trunk R. Co. of Canada*, 89 Fed. Rep. 255; *Henry v. St. Louis, E. C. & N. R. Co.* 76 Mo. 289, 48 Am. Rep. 769; *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 56 Am. Rep. 836.

The court erred in its instructions as to what constituted the "proximate cause" of the insured's death.

Louisiana Mut. Ins. Co. v. Tweed, Scheffer v. Washington City, V. M. & G. S. R. Co. and DeGogorza v. Knickerbocker L. Ins. Co. supra; Harris v. Travelers Ins. Co. 7 Am. L. Rev. 589; *Clark v. State*, 82 Neb. 246; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, 55 Fed. Rep. 949; *McCarthy v. Travelers Ins. Co. of Hartford, Conn.* 8 Biss. 362; *Accident Ins. Co. of North America v. Orndal*, 120 U. S. 527, 80 L. ed. 740; *The Clara*, 55 Fed. Rep. 1020; *Streeter v. Western Union Mut. Life & Acc. Soc. of United States*, 65 Mich. 199; *Smith v. Accident Ins. Co. L. R.* 5 Exch. 802.

Messrs. Allen W. Field and Edward P. Holmes for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

The first question in this case is whether or not the court below should have instructed the jury to return a verdict in favor of the plaintiff in error. The Travelers' Insurance Company of Hartford Conn., the plaintiff in error, insured, by its written policy, Dr. Leonard H. Robbins, a physician of Lincoln, Neb., for a term of one year, against death that should result from "bodily injuries effected during the term of this insurance, through external, violent, and accidental means alone, . . . independently of all other causes." The policy provided that: "This insurance does not cover disappearances; nor suicide, sane or insane; . . . nor accident, nor death, . . . resulting wholly or partly . . . from . . . disease or bodily infirmity, hernia, fits, vertigo, sleepwalking, . . . intentional injuries (inflicted by the insured or any other person)."

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Samuel M. Melick, the defendant in error, as administrator of the doctor's estate, brought this action on the policy, and recovered a judgment in the court below. In his petition the administrator alleged that the doctor died June 18, 1890, and that his death was caused by an accidental shot wound in his foot, which he inflicted upon himself June 1, 1890. The answer denied this allegation, and alleged that his death was caused by his cutting his own throat with a scalpel, and that it resulted from intentional self-inflicted injury. The reply denied these allegations of the answer.

There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever, and gradually reduced his strength, until he died, June 18, 1890; that this gunshot wound was just such an injury as would naturally produce tetanus or lockjaw; that the doctor and his physicians feared that disease from the first, and that they used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed, June 18, 1890, with a scalpel in his right hand, and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce the death, and the throat-cutting was sufficient to produce it. The administrator, who was not a physician, stated in his proofs of loss that the insured "took a knife and cut his throat; all evidence shows that the conditions of his mind and his physical condition that prompted the suicide was caused by the shot wound;" and he testified that he thought the loss of blood from the cut produced the death, but he could not say positively. On the other hand, Dr. Shoemaker, who was the attending physician, testified that tetanus was the only cause that he should attribute the death to in this case; and Dr. Hatch, another physician, in answer to an inquiry for his opinion, said: "Well, there was conclusive evidence that the man was in the embrace of tetanic spasms. It is impossible for mortal to tell, and no one but the recording angel will be able to tell. He was in the embrace of tetanic spasms. I think both. I think tetanic spasms and the cut,—the two were present when breath left the body."

Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death, was a question of law for the court.

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 474, 476, 24 L. ed. 256, 258,

559, *Mr. Justice Strong*, who delivered the opinion of the court, said: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. . . . In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here. *Union Pac. R. Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. Rep. 988.

It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case,—whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it; and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury. *Grand Trunk R. Co. of Canada v. Ives*, 144 U. S. 408, 417, 36 L. ed. 485, 489; *Union Pac. R. Co. v. Jarvi*, 10 U. S. App. 439, 450, 451, 8 C. C. A. 433, 437, 438, and 53 Fed. Rep. 65; *Northwestern Fuel Co. v. Danielson*, 12 U. S. App. 688, 6 C. C. A. 636, 57 Fed. Rep. 915; *Illinois Cent. R. Co. v. Kelley*, 10 U. S. App. 537, 544, 8 C. C. A. 589, 593, 53 Fed. Rep. 459; *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 640, 644, 4 C. C. A. 454, 456, 54 Fed. Rep. 481.

But the evidence in this case was not undisputed. One witness testified that he thought the cutting was the cause of the

death, another that tetanus was, and a third that it was both. It was at least doubtful what answer ought to be given to the question upon the evidence. It was by no means clear that no reasonable man could fairly draw the conclusion that the shot wound, and not the cutting, was the cause of the death; and the request to withdraw the case from the jury was properly denied.

A special verdict was rendered by the jury, and it is assigned as error that the court below rendered judgment thereon for the defendant in error. Before entering upon the discussion of this assignment, let us consider what findings were necessary to sustain the claims of the respective parties to this litigation. The administrator had alleged that the shot wound was the cause of the death, and the burden of proof was upon him to establish that fact. The insurance company had denied this averment, and had alleged that the death was caused by the suicidal throat cutting; and the administrator had denied this allegation. That the death was caused by suicide, or self-inflicted injuries, or resulted from any of the excepted causes named in the policy, was matter of defense, and the burden of proof was upon the insurance company to establish it. Again, where it is doubtful from the facts of a case whether a death was caused by accidental injuries or by the suicidal act of the deceased, a presumption of law arises that the accident, and not the suicidal act, was the cause. *Mallory v. Travelers Ins. Co. of Hartford, Conn.* 47 N. Y. 52, 7 Am. Rep. 410; *Oronkhite v. Travelers Ins. Co. of Hartford, Conn.* 75 Wis. 116; *Travelers Ins. Co. of Hartford, Conn. v. McConkey*, 127 U. S. 661, 667, 32 L. ed. 808, 811.

The only finding, then, requisite to sustain the administrator's case here was that the shot wound caused the death. It was not incumbent upon him to obtain a finding that the cut pleaded by the insurance company did not cause it; that was the necessary legal effect of a finding that the shot wound did cause it, in the absence of any further finding as to the cause of the death. On the other hand, it was necessary to the defenses of the insurance company that it should either prevent a finding that the shot wound was the cause of the death, or procure an affirmative finding that it was caused wholly or partly by a suicidal act or intentional self-inflicted injury. In this state of the case, the court submitted to the jury three findings upon this question, and instructed them to return those which stated the facts as they found them. The three proposed findings were:

"(10) We find that the pistol-shot wound received by the said Leonard H. Robbins, on the 1st day of June, 1890, was an accident, and one insured against in said policy of insurance; and that said pistol-shot wound was the proximate cause of the said Leonard H. Robbins' death, on or about the 18th day of June, 1890."

"(8) We find that on or about the 18th day of June, 1890, after being confined to his bed from the effects of said wound, tetanus or lockjaw had set in, superinduced

and caused by said pistol-shot wound; and that the said Leonard H. Robbins, while in a state of frenzy and delirium, and in the agonies of tetanic convulsions, caused by said wound, seized a scalpel, and cut his throat; and that death followed from the two causes combined; but whether or not the said Leonard H. Robbins died from loss of blood resulting from said cut in the throat, or from tetanic convulsions or lockjaw, we, the jury, are unable to determine."

"(18) We find that the wound inflicted by the said deceased with a scalpel was a mortal wound, and that the same caused the death of said Robbins."

It will be seen that the tenth finding was that the shot wound was the cause of the death, the eighth was that the shot wound and the throat cutting together caused the death, and the eighteenth was that the throat cutting alone caused it. The jury returned the tenth finding, and rejected the eighth and eighteenth. In effect they thus found that the pistol-shot wound caused the death, and that the cutting neither caused or assisted to cause it. This was certainly as conclusive of this question as a general verdict for the administrator, and fully authorized the judgment in his favor.

The jury also made the following findings with reference to the cutting of the throat:

"(8) We find that the wound inflicted on the throat of the insured was sufficient to produce death, independent of any and all other causes; and we further find that tetanus, suffered by the insured, superinduced by the pistol-shot wound, was sufficient to produce death, independent of all and any other causes."

"(9) We find that the insured, Leonard H. Robbins, cut his own throat with a scalpel, to end great and excruciating pains which he, the said Robbins, was then suffering from the effects of the pistol-shot wound in his foot."

"(11) We find that the cutting of his throat by Leonard H. Robbins was an act caused by physical pain and suffering, which he was unable to resist or control, resulting from the wound in the foot; whether voluntary or involuntary, we, the jury, are unable to decide."

It is said that the ninth finding—that the insured cut his own throat with a scalpel, to end great and excruciating pains—is a finding of intentional self-destruction, and is a bar to any judgment for the administrator under the clause of the policy which excepts death by suicide. It is a conclusive answer to this proposition that the jury refused to find that the cutting either caused or contributed to the death, and did find that the shot wound caused it; hence whether the cutting was intentional or unintentional becomes immaterial, since it had no part, according to this verdict, in producing the death.

The exception to the action of the court in rendering judgment upon the findings of the jury cannot be sustained.

The objection that the findings of the jury are contrary to the weight of the evidence cannot be considered by this court. In an

action at law, this is a court for the correction of the errors of law of the court below only. There was, as we have already held, sufficient evidence to warrant the submission of the question of proximate cause to the jury in this case. The court below submitted no error in weighing this evidence; that duty was performed by the jury, and not by the court; and hence there is no ruling of the court in that regard for us to review, and it is not our province to review and correct the findings of the jury on questions of fact properly submitted to them. *Gulf, C. & S. F. R. Co. v. Ellis*, 4 C. C. A. 454, 456, 10 U. S. App. 640, 54 Fed. Rep. 481; *Lincoln v. Sun Vapor Street-Light Co.* 8 C. C. A. 253, 257, 258, 59 Fed. Rep. 756.

The conclusions we have thus reached upon the evidence and the findings of the jury render it unnecessary to consider in this case the vexed question, exhaustively discussed in the briefs of counsel, whether the throat cutting was suicidal or accidental, with the intent of self-destruction or with the intent to cure or mitigate a mortal malady.

It is assigned as error that the court charged the jury, in effect, that if they found that the pistol-shot wound was an accident, that the wound caused tetanus, great bodily pain, and delirium or fever, and that, while in that state of fever and delirium, the insured cut his own throat, being impelled thereto by the intense agony caused by said wound, which the deceased was unable to resist or overcome, then the shot wound might be considered a proximate cause of this injury; and that if, in a period of delirium or a state of frenzy, uncontrollable because of the great pain and bodily suffering caused by the lockjaw that was produced by the shot wound, he cut his own throat with a scalpel, from the direct effects of which he died, they might, notwithstanding, find that the proximate cause of the death was the pistol-shot wound accidentally received in the foot. If this charge was erroneous, it is difficult to see how the plaintiff in error could have been prejudiced by it, in view of the refusal of the jury to sustain by their findings its defense that the cutting either caused or contributed to cause the death. As, however, the claim is strenuously urged that it must have influenced the jury, we proceed to consider it. The criticism made of this charge was that the pistol-shot wound was too remote from the cutting and the death to be considered as the moving cause of either, and that the court should have told the jury that it must appear from the evidence that the cutting of the deceased's throat was the natural and probable consequence of the shot in the foot, and ought to have been foreseen in the light of attending circumstances, and that it must appear that the death naturally followed from the shot wound, without the intervention of some act of the deceased not reasonably to be expected, before they could find that the shot wound was the proximate cause of the death. The question whether or not the court ought to have given to the jury the general rules of law on the subject of proximate cause em-

bodied in this criticism is not before this court, because the plaintiff in error did not request the court below to give them; they were merely urged *arguendo* in the exceptions to the charge. The only question here is whether, in the state of the case set forth in this instruction, the pistol-shot wound was so remote from the injury inflicted by the cutting and the death that it could not be found to be their efficient or moving cause. The proximate cause has been so lately defined and the rules for its discovery so fully stated by this court that it is only necessary to refer to *Chicago, St. P. M. & O. R. Co. v. Elliott*, 5 C. C. A. 847, 55 Fed. Rep. 949, 20 L. R. A. 582; *Union Pac. R. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. Rep. 988; and *Missouri Pac. R. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. Rep. 921, for our views of the law upon this subject. In the last case we said that: "The proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces. In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the efficient moving cause, and yet subordinate to it, and often themselves influenced, if not produced, by it." Page 925, 57 Fed. Rep. and page 641, 6 C. C. A.

And in *Chicago, St. P. M. & O. R. Co. v. Elliott*, *supra*, we said: "Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn, that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case, as it arises." Page 952, 55 Fed. Rep. and page 347, 5 C. C. A. and 20 L. R. A. 385.

The question presented by this instruction is, like most questions involving this doctrine of proximate cause, perplexing and difficult; but after as careful a consideration as we are able to give to the supposed case stated in this instruction, in the light of the authorities and the exhaustive arguments presented by counsel, we are unwilling to say that the wound in the foot might not have been the efficient cause of the death under the facts and circumstances there set forth. It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within ninety days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone. The crucial question was whether or not it did in fact so result, and the doctrine of proximate cause was applicable to this case only to aid in finding a just answer to this question, and

not to measure the liability which the contract had fixed.

The authority chiefly relied on to sustain the exception to his instruction is *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070. That was an action for negligence. The plaintiff was injured in a railroad wreck. The complaint alleged that the injury caused phantasms, illusions, and forebodings, which eventually prostrated the reasoning powers of the assured, and caused him to take his own life eight months after the injury. The supreme court declared that the original injury was too remote to be deemed the proximate cause of the death, and that the act of self-destruction was a new intervening cause which must be held responsible for it. But it is far from following from this decision that if the railroad company had contracted to indemnify Mr. Scheffer against a death that resulted from that wreck, and the injury there received had confined him to his bed, had worn and exhausted him with pain, and then caused an agony of delirium and fever that irresistibly impelled him to take his own life only eighteen days after the injury, that court or any court would have declared the injury too remote to be deemed the efficient cause of the death. So, in *Streeter v. Western Union Mut. Life & Acc. Soc. of United States*, 65 Mich. 199, cited by counsel, where the insured received an injury at the base of his brain from a fall on the sidewalk, complained of pains in his head, changed his demeanor, and after six weeks shot himself at a time when some of the witnesses testified that he was unable to control his physical actions, the court held that the fall was too remote and unconnected with the act of self-destruction to stand as its moving cause. But it is unprofitable to review the cases. In these and other cases cited for plaintiff in error the original negligence or accident is so much further removed, so much more disconnected, from the fatal effect than the shot wound in this case is from the cutting, that they form no criterion for its determination.

In the case in hand the original cause is near in time,—only eighteen days from the fatal effect; while in the *Scheffer Case* it was eight months, and in the *Streeter Case* six weeks, from it. In this case the sequence of events is neither unnatural nor improbable, and the chain of causation seems to us unbroken. It was not unnatural nor improbable that the shot wound in the foot should produce great pain and fever. It was not unnatural nor improbable that it should produce tetanus, and that tetanus should produce uncontrollable pain, fever, and delirium. It was neither unnatural nor improbable that a man in the torture of uncontrollable agony and in a delirium or fever should be irresistibly impelled to do himself an injury in an attempt to abate his suffering, or that, if he was a physician, and familiar with the use of a scalpel, near at hand, he should seize and use that to relieve his pain. The universal practice of providing such sufferers with constant attendants, in order to prevent just such accidents, is convincing proof that

this was neither an unnatural nor an improbable consequence of the excruciating torture of the lockjaw that the shot wound produced. We are forced to the conclusion that, if the jury found the facts as stated in this instruction, they might well find that the shot wound was the efficient cause which set in motion the train of events that in their natural sequence produced the cutting and the death,—the *causa causans* without which neither would have been. But it is said that this view is erroneous, because the cutting was a new and sufficient cause of the death, which intervened between the shot wound and the fatal result, and thus became itself its proximate cause. This position is untenable, because in the state of facts set forth in this instruction the cutting was not a new cause, nor a cause independent of the original efficient cause,—the shot wound. It was only an effect of that cause,—an incidental means produced and used by the original moving cause to produce its fatal effect. In the absence of the shot wound the cutting would never have been. That was dependent entirely for its existence and for its effect upon the original accident, and was a mere link in the chain of causation between that and the death. The intervening cause that will prevent a recovery for a death which results from an accidental bodily injury indemnified against by contract must be a new and independent cause, which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original accidental injury, and produces a different result, that could not reasonably be anticipated. It may not be a mere effect of that injury, produced by it, and dependent upon it for both its existence and its effect. *Union Pac. R. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. Rep. 988, 994; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259. If the jury found that the facts were as they were stated in this instruction, the cutting was neither a new cause nor a cause independent of the shot wound, but a mere effect of it. Therefore, it could not have been the proximate or moving cause of the death.

For the reasons already given in the affirmance of the instruction we have been considering, there was no error in the refusal of the court to give the counter instruction requested by counsel for the plaintiff in error, to the effect that the jury could not find that the wound inflicted by the scalpel was caused by the shot wound, and that, if they found the wound inflicted with the scalpel was a mortal wound, they could not find that the shot wound was a cause of the death.

Complaint is made that the court below refused to give four elaborate instructions upon the burden of proof, requested by counsel for plaintiff in error. But in its charge the court told the jury that, to entitle the plaintiff to recover, it was necessary for them to find from the evidence that the death of the assured was proximately caused by such an accident as was covered by the terms of the policy; that it was the duty of the defendant in error to establish, by a preponderance of proof, the truth of every affirmative

proposition which it was necessary for him to show, in order to justify a recovery; and that they could not base any of their findings upon conjecture. In view of the fact that the court submitted the crucial questions in the case—whether or not the shot wound was the proximate cause of the death, and whether or not the cutting of the throat either caused or contributed to the death—to the jury by special proposed findings on these questions, in accordance with the respective claims of the parties in their pleadings, we are persuaded that there was no error in the refusal of the court to charge more at length upon the burden of proof. The rule of law was fairly stated, and, where this is done in the general charge, there is no error in a refusal to give instructions upon the same subject requested by counsel. *Union Pac. R. Co. v. Jarvi*, 10 U. S. App. 439, 453, 8 C. C. A. 438, 439, and 58 Fed. Rep. 65; *Gulf, C. & S. F. R. Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. Rep. 347.

It is assigned as error that the court instructed the jury with reference to the statements in the proof of loss that "the deceased, Leonard H. Robbins, took a knife, and cut his throat. All evidence shows that the condition of his mind and his physical condition, that prompted the suicide, was caused by the shot wound,"—that they were at liberty, in determining the cause of death, to consider this statement of the defendant in error, but that it was not in any manner conclusive upon him; that they should only give to it such weight as they thought it might be entitled to receive; that, whatever cause of death might have been alleged in the proof of death, he was at liberty, on the trial, to show that the death resulted from some other or different cause; and that, in determining the cause of death, they should be governed by all the evidence that had been introduced upon that question. The better rule upon this subject is that statements of this nature in proofs of loss are binding and conclusive upon the party who makes them until, by pleading or otherwise, he gives the insurance company reasonable notice that he was mistaken in his statement, and that he will endeavor to show that the death was the result of a different cause from that stated in his proofs. After the insurance company has received due notice of this fact, the proofs have the probative force of solemn admissions under oath against interest, but they are not conclusive. *Mutual Ben. L. Ins. Co. v. Newton*, 89 U. S. 23 Wall. 82, 23 L. ed. 793; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198, 201; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 223, 233, 14 Am. Rep. 239; *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193. There was nothing in the charge of the court in conflict with this rule. Ample notice of the claim of the defendant in error that the death was not caused by suicide was given in the pleadings, and the proof itself disclosed the claim that the cutting was an effect of the accidental shot wound. The court, it is true, declared that this statement was not in any manner conclusive; but, if it was conclusive, it was conclusive in every manner. The

court told the jury that they should only give it such weight as they thought it was entitled to receive; but there was no error in this, for the presumption is that they thought it was entitled to receive its lawful probative force. The fact is that there is no positive error in the charge the court gave here. The real complaint of counsel is that the court did not also charge the jury that the weight which they should give to the statement was that of a solemn admission under oath against interest. Undoubtedly, the court would have so charged if its attention had been called to it, and it had been requested so to do. It was not. The question was not presented to it, and was not ruled upon, and cannot now be successfully urged upon our consideration.

Finally, it is insisted that the court erred

in directing the jury to find the special verdict. Upon an examination of the record, however, we discover that no objection to this course of proceeding was made at the trial. On the other hand, counsel for the plaintiff in error requested the court to submit four special questions to the jury, and his only exceptions relative to this subject were to the refusal of the court to submit his questions, and to the statement of facts in certain of the proposed findings it did submit. The court below, therefore, was not called upon to rule upon this question, and there is no ruling here for us to review.

The judgment below must be affirmed, with costs; and it is so ordered.

Rehearing denied.

MINNESOTA SUPREME COURT.

GERMANIA BANK OF MINNEAPOLIS,

*Appt.,
v.*

William T. BOUTELL *et al.*, *Repts.*

(.....Minn.....)

***Held that, upon the facts stated in the complaint, the case comes within the**

***Headnote by MITCHELL, J.**

rule that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a check or bill upon which the drawer's signature has been forged, he cannot recover back the amount if the party to whom he paid it was a bona fide holder.

(February 1, 1895.)

A PPEAL by plaintiff from a judgment of the Municipal Court for the City of Min-

**NOTE.—Drawee's duty to know signature of drawer.
I. Duty of bank.**

a. In general.

b. Negligence or fault of party obtaining payment.

II. Duty of other parties.

1. Duty of bank.

a. In general.

The above case of *GERMANIA BANK OF MINNEAPOLIS V. BOUTELL* is in accord with the general doctrine though the vigorous dissenting opinion is not without some support. As between the bank and its depositors it is clearly established that a bank paying checks purporting to be drawn by him must know the signature and takes the risk of its forgery and must bear the loss if his subsequent negligence does not shift it upon him. As to this, see *note to First Nat. Bank of Birmingham v. Allen (Ala.) ante, 426*.

In *Bank of St. Albans v. Farmers & Mechanics Bank* (1838) 10 Vt. 141, 38 Am. Dec. 188, it was held that a drawee bank which paid a forged check to another bank could not on discovering the forgery about two months afterwards recover back the money. This decision, however, seems to be based on the effect of the delay in discovering the forgery rather than upon the general rule which requires the drawee to know the drawer's signature. The fact that the bank obtaining payment had bought the check of a stranger appeared in the case and although not discussed may have had some weight in preventing the court from basing the decision on the rule that a drawee having paid a forged check cannot recover back the money.

The general rule requiring the drawee to know the drawer's signature is as old as the case of *Price v. Neale* (1762) 3 Burr. 1264, 1 W. Bl. 360, in which a bona fide holder who took a draft on the faith of an acceptance and obtained payment thereof was

held entitled to retain the money. But the doctrine has not been confined to the protection of bona fide holders who have been misled by the drawee or induced by him to purchase the forged instrument.

Thus in the case of *Levy v. Bank of the United States* (1808) 1 Binn. 27, 4 Dall. 234, it was held that a bank receiving a forged check upon itself and crediting it as a deposit of cash was bound thereby and could be compelled to recognize the depositor's right to the credit although the forgery was discovered the same day. It was further held that a mere promise of the depositor under misconception of his rights when urged to give his check to the bank for the amount on the ground that the check deposited was forged, that if it was forged he would consider it no deposit, was not binding upon him when he did not comply with the demand to refund.

The general doctrine is also asserted in *Commercial & Farmers' Nat. Bank v. First Nat. Bank of Baltimore* (1868) 30 Md. 11, 96 Am. Dec. 554, where it is held that a drawee which pays a forged check through the clearing house must bear the loss so far as the collecting bank has innocently paid out the proceeds. But its right to the balance of the proceeds remaining in the collecting bank was conceded.

The same doctrine that a drawee bank is bound to know the signature of the drawer of a check and cannot recover from a bank to which it was paid is also decided in *First Nat. Bank of Carthage v. Yost* (1890) 34 N. Y. S. R. 180, in which the bank obtaining payment had previously bought the checks.

Likewise in *Salt Springs Bank v. Syracuse Sav. Inst.* (1868) 62 Barb. 101, the drawee's payment of a forged check with a forged acceptance by its cashier was held to throw the loss on the bank, and that it could not recover the money from the payee bank which had cashed it.

neapolls in favor of defendants in an action brought to recover the amount which had been paid by plaintiff upon a forged check brought against it and indorsed by the defendants. *Affirmed.*

The facts are stated in the opinions.

Mr. C. G. Laybourn, for appellant:

The modern doctrine undoubtedly is that where the payee, holder, or presenter of the forged paper has himself been in default, or if he has himself been guilty of negligence prior to that of the drawee bank, or if by any act of his own he has at all contributed to induce the bank's negligence, then he may lose the right to cast his loss upon the bank.

Morse, Banks & Banking, § 466.

If both parties are innocent equally, or both negligent equally, or the holder chiefly negligent, the bank may recover.

2 Morse, Banks & Banking, § 466, pp. 744, 776; *Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610.

Unless the drawee's mistake as to the signature of the drawer has caused the holder some loss, or the paper has been taken by a bona fide holder subsequently to acceptance by the drawee, the latter should not be held absolutely to a knowledge of his correspondent's signature.

McKleroy v. Southern Bank of Kentucky, 14 La. Ann. 462, 74 Am. Dec. 488.

If the loss can be traced to the fault or negligence of either party, it shall be fixed on him. *Gloucester Bank v. Salem Bank*, 17 Mass. 42.

He through whose means a loss happened, should sustain it, although innocent, rather

than he who is not wholly innocent but wholly without the imputation of negligence.

First Nat. Bank of Leavenworth v. Tappan, 6 Kan. 466, 7 Am. Rep. 568.

Where no negligence is imputable to the drawee in failing to detect the forgery, want of notice within the time which ordinarily charges previous parties on negotiable paper is excused provided notice is given to the holder as soon as the forgery is discovered.

City Bank of Houston v. First Nat. Bank of Houston, 45 Tex. 208; *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 810; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *National Bank of Commerce v. National Mechanics Bkg. Assn.* 55 N. Y. 211, 14 Am. Rep. 282; *Lawrence v. American Nat. Bank*, 54 N. Y. 433; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *Goddard v. Merchants Bank*, 4 N. Y. 147.

Where by a settled course of business between the parties, or by a general custom in the place and applicable to the business in which both parties are engaged, the holder takes upon himself the duty to exercise some material precaution to prevent the fraud, and by his negligent failure to perform it has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it, the drawee shall not be held responsible.

Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610; 2 Morse, Banks & Banking, § 466, p. 477; *State Nat. Bank at Keokuk, Iowa v. Freedmen's Sav. & T. Co.* 2 Dill. 11.

Money paid by one party to another through a mutual mistake of facts may be recovered

And where a bank had in good faith advanced money on forged checks and collected them of the drawee it was held that the latter must bear the loss, especially where the depositor lived near by and the checks continued to be presented and paid for several months before the forgery was discovered. *Deposit Bank of Georgetown v. Fayette Nat. Bank* (1890) 7 L. R. A. 849, 90 Ky. 10.

This doctrine is recognized in a peculiar way in *First Nat. Bank of Chicago v. Northwestern Nat. Bank of Chicago* (1894) (Ill.) 28 L. R. A. 229, in which a collecting bank called on by the drawee bank to refund payments made on checks with forged indorsements was estopped to claim that the loss must fall on the drawee because the signature of the drawer also was forged, since the drawee was estopped to set up the forgery of the drawer's signature, and as the estoppel must be mutual the indorser also was precluded from asserting that fact against the drawee.

On payment of a check through a clearing house the rule is modified by reason of the fact that the payment is made without seeing the check and with an understanding that checks not good may be returned within a limited time. In such a case where the drawee bank failed to return a check within the time limited by clearing-house rules but returned it on a subsequent day to the collecting bank, which received it and charged it to another bank not a member of the clearing house for which the collection was made, it was held that the latter could not object if the collecting bank waived the benefit of the clearing-house rule in respect to the time of return and that the ordinary rule as to the effect of payment of checks by the drawee did not apply. *Stuyvesant Bank v. National Mechanics Bkg. Assn.* (1872) 7 Lans. 197. 27 L. R. A.

But several months after forged checks are paid through the clearing house a drawee cannot get back the money paid by credit at the clearing house; and the other party if forced by the clearing house to allow credit therefor may maintain an action for the amount against the drawee. *National Bank of the Commonwealth v. Grocers Nat. Bank* (1867) 85 How. Pr. 412, 2 Daly, 289.

A check or bank draft with a forged signature, although it was re-written after erasing a genuine signature and raising the amount, was held altogether a forgery and not a raised or altered instrument within the rule as to payment by the drawee. *National Park Bank v. Ninth Nat. Bank* (1871) 46 N. Y. 77, reversing 55 Barb. 87, 7 Abb. Pr. N. S. 120.

The payment by a bank on a forged indorsement of a depositor's name on its cashier's check upon itself, was held binding on the bank and it was denied the right to recover against any indorser, while an indorser voluntarily repaying the money was denied the right to recover of the prior indorser who innocently made a blank indorsement and identified the holder who bore the same name as the payee. *People's Nat. Bank v. Westfall* (1894) (Colo.) 27 Chicago Legal News, 141.

In Pennsylvania the rule is changed by the Statute of 1849 so that a drawee can recover back money paid on a forgery of the drawer's name. *Tradesmen's Nat. Bank v. Third Nat. Bank of Pittsburgh* (1870) 66 Pa. 426; *Corn Exch. Nat. Bank v. National Bank of the Republic* (1875) 78 Pa. 223. The above cases are both instances of payment through a clearing house, but the statute was held to permit recovery after the time allowed by clearing-house rules for adjusting errors.

Quite similar to the cases on this subject of the drawee's duty to recognize the drawer's signature is the case which holds that a bank receiving for-

back, and that, too, though the payer may have been negligent, unless his negligence has caused a loss to an innocent party.

Lawrence v. American Nat. Bank, 54 N. Y. 435; 2 Morse, Banks & Banking, § 464, p. 768; *Hortsmann v. Henshaw*, 52 U. S. 11 How. 177, 18 L. ed. 658.

Even the ostensible maker of a note paying innocently upon his own forged signature (having failed to discover the forgery), may sue and recover from the person to whom payment was made.

Carpenter v. Northborough Nat. Bank, 123 Mass. 69; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; 2 Morse, Banks & Banking, § 464.

After a party (a drawee bank if you please) has paid out money on a forged paper, it will not be able to recover of the supposed drawer even though he should have pronounced it (after payment), his genuine paper. The supposed drawer is not estopped to deny his assertion, unless the other party has thereby been led to do some act or thing to his injury.

Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 781; *Hall v. Huss*, 10 Mass. 40.

The transferor of a negotiable check, whether by delivery or indorsement, warrants his title and that it is what it purports to be.

State Bank v. Fearing, 16 Pick. 533, 28 Am. Dec. 265; *National Bank of North America of Boston v. Bangs*, 106 Mass. 445, 8 Am. Rep. 349; Morse, Banks & Banking, § 477.

The indorsement of a third party on a check must be absolutely meaningless if it does not signify a guaranty of the genuineness of all prior signatures.

geries of its own notes as cash is bound thereby. *Bank of United States v. Bank of the State of Georgia* (1825) 23 U. S. 10 Wheat. 333, 3 L. ed. 324.

And where bank notes were stolen after the cashier had signed them and were then completed by forging the signature of the president, they were held not binding on the bank, although the burden of disproving the president's signature rested on the bank as against a bona fide holder. But mere hesitation in respect to declaring the forgeries which was to obtain knowledge although the forgery was suspected was held not to amount to an adoption. *Salem Bank v. Gloucester Bank* (1820) 17 Mass. 1, 9 Am. Dec. 111.

Where a sealed package of forged bank notes was received by the cashier away from the bank and outside of banking hours under representations that they were good, it was held that he should have reasonable time to count and examine them. But a delay for fifteen days after counting and placing in the vault before taking any further notice of them, and then merely proposing to examine them without any express disavowal of them, was held fatal, although there was no proof that the other bank could have saved itself from loss if notified earlier. It was held to be not a question for the jury but an unreasonable delay as a matter of law. *Gloucester Bank v. Salem Bank* (1820) 17 Mass. 33.

A bank which pays a draft drawn on its depositor and made payable to the bank when his acceptance has been forged thereon cannot recover back the money. *Smith v. Mercer* (1815) 6 Taunt. 76, 1 Marsh. 453.

So the payment by a bank of an accepted draft on an insurance company which was one of its depositors, with forged indorsements on the draft, was held invalid as against the insurance company 27 L. R. A.

Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; *National Bank of North America of Boston v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; Bolles, Banks & Depositors, § 209, p. 211; *City Bank of Houston v. First Nat. Bank of Houston*, 45 Tex. 208; Story, Prom. Notes, §§ 135, 379, 380, 387, and cases there referred to; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Aldrich v. Jackson*, 5 R. I. 218; *State Bank v. Fearing*, *supra*; *Merriam v. Wolcott*, 8 Allen, 258, 80 Am. Dec. 69; *Loddell v. Baker*, 1 Met. 193, 35 Am. Dec. 358; *Central Nat. Bank of New York v. North River Bank*, 44 Hun, 115.

The presumption of the genuineness arises when the check comes to the drawee bank through respectable channels.

State Nat. Bank at Keokuk, Iowa v. Freedmen's Sav. & T. Co. 2 Dill. 11; *McKerroy v. Southern Bank of Kentucky*, 14 La. Ann. 462, 74 Am. Dec. 438; *Rouvant v. San Antonio Nat. Bank*, 68 Tex. 610.

Mr. John M. Miller, for Boutell Bros., respondents:

If a bank pays out money on a forged check it cannot charge the depositor or the payee.

Bernheimer v. Marshall, 2 Minn. 81, 72 Am. Dec. 79; 3 Randolph. Com. Paper, § 1487; 3 Dan. Neg. Inst. ¶1654, 1656; 8 Am. & Eng. Encyclop. Law, pp. 222-224.

Generally where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it.

Bernheimer v. Marshall, *supra*; *Gloucester Bank v. Salem Bank*, 17 Mass. 42; *Commercial & Farmers Nat. Bank v. First Nat. Bank of*

although the forged indorsements were upon it when it was accepted and it was a custom of the insurance company, but this was not known to the bank, to require indorsements before acceptance. *Roberts v. Tucker* (1861) 16 Q. B. 560, 20 L. J. Q. B. 270, 15 Jur. 987.

A bank discounting a bill on the faith of a forged acceptance by a customer is held not to be within the rule requiring a bank to know the handwriting of its customer when paying his bills. *Fuller v. Smith* (1824) 1 Car. & P. 197, Ryan & M. 49.

b. Negligence or fault of party obtaining payment.

The general rule established by the cases in the preceding division has been modified in a few cases in which fault or negligence on the part of the bank obtaining payment, which is held to have contributed to the deception of the drawee, is held ground for compelling repayment of the money to the latter. Thus in *People's Bank of Springfield v. Franklin Bank of Clarksville* (1869) 6 L. R. A. 724, 88 Tenn. 299, which is an important case on this branch of the subject, it is held that a bank which accepts and cashes a check drawn on a bank in another county to which the signatures of the drawer and payee have both been forged without requiring identification of the person to whom payment is made, or taking any steps to preserve any evidence of his identity, must refund to the drawee bank the money paid on the check when the drawee discovers the forgery.

So it has been said that only when the party receiving the money has in no way contributed to the success of the fraud or to the mistake of fact under which payment is made does the presumption that the drawee knows the maker's signature prevail. *National Bank of North America of Boston v. Bangs* (1871) 106 Mass. 441, 8 Am. Rep. 349;

Baltimore, 80 Md. 11, 96 Am. Dec. 554; *First Nat. Bank of Quincy v. Ricker*, 71 Ill. 489, 23 Am. Rep. 104; *Ledy v. Bank of United States*, 1 Binn. 27; *Bank of St. Albans v. Farmers & Mechanics Bank*, 10 Vt. 141, 83 Am. Dec. 188; *People's Bank of Springfield v. Franklin Bank of Clarksville*, 6 L. R. A. 724, 88 Tenn. 299.

A bank "is even more bound" to know such depositor's handwriting, than a drawee is bound to know a drawer's.

2 Dan. Neg. Inst. 1654; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24.

Mr. A. Ueland, for Washington Bank, respondent:

The rule that a drawee is bound to know the drawer's signature is particularly applicable to banks in cashing their depositor's checks.

Smith v. Mercer, 6 Taunt. 76.

The rule is not only reasonable but necessary.

Morse, Banks & Banking, 2d ed. pp. 338-339; *Bernheimer v. Marshall*, 2 Minn. 78, 72 Am. Dec. 79; *Ledy v. Bank of United States*, 1 Binn. 27; *Bank of United States v. Bank of the State of Georgia*, 23 U. S. 10 Wheat. 354, 6 L. ed. 340.

The drawee's right to recover is based upon some negligent act or omission of the person to whom the money has been paid, or some breach of duty on his part towards the drawee, which has misled the latter.

Commercial & Farmers Nat. Bank v. First Nat. Bank of Baltimore, 80 Md. 11, 96 Am. Dec. 554.

First Nat. Bank of Danvers v. First Nat. Bank of Salem (1890) 151 Mass. 280.

In *National Bank of North America of Boston v. Bangs*, *supra*, a payee who takes a forged check from a person other than the apparent maker of it is held sufficiently put upon inquiry to make him liable to refund money paid by the drawee.

In *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, *supra*, a bank cashing a check on another for a stranger without the identification required by custom was held liable to refund to the drawee which paid it. The negligence of the drawee bank in discovering the forgery of the check after payment was held not to prevent recovering back the money from the other bank if the latter had not been prejudiced by the delay.

The earliest case to present this doctrine was *Ellis v. Ohio Life Ins. & T. Co.* (1855) 4 Ohio St. 623, 64 Am. Dec. 610, which held that a drawee bank which paid forged checks without examination when presented by another bank in the same town according to a custom which authorized the examination and return on the same day if not good, but did not discover the forgery for ten days, was held entitled to recover if the other bank contributed to the mistake in payment by negligently taking the check without making the inquiry required by custom as to the validity of the indorsement, and the drawee bank acted in reliance on the presumption that such caution had been exercised.

A bank cashing for a stranger a forged check on another bank relying merely on comparison of the signature with a genuine signature of the supposed maker without any proof of the identity of the payee or any inquiries about him was held liable to refund money received by it from the drawee bank as the drawee had the right to assume that the instrument with the indorsement of the bank which cashed it was genuine. The court said: "After careful examination of the authorities we have no

Mitchell, J., delivered the opinion of the court:

This action was brought to recover money paid on a forged check. To the complaint the defendants separately demurred, on the ground that it did not state a cause of action. This appeal is from an order sustaining these demurrers. The complaint is very prolix, but the substance of its allegations is as follows: Osborne & Clark, lumber dealers in Minneapolis, were customers of the plaintiff bank, with which they kept a large deposit. They had in their employ a man named Seymour, at a salary of \$7 per week, "a man of limited means and small personal resources," which facts were known to Boutell Bros. Boutell Bros. had sold Seymour some goods on credit on the installment plan, upon which there was due an installment of \$10. During business hours of April 11th, Seymour went to Boutell Bros.' place of business in Minneapolis, with a check for \$457.90, payable to his own order, purporting to be drawn by his employers, Osborne & Clark on plaintiff bank; whereupon Seymour and Boutell Bros. both indorsed the check for the purpose of giving it credit and putting it in circulation, and to enable Seymour to pay the \$10, and then went over to the defendant bank, and presented the check thus indorsed (Boutell Bros. identifying Seymour), and requested the bank to cash it, which it did, paying the money to Seymour and Boutell Bros. Al-

doubt that a party who pays a forged check does so at his peril, and if by means of his indorsement and use of the same he thereby obtains money from another he is liable for the amount thus received." *First Nat. Bank of Orleans v. State Bank of Alma* (1888) 22 Neb. 799. This case seems to ignore the rule as to the obligation of the drawee to know the drawer's signature and rests the decision on the effect of the indorsement as a warranty of genuineness. In this respect the case is exceptional. But perhaps the language above quoted should be restricted to the facts of the particular case which the court regarded as showing a fault in thus cashing the check of a stranger.

But on the other hand the receiving of a check on deposit from a stranger, even if contrary to the custom of the bank, and sending it through the clearing house without communicating that fact, is held in *Commercial & Farmers Nat. Bank v. First Nat. Bank of Baltimore* (1888) 80 Md. 11, 96 Am. Dec. 554, not to relieve the drawee from the risk of paying it if the maker's signature is forged.

So in *Salt Springs Bank v. Syracuse Sav. Inst.* (1863) 62 Barb. 101, the fact that a check on another bank was cashed for a stranger although the pretended drawer was not a customer of the bank which cashed it, was held not to relieve the drawee from the loss if the check was forged.

But an exception to the rule that a bank is bound to know the signature of the depositor is also recognized in *Rouvant v. San Antonio Nat. Bank* (1885) 63 Tex. 610, where the party receiving the payment is in fault. It is held that the payee of a check who is a responsible merchant known to the bank who indorses and collects the check without disclosing grounds for suspicion thereby aids to mislead the bank, as the bank might well assume that there was no question of the identity of the person who drew and signed it. The court says: "Here the check had not gone into circulation; it was drawn in favor of R—— and was indorsed

though the places of business of both Osborne & Clark and of plaintiff were within a few blocks, and of ready access, Boutell Bros. made no inquiry to ascertain the genuineness of the check, and the defendant bank took no means to assure itself of the fact, except the identification of Seymour by Boutell Bros. and the indorsement of the check by the latter. The next day the defendant bank presented the check to the plaintiff, which, after examining the signature and believing it to be genuine, induced thereto by its apparent genuineness (it not being possible by ordinary care to detect the forgery), and by the financial standing and integrity of the defendant bank, which presented it, and of Boutell Bros., who had indorsed it, "in the exercise of due care and caution," paid the check. It is also alleged that it was the custom and practice among all the banks in Minneapolis, well known to the defendants, for the bank upon which any check purports to be drawn to pay it when presented by any other bank (provided the drawer has sufficient funds), relying upon the genuineness of the check and of all prior indorsements; also not to pay a check "of any considerable size" purporting to be drawn by one of its depositors unless the party presenting it is identified, "save when indorsements of responsible parties known to the drawee bank are indorsed thereon." On April 24 plaintiff discovered that the signature of Osborne & Clark was a forgery, and immediately notified the defendants of the fact, tendered back

the check, and demanded payment of the amount, which was refused. The signature of Osborne & Clark had been forged by Seymour, who absconded April 12, the same day on which plaintiff paid the check, but whether before or after is not alleged. His whereabouts is still unknown.

These facts present the question, upon which so much has of late years been said and written, whether the drawer of a bill of exchange, or the banker upon whom a check has been drawn, who has paid a bill or check upon which the drawer's signature has been forged, can, upon discovery of the forgery, recover back the amount from the holder, and, if so, under what circumstances he may thus recover. It is a well-settled rule of law that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. And the tendency of the modern authorities is to extend rather than to curtail the operation of this rule. One generally received exception to the rule is that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a bill or check upon which the drawer's signature has been forged, he must stand the loss, and cannot recover back the amount, if the party to whom he paid it was a bona fide holder. This doctrine was established in England in 1762, in the leading case of *Price*

and collected by him. At that time he was a responsible merchant in the city of San Antonio and was known to the bank as such. When the check was presented payable to and indorsed by him the bank might well assume that there were no suspicious circumstances attending its execution, and no question as to the identity of the person who drew and signed it. At least his receiving and indorsing the check would have a tendency to mislead and throw the officers of the bank off their guard and cause them to accept and pay the check without subjecting it to the same scrutiny as if it had been indorsed and presented by a stranger." In this case the payee of the check took it with knowledge of the suspicious circumstance that it was executed by a person who had previously given him a check in a different name.

Likewise it was held in *First Nat. Bank of Quincy v. Ricker* (1874) 71 Ill. 439, 22 Am. Rep. 104, that one who obtains money on a forged check, which he suspects to be forged, by indorsing it as a condition of its payment by the drawee bank which doubts the signature but consents to pay it if he will indorse it, must refund to the drawee bank on its proving a forgery and demanding back the money within a few hours. It is declared in *First Nat. Bank of Quincy v. Ricker*, *supra*, that the rule requiring the drawee to know the drawer's signature presupposes good faith of the other party to the transaction as a bona fide holder.

The forgery of a bank check or draft on another bank was held not to make a bank liable because of its lack of care in keeping its blanks and by selling a similar genuine draft to a stranger and inclosing his signature at his request to the drawee bank although the cashier became somewhat suspicious because of the premium paid by the stranger and did not communicate his suspicions to the drawee bank. *Leavitt v. Stanton* (1844) 111 U. S. Supp. 413.

27 L. R. A.

II. Duty of other parties.

The first declaration of the doctrine that a drawee must know the signature of his drawer seems to be that made in *Price v. Neale* (1762) 3 Burr. 1354, 1 W. Bl. 390, in which a drawee after payment of forged bills to a bona fide holder who took one of them after acceptance by the drawee, was denied the right to recover back his money on the ground that if there was any negligence it was that of the drawee and that it was incumbent on him to be satisfied that the signature "was the drawer's hand" before acceptance or payment.

A drawee of forged drafts purporting to be drawn to the drawer's own order and to have his indorsement, who pays them to a bank which has cashed them for an unknown party without requiring his indorsement and thus left the drawee to presume that they were discounted for the drawer himself, was held in *Howard v. Mississippi Valley Bank of Vicksburg* (1876) 28 La. Ann. 727, 26 Am. Rep. 106, to be without remedy against the bank although he paid them acting on such presumption. The court seems to have decided the case chiefly on the doctrine that the drawee must know his drawer's hand, although it recited that continuous acts of accepting and paying drafts were calculated to induce the bank to suppose that he knew them to be genuine.

The doctrine has a strong application in *Bernheimer v. Marshall* (1858) 2 Minn. 78, 73 Am. Dec. 79, in which a drawee who paid a draft by check sent by his bookkeeper without examining the instrument although he had opportunity to do so, was held bound by the payment and was denied the right to recover on finding that the draft was forged. The mere statement of the party presenting the forged draft that he had a draft of the drawer was held not to constitute a guaranty of the genuineness of the signature.

The right of a drawee to recover after payment.

v. Neale, 8 Burr. 1355, in which Lord Mansfield stopped defendant's counsel, saying the case was one that could not be made plainer by argument; that it was incumbent upon the plaintiff (the drawee) to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it. The same doctrine was firmly established in the commercial law of this country in *Bank of United States v. Bank of the State of Georgia*, 23 U. S. 10 Wheat. 333, 6 L. ed. 334, in which Mr. Justice Story, referring to *Price v. Neale*, said: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." And, so far as we have been able to discover, this general doctrine is recognized as the law by the courts of

every state in the Union except Pennsylvania, where the rule has been changed by statute. The doctrine was announced and applied by this court as early as *Bernheimer v. Marshall*, 2 Minn. 78 (Gil. 61), 72 Am. Dec. 79. That was a case of a forged draft, but the doctrine is equally applicable to a forged check. Indeed, if there is any difference in the cases, the reasons upon which the doctrine rests apply with more force to the latter than the former, for not only do checks pass from hand to hand as money more frequently and rapidly than do drafts or ordinary bills of exchange, but a banker is "even more bound" to know a customer's handwriting than a drawee of a bill of exchange is bound to know the drawers. Many modern text-writers, some of them of learning and

of a forged draft was denied in *Vogel v. Ball* (1889) 99 Tex. 604, where the claim was asserted against a collecting bank which had paid over the money and which did not indorse the draft but merely gave a receipt therefor. The right of action against any other party was not decided.

Where the payee's indorsement as well as the drawer's signature was forged the drawee who paid the bill without fault on his part was allowed to recover back the money from an indorser whose position was not changed after the payment was made, on the ground that the indorsement was a representation if not a warranty of the genuineness of the preceding indorsements by the payee which gave a right of action to the drawee even if he was estopped to deny the drawer's signature. *McCall v. Corning* (1848) 3 La. Ann. 409, 48 Am. Dec. 454.

An exception to the rule which denies the right of a drawee to recover back money paid on a forged draft is made where the payment was innocently made to a holder who had bought the draft and thus incurred his loss before acceptance and without any act of the drawee to mislead him. *McKleroy v. Southern Bank of Kentucky* (1850) 14 La. Ann. 432, 74 Am. Dec. 438.

Where a check was sent to a bank which was a member of a clearing house in accordance with a continuing arrangement to send a check daily for the balance of paper taken up through the clearing house for the maker of the check, and the balance for which the check was given included the payment of a forged certificate of deposit which was not taken up through the clearing house and was not shown to the maker, he was held entitled to recover back the amount of the forged certificate on discovering the forgery after banking hours on the same day. *Allen v. Fourth Nat. Bank* (1874) 59 N. Y. 12.

One who intervenes for the honor of a supposed drawer of a draft on which payment has been refused for lack of funds and pays it without seeing the draft may recover, but if he saw the draft he would be within the same rule that applies to drawees and could not recover. *Goddard v. Merchants Bank* (1850) 4 N. Y. 147, affirming 2 Sandf. 247.

The agent of a steamboat, who voluntarily called at a bank as requested by a forged letter to take up a forged draft purporting to be drawn by the clerk of the steamboat on the captain and paid it, was denied the right to recover back his money from the bank after it had paid over the money in good faith. *Stephenson v. Mount* (1837) 19 La. Ann. 205.

But one who is called on to pay bills for the honor of an apparent indorser whose name was in fact forged was held entitled to recover back the money on discovering the forgery, at least when

the remedy of the other party was still open, because the presentment for payment for the honor of the drawer was held to be a representation of the genuineness of the indorsement. *Wilkinson v. Johnston* (1824) 3 Barn. & C. 423, 5 Dowl. & R. 408.

An acceptor after protest for the honor of the drawer on request of the drawee of a forged bill who had refused to accept it only because of financial embarrassment was held bound to pay to a bona fide holder who discounted the bill on the faith of the acceptance, although the payee's name was fictitious. *Phillips v. Imthurn* (1836) L. R. 1 C. P. 463, 35 L. J. C. P. 220, 14 L. T. N. S. 406, 14 Week. Rep. 653.

The general doctrine that an acceptance is an acknowledgment of the drawer's signature is declared in *Wilkinson v. Lutwidge* (1726) 1 Strange, 648, where it is said that the drawee is supposed to know the hand of his own correspondent, but that this is not conclusive.

So in *Jenys v. Fawler* (1733) 2 Strange, 946, the court was strongly inclined to think that even actual proof of forgery would not excuse a drawee against his own acceptance which had given credit to an indorsement.

The acceptance of a bill payable to the drawer's order although an admission of his signature does not admit that an indorsement thereon and apparently in the same handwriting purporting to be his is genuine. *Williams v. Drexel* (1859) 14 Md. 566.

The receipt and payment of forged United States treasury notes by the assistant treasurer at New York is not binding on the government because that officer had no authority to settle, adjust, or determine the validity of claims against the government. *Cooke v. United States* (1875) 91 U. S. 339, 23 L. ed. 237.

A bank at which a township order was made payable was held entitled to recover on discovering that it was forged against an indorser who obtained payment, unless the delay in discovering the forgery of the instrument was such as to put the indorser in a worse position than if payment had been refused. *Indiana Nat. Bank of La Fayette v. First Nat. Bank of Crawfordville (Ind.)*, Feb. 2, 1894.

Similar to the cases about a drawee's duty to know the drawer's signature are the cases as to the obligation of the maker of a note to recognize his own signature.

In *Welch v. Goodwin* (1877) 123 Mass. 71, 25 Am. Rep. 24, it was held that one who paid a note to which his name was forged could recover back the money if he had not been guilty of laches.

In *Wilson v. Alexander* (1842) 4 Ill. 392, an administrator who paid a forged note apparently signed by his intestate was allowed to recover back the money. The court distinguished this case from that of payment by the supposed maker.

R. A. R.

ability, have assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although at fault in not discovering the forgery of its customer's signature, can recover even from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check. See 2 Parsons, Notes & Bills, 80; Morse, Banks & Banking, chap. 33; Dan. Neg. Inst. chap. 42; also, Am. L. Rev. April, 1875, p. 411, and note to *People's Bank of Springfield v. Franklin Bank of Clarksville* (Tenn.) 17 Am. St. Rep. 889, 88 Tenn. 299, 6 L. R. A. 724. We shall not enter upon a consideration of the soundness of the argument against the doctrine, or as to which rule we would adopt if the question was *res integra*, because we do not feel at liberty to overrule or disregard a doctrine so well established and so firmly rooted in the commercial law of the country. If the rule is incorrect or works badly in practice, its change must be left to the legislature. We may say, however, that the opponents of the doctrine seem to have found no followers among the courts. We may also suggest that perhaps the courts themselves have given the opponents of the doctrine an unnecessary vantage ground, by frequently placing it exclusively on the narrow ground of actual negligence on part of the drawee in not discovering the forgery, because he was bound to know the signature of his own customer or correspondent. It is undoubtedly true that he is in better position than a stranger to know his customer's signature, and that men have a right to deal with checks and drafts on that assumption; but it does not seem to us that the doctrine rests entirely on this narrow basis of actual negligence on part of the drawee. The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment; and that, if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences. See dissenting opinion of *Mr. Justice Snodgrass* in *People's Bank of Springfield v. Franklin Bank of Clarksville*, 88 Tenn. 299, 6 L. R. A. 724.

The rule that, if a bank pays a check under the misconception that it has funds of

the drawer, it cannot recover from a bona fide holder, but must look to the drawer alone for redress, is founded on much the same reasons. There is not as much force as may at first seem in the suggestion of practical objections to the doctrine. In large commercial centers, where vast numbers of checks have to be rapidly exchanged between banks, it is always done through and under the clearing-house rules, adopted by the banks for mutual convenience, by which checks paid in that way may be returned within a certain time, if it be found that they are not genuine or that the drawer had no funds. And the doctrine has no application to cases where, as is common in cities, a customer of a bank deposits checks purporting to be drawn on other banks. Entirely different principles apply to such cases. But while the general doctrine is too well established to be overruled or disregarded, yet it is undoubtedly true that the trend of the modern authorities is to impose upon it some limitations and modifications; so that it is not now always easy to definitely state when a case falls within the doctrine or comes within the general rule as to money paid by mistake. From what examination we have been able to make of the authorities, we have arrived at the conclusion that there are very few well-considered cases which go further than to hold that the bank may recover back money paid on a check to which the signature of one of its customers was forged, when there was a lack of good faith on part of the payee towards the bank, as when he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank, and which he did not communicate to it, or where the holder was negligent in not making due inquiry as to the validity of the check before he took it, and the drawee, having a right to presume that he had made such inquiry, was thereby excused from itself making inquiry before paying it. In the first case the holder is really a party to the fraud, and is not a good-faith holder. In the second case, he has, by his negligence, contributed to the consummation of the mistake on part of the drawee by misleading him.

There is no allegation that either of the defendants knew or suspected that the check was forged. So far as appears, they both acted in entire good faith. All that is claimed against either is negligence. It remains only to consider whether either is charged in the complaint with any act of negligence in failing to make proper inquiry as to the genuineness of the check, and which the plaintiff assumed, and had a right to assume, that they had made, so as to excuse it for not making the investigation as to the genuineness of its own customer's signature which it otherwise would have made. So far as the defendant bank is concerned, there is only one side to the question. When it was requested to cash a check purporting to be drawn by one not its customer, on another bank, payable to a person unknown to it, it took the precautions, which any prudent bank would have taken,

to have the payee identified and the check indorsed by a responsible party, and thereby protect itself against loss in case the check was not honored when presented for payment. This is just what any bank would naturally do, and has a right to do, under such circumstances, instead of going in search of the maker of the check to ascertain from him if his signature is genuine, and then going to the drawee bank to ascertain if he has funds on deposit with which to meet it. It owned the plaintiff no duty to investigate as to the genuineness of the signature of its own customer, and the plaintiff had no right to assume that it had made such investigation. It seems to us that the same is true as to Boutell Bros. The distinction must be kept clearly in mind between their duty and responsibility to the defendant bank or any other bona fide indorsee of the check, and their duty and responsibility to the plaintiff bank, with reference to the genuineness of the signature of its own customer. By indorsing the check, Boutell Bros. undoubtedly guaranteed to the defendant bank the genuineness both of Osborne & Clark's signature and of Seymour's indorsement as the payee. That was the very purpose of their indorsement. And, if the indorsement of Seymour had proved to be forged, they would no doubt have been liable to plaintiff had it been thus led to pay the check to one not the owner of it; for by indorsing it they guaranteed to all persons, including plaintiff, the genuineness of the preceding indorsement. But upon the question of the genuineness of the signature of Osborne & Clark, the drawee's own customers, the case stands upon an entirely different footing. Not being the original payees of the check, the indorsement of Boutell Bros. constituted no guaranty or representation to the drawee that the signature of the drawer was genuine; and the plaintiff had no right to rely on it as such, or to assume that Boutell Bros. had investigated as to its genuineness. That was a matter which it devolved on the plaintiff to ascertain for itself when the check was presented. In fact, the complaint negatives the idea that the plaintiff acted on any such assumption; for it is alleged that it did examine the signature with due care and caution, that it was to all appearances genuine, and that it was not possible by any ordinary care or precaution to detect the forgery.

Our conclusion is that as to both demurrers the order appealed from must be affirmed.

Canty, J., dissenting:

I cannot concur in the foregoing opinion. Because error is gray with age is no reason why it should be respected or followed. It seems to me that the foregoing opinion is a mere apology for such error, and this is true of the opinion in most of the modern cases on the question here involved. I concede that it is good public policy to hold that a banker should know the signature of his depositor. It tends to greater vigilance on the part of the banker, and more prompt discovery of the forgery, which makes the business of forgery more dangerous and less suc-

cessful. But it does not follow that this is the only principle involved in this kind of a case, or that it should overturn and exclude all other well-established principles applicable thereto. There is no stronger or better established principle of law or public policy than that which holds that no one shall be allowed to retain the consideration received by him on a forged instrument, however innocent he may be, unless he can invoke the aid of the doctrine of estoppel. Even when a person has been deceived by the forgery of his own signature, and has paid the forged obligation, he may recover back the money so paid, from an innocent holder. *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; 3 *Morse, Banks & Banking*, § 464, p. 768. This principle tends to cause greater vigilance on the part of every one about to take such paper, and to prevent him, when he has taken it, from suppressing his suspicions, and putting the paper off on some one else, instead of investigating the matter and pursuing the guilty parties. Why should the law in such a case offer a premium on attempting to put the paper off on the drawee bank? The money of a bank is not legitimate plunder, and a person receiving it through mistake and without consideration ought not to be entitled to retain it. The mere fact that a bank pays a forged check drawn upon it is no reason why it should lose its money. It was the absolute duty of the bank to know its depositor's signature, and detect the forgery, and it should suffer any loss caused by its failure to perform that duty; but there is no principle of law which says that, when such failure has caused no loss, the bank shall, as a mere penalty, forfeit the money so paid by it.

The transfer of negotiable paper by one holder to another is accompanied by an implied warranty that the paper is genuine. *Brown v. Ames* (Minn.) 61 N. W. Rep. 448. But, when a bank pays a check drawn upon it, there is no such implied warranty that the signature of the maker is genuine. On the contrary, it is the duty of the bank to ascertain, when the check is presented, whether or not the signature to it is genuine. It owes this duty not only to the innocent holder presenting the check, but also to all prior innocent holders. If it fails in this duty, it can only recover back the money so paid by it on the ground that it was paid and received by mutual mistake and without consideration, and that none of the successive innocent holders through whose hands the check passed will suffer any loss by reason of such failure if compelled to return the consideration received by him; that is, that none of such innocent holders will be in a worse position when he has returned such consideration than he would be if the check had not been paid by the bank. There is no reason why this rule should lead to multiplicity of actions, or result in conditions too complex for practical solution. When the bank brings suit against the last holder to whom it paid the check, he can give notice of the suit to the next prior holder of whom he received it, and who is

liable over to him on such implied warranty, and thereby bind such prior holder by the result of the suit. See *Love v. Gibson*, 2 Fla. 598; *Kip v. Brigham*, 6 Johns. 158, 7 Johns. 168; *People v. Judges of Monroe Common Pleas*, 1 Wend. 19; *Blasdale v. Babcock*, 1 Johns. 517; *Bigelow, Estoppel*, 84.

I see no reason why the second last holder of the check cannot in like manner give notice of the suit to the third last holder of it, and thereby bind him by the result of that suit. And it seems to me that the defense

will be entitled to plead and prove the existence of as many successive innocent prior holders as it can, and thereupon the burden should, perhaps, be thrown on the plaintiff bank to prove that none of these holders will be in a worse position when he has, by reason of the recovery of the bank, been compelled to return the consideration received by him, than he would be if the bank had never paid the check.

Rehearing denied.

MARYLAND COURT OF APPEALS.

Rebecca H. KILPATRICK *et al.*, Appts.,

v.

Mayor etc., of BALTIMORE.

(.....Md.....)

A condition is not created by an habendum clause "to have and to hold . . . as and for a street, to be kept as a public highway," following a granting clause conveying absolutely a portion of a larger tract of land which a city was acquiring in accordance with a resolution directing its acquisition "for public use" when the entire property was immediately devoted to the uses of the public square which could not be done if the strip was devoted to street purposes and the opening of the street would be profitless both to the grantor and the public.

(March 27, 1895.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Baltimore in favor defendants in an action brought to recover possession of a strip of land which defendants claimed under a deed from plaintiffs. *Affirmed*.

The facts are stated in the opinion.

Messrs. Harry M. Benninger, James S. Calwell, Thomas MacKensie, and John V. L. Findlay, for appellants:

The conveyance was for a special purpose, to wit, "as and for a street to be kept as a public highway," and that purpose being embodied in the deed as one of its conditions, the mayor and city council must have taken the title subject to the conditions.

Bigelow, Estoppel, p. 684, and *note 4*; *Dill. Mun. Corp.* § 575.

As it appears from the terms of the deed itself that there was a condition attached to the grant, it necessarily follows that the intention was not to grant a fee.

1 P. G. L. art. 21, § 11 (Code 1888); *Hawkins v. Chapman*, 86 Md. 88; *Foss v. Scarf*, 55 Md. 811; *Reed v. Stouffer*, 56 Md. 238.

Grantee must use the land in strict conformity with the uses expressed in the deed.

Second Universalist Soc. of Baltimore v. Dugan, 65 Md. 464; *Kelso v. Stigar*, 75 Md. 886; *Heard v. Brooklyn*, 60 N. Y. 246; *Horn v. Buck*, 48 Md. 865.

NOTE.—For conditions in deeds as to use of land for specified charitable or quasi public purposes, see *note to Greene v. O'Connor* (R. L.) 19 L. R. A. 282.

27 L. R. A.

Having failed to use the land in accordance with the terms of the deed and conditions contained therein, the plaintiffs are entitled to have and possess the same.

Reed v. Stouffer, Second Universalist Soc. of Baltimore v. Dugan, and Kelso v. Stigar, supra.

The court will so construe the deed as to carry the intention into effect.

Matthews v. Ward, 10 Gill & J. 448; *Ware v. Richardson*, 8 Md. 505, 56 Am. Dec. 762; *Albert v. Thomas*, 78 Md. 181; *Martindale, Conv.* pp. 90, 101; *Horrick v. Hopkins*, 28 Me. 217; *Watters v. Bredin*, 70 Pa. 288; *Richardson v. Palmer*, 38 N. H. 212; *Thrall v. Newell*, 19 Vt. 302, 47 Am. Dec. 632; *Winter v. White*, 70 Md. 805; *Handy v. McKin*, 64 Md. 565.

Wherever the habendum can be construed so as to stand with the premises it may explain or abridge the grant.

Lee v. Tucker, 56 Va. 9; *Rupert v. Penner*, 17 L. R. A. 824, 35 Neb. 587; *Second Universalist Soc. of Baltimore v. Dugan*, 65 Md. 471.

The habendum describes, limits, and defines the estate granted.

See *Bouvier, L. Dict.* title *aeed*; 5 Am. & Eng. Encyclop. Law, p. 457; 4 Kent, Com. § 67, title *Habendum*; 8 Washb. Real Prop. p. 440.

The mayor and city council has no power to receive donations unaffected by the trusts fastened upon them by the donors, either by will or deed.

City Code, Charter, p. 81; *Darling v. Baltimore*, 51 Md. 1; *Barnum v. Baltimore*, 62 Md. 275, 50 Am. Rep. 219.

A gift or grant of property to a grantee or donee, to be applied to a certain purpose, fastens a trust on the holder of the legal estate.

Ware v. Richardson, supra.

Mr. Thomas G. Hayes, for appellee:

The granting clause by the words "do grant unto the mayor and city council of Baltimore and its successors," conveys to said city a fee-simple estate, and if the words in habendum "as and for a street to be kept as a public highway," are words of condition subsequent which, if operative and effective would create a base or defeasible fee upon a breach of which a forfeiture and reverter would occur in favor of the grantors, then these words occurring in the habendum would create a repugnancy between it and the estate conveyed in the granting clause, and be inoperative in so far as these words limited or diminished the fee-simple estate previously granted.

1 Bl. Com. 469; *Regents of University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; 1 Washb. Real Prop. § 62, p. 90; Ang. & A. Priv. Corp. chap. 6, § 172; 6 Am. & Eng. Encyclop. Law, p. 876, title *Estates*; Comyn's Dig. Estate, A. 2, 215; 2 Preston, *Estates*, 1, p. 7; *Congregational Soc. of Halifax v. Stark*, 34 Vt. 243; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121.

The habendum of a deed must give way if in conflict with or repugnant to the granting clause of a deed.

Budd v. Brooke, 8 Gill, 198, 43 Am. Dec. 321; *Farguharson v. Eichelberger*, 15 Md. 68; *Winter v. Gorsuch*, 51 Md. 186; *Foreman v. Presbyterian Assn. of Baltimore* (Md.) Dec. 18, 1894.

The words "as and for a street to be kept as a public highway," occurring in the habendum, do not in themselves create a condition subsequent.

A condition subsequent is never favored, because it works a forfeiture, and forfeitures, both in law and equity, are "odious."

4 Kent, Com. 125, 180, 132; *Stanley v. Colt*, 72 U. S. 5 Wall. 119, 18 L. ed. 592; *Paschall v. Passmore*, 13 Pa. 295; *Farnham v. Thompson*, 84 Minn. 380; *Earle v. Dawes*, 8 Md. Ch. 280.

The fact that the consideration was nominal in the deed which it is claimed has words creating a condition subsequent, does not change the rules of law as to the construction of the words, but only makes a condition subsequent more readily implied.

Olcott v. Gabert, 86 Tex. 121.

The mere declaration of the uses to which the granted premises are to be applied does not ordinarily import a condition.

Ibid.; *Packard v. Ames*, 16 Gray, 327; *Rawson v. Uxbridge School Dist. No. 5*, 7 Allen, 129, 83 Am. Dec. 670; *Heaton v. Randolph County Comrs.* 20 Ind. 398.

Where the use or purpose declared in the deed is not for the special benefit of the grantor, but for the public at large, the courts are not inclined to treat the words as creating a condition subsequent.

Olcott v. Gabert, *Packard v. Ames*, and *Rawson v. Uxbridge School Dist. No. 5*, *supra*; *Greene v. O'Connor*, 19 L. R. A. 262, 18 R. I. 49; *Thornton v. Trammell*, 89 Ga. 209; *Paschall v. Passmore*, 15 Pa. 295; *Labaree v. Carlston*, 53 Me. 211; *Gadberry v. Sheppard*, 27 Miss. 208; *Farnham v. Thompson*, 84 Minn. 380; *Sumner v. Darnell*, 18 L. R. A. 178, note, 128 Ind. 88; *Hague v. Ahrens*, 8 U. S. App. 244, 53 Fed. Rep. 58; *Stanley v. Colt*, 72 U. S. 5 Wall. 119, 18 L. ed. 592; *Stewart v. Redditt*, 3 Md. 71; *Newbold v. Glenn*, 67 Md. 490.

In ascertaining whether the words "as and for a street to be kept as a public highway" create a condition subsequent, the intention of the grantors is controlling.

The resolution, the incapacity of the appellee to take the land in question for a street, but only for a part of a public square, under the express provisions of said resolution, the recitals in the other deed made three days later, and all the surrounding facts, conclusively show that it was not the intention of the grantors by the use of these words to create a condition subsequent.

27 L. R. A.

The Redemptorist v. Wenig (Md.) June 19, 1894; *Stanley v. Colt*, and *Paschall v. Passmore*, *supra*; *Lyon v. Hersey*, 103 N. Y. 264; *Newbold v. Glenn*, *supra*.

Page, J., delivered the opinion of the court:

This is an action of ejectment, brought by the appellant to recover from the appellee a strip of land running through Perkins' Spring property in the city of Baltimore. The case was heard below upon an agreed statement of facts, and from the *pro forma* judgment thereupon rendered this appeal is taken.

On the 16th day of October, 1872, the mayor and city council of Baltimore passed a resolution authorizing and directing the city comptroller to lease "for public use" all that portion of the Perkins Spring property located within the bounds of Ogston, George, and Chatsworth streets (except a portion theretofore leased) "at a rate not to exceed four dollars and a-half per front foot, for the building lots contained within said bounds," with the right reserved "to purchase at six per cent, capitalized, at the convenience of the city." The land described in this resolution was conveyed to the city in separate parcels by two deeds, dated respectively the 11th day of January, 1873, and the 14th day of January of the same year. These deeds were submitted to and approved by the city solicitor at the same time, that is to say on the 4th of January. By the deed of the 14th day of January the grantors, first having set out the resolution above cited, lease to the city for ninety-nine years, renewable forever, with the right reserved to purchase the fee, all of the ground mentioned in the resolution, except so much thereof as constituted Clark street, which was granted by the deed of the 11th of January to the city "in fee simple." Clark street thus referred to did not, in fact, exist; it was only the strip of land running from Ogston to Chatsworth street, sixty feet wide, which the grantors, by deed of the 11th of January, had, in consideration of one dollar, granted unto the mayor and city council of Baltimore and its successors, with an habendum clause, as follows:

"To have and to hold the parcel of ground above described with the appurtenances aforesaid unto the mayor and city council of Baltimore, aforesaid, and its successors forever, as and for a street to be kept as a public highway." Upon the execution and delivery of these deeds, the city took possession of the property, and since then it has been used as a part of Perkins Spring square. It has expended large sums of money in improving it, by the construction of expensive paved ways for the persons using the square, and of a large mound of earth in the center, ornamented and embellished with receptacles for flowers. No ordinance or resolution was ever passed by the mayor and city council authorizing the purchase of the land mentioned in the declaration as a public highway, or accepting it as such; on the contrary if it should be used as a street such use would render the triangular parcel incapable

of improvement as a public square, as provided by the ordinance or resolution of 1872. It is agreed by the parties that the court shall draw such inferences of law or fact from the "statement of facts and exhibits as may be right and proper, and all questions of law, as well as inferences that might have been made in the court below, shall be open for consideration and decision by this court."

Under these circumstances the appellant contends that the deed of the 11th of January, 1873, was made for the purpose of opening, and forever keeping open, Clark street from Ogston to Chatsworth as a public highway; that the words, "as and for a street to be kept as a public highway," found in the habendum, create a condition, and as the city has failed to use the land in accordance with this condition, a forfeiture has occurred, and the title has reverted to the grantors. To sustain this contention it obviously is necessary to determine that the words in themselves import a condition, or when taken in connection with the whole deed, that they show a clear and unmistakable intention on the part of the grantor to grant an estate on condition. Technical words are not absolutely essential to create a condition, nor, on the other hand, does their use necessarily raise one; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only. *Paschall v. Passmore*, 15 Pa. 295; *Bacon v. Huntington*, 14 Conn. 92; *Worman v. Teagarden*, 2 Ohio St. 380; *Walters v. Bredin*, 70 Pa. 235; *Labree v. Carleton*, 58 Me. 211.

Conditions subsequent are not favored in law "because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures." 4 Kent, Com. 130; *Stanley v. Colt*, 72 U. S. 5 Wall. 119, 18 L. ed. 502.

Therefore it is that a condition will not be raised by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition. *Packard v. Ames*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio, 353.

And as a further consequence of this rule, it has always been held that "in doubtful cases the disposition of the courts is, to construe language as creating a trust or covenant, rather than a condition. See Mr. Brantley's note to the case of *Earle v. James*, 3 Md. Ch. 230, and authorities there cited. *Scott v. McMahon*, 62 Conn. 378, 21 L. R. A. 58; *Greene v. O'Connor*, 18 R. I. 49, 19 L. R. A. 262; *Rawson v. Uzbridge School Dist.* No. 5, 7 Allen, 128, 129, 88 Am. Dec. 670.

In the elaborate and able opinion delivered in the last cited case by Bigelow, Ch. J., the court said: "If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. . . . We believe there is no authoritative sanction for the doctrine that

a deed is to be construed a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

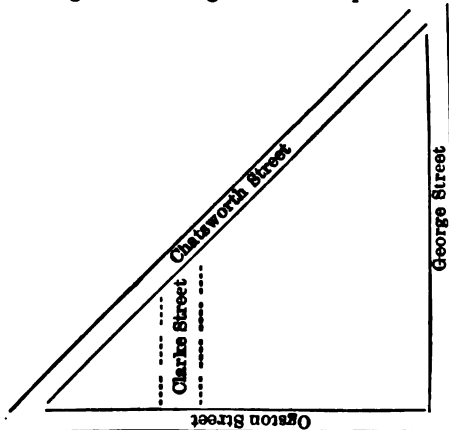
These principles which, so far as our researches have gone, seem to be of universal acceptance, are fully sustained by the decisions of this court. Without undertaking to review the cases in which questions of this nature have been considered, we deem it quite sufficient to refer to the case of *Newbold v. Glenn*, 67 Md. 490, in which Judge Robinson, speaking for the court, has succinctly stated the whole law. There, in pursuance of an ordinance of the city the trustees of the McDonough Educational Fund & Institute bought of Wolfarden a lot of ground as a site for the proposed McDonough Institute. The deed recited the ordinance, and conveyed the property to the city, "in trust for the uses and purposes, and subject to the trusts, limitations, powers, and provisions imposed, expressed, and declared in and by the ordinance." Subsequently the city sold the property to William W. Glenn and bought another, on which the buildings were erected. One of the questions involved was whether the city acquired an indefeasible fee-simple title, or only a fee on condition subsequent, that the property was to be used as a site for the institute, and on failure so to use it, there was a reverter to the grantor.

It was held, however, the words relied on to establish the condition were used only "for showing the purpose for which the property was bought and the character in which it was held, and not for the purpose of limiting the right of alienation." It was also held there was nothing "to justify the inference that the property was sold or conveyed on condition that it was to be used as a site for the McDonough Institute, and on failure thus to use it the title was to revert to the vendor . . . and if such had been the intention we must presume that it would have been expressed in clear and explicit terms or in terms at least from which such intention could be fairly inferred." The court also distinguished that case from those of *Reed v. Slouffer*, 56 Md. 236, and of *Second Universalist Soc. of Baltimore v. Dugan*, 65 Md. 460, in which it was held "on the express terms of the grant and the incapacity of the grantee to take upon any other conditions, that, upon the "failure to use the property for the purposes in consideration of which it was conveyed the title reverted to the grantor."

Applying these principles to the case at bar, we cannot find anything in the deed of the 11th of January to justify the inference that the property was conveyed on the condition that it was to be used as a public highway and "on failure thus to use it, the title was to revert to the vendor." In the granting clause the property is conveyed abso-

lutely to the city and in the habendum are the words, "to have and to hold, etc., as and for a street to be kept as a public highway." These words do not *ex proprio vigore* import a condition, nor are they so connected with the grant itself, as in any manner to qualify the general terms there employed; and there is no such language to be found in the deed, from which when the context is taken into consideration, an intention to create a condition can be inferred. The lot was acquired by the city under the authority of a resolution, which directed a lease "for public use, with the right reserved to purchase."

It was part of the property included within what was called the Perkins Spring property, and inasmuch as the whole of the property was, immediately upon its acquisition, devoted by the city to the uses of a public square, it may reasonably be presumed that such was the "public use" had in view when the resolution was passed. Under these circumstances, it is inconceivable, and it would require the plainest terms to enable us to determine, that it was the intent of the deed that if the property was put to the public use contemplated by the resolution and not to the use of a public street, the city should lose its title and the property revert to the grantors. A glance at the plat with



which we have been furnished will satisfy any one that to use this parcel of land as a street would be profitless both to the grantor and the public; and it is agreed by the parties that such use would render the property included in the resolution, "incapable of improvement as a public square as provided in the ordinance of 1873."

We are disposed to place but little importance upon the fact that the consideration in the deed is merely nominal. The whole of the Perkins Spring property (except a portion thereof) was transferred to the city by the same parties. The resolution authorized a lease at \$4.50 per front foot of the building lots contained. Prior to the passage of the resolution Clark street did not exist. It is obvious that if Clark street be taken into account more front feet can be obtained than would otherwise be possible, and thus a larger price could be realized for the entire property. The transfer to the city of the Spring property, although accom-

plished by two deeds, ought to be regarded as one transaction, and the real consideration for the conveyances must be taken to be the aggregate amounts received from the entire property.

In view of all the facts of the case and the terms of the deed, we think the words relied on to create the condition are quite as consistent with an intent to repose a confidence in the authorities of the city, that they "would fulfill the purpose of the grant, so long as it was reasonable and practicable so to do, as they are with the intent to impose a condition which should compel it, on pain of forfeiture, to maintain the property as a public street, however inconvenient, impracticable or worthless it might become either to the vendor or vendee." "Language so equivocal cannot be construed as a condition subsequent without disregarding the cardinal principle of real property . . . that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication." *Rawson v. Uzbridge School Dist. No. 5, supra.*

From what we have said it follows that the judgment of the court below must be affirmed.

Mayor, etc., of BALTIMORE *et al.*, Appts.,

KEELEY INSTITUTE OF MARYLAND.

(.....Md.)

1. A statute authorizing any habitual drunkard to be sent for treatment and cure to an institution within the state maintained for such persons, at the expense of the county or city of his residence, if neither he nor his petitioning kin is financially able to incur the expense, does not make an unconstitutional use of money raised by taxation.
2. The title "An act to provide for the treatment and cure of habitual drunkards" does not describe more than one subject, or vary from the body of the act which mentions treatment only and not cure.
3. Mandamus is the proper remedy to compel payment of a decree against a city.

(March 27, 1895.)

APPEAL by defendants from an order of the Superior Court for Baltimore City in favor of plaintiff in a proceeding brought to obtain a writ of mandamus to compel defendants to pay a certain sum for the treatment of a patient at the plaintiff institute. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Thomas G. Hayes* for appellant.

Messrs. Frederick W. Story and P. F. Pampel, for appellee:

This law is constitutional.

Baltimore v. State, 15 Md. 376, 74 Am. Dec. 573; *Cooley*, Const. Lim. p. 706; *Parker & Worthington*, "Public Health & Safety," pp. 1, 269, § 232; Md. Code, p. 146; "Chancery,

NOTE.—On the question what purposes are public such as to justify the raising or expenditure of public money therefor, see *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.

For a Michigan statute providing for the treatment of persons convicted of drunkenness to cure them, see *Senate of Happy Home Club of America v. Alpena County Supra*. 23 L. R. A. 144.

and Laws of 1894," chap. 474; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

Roberts, J., delivered the opinion of the court:

The appeal in this case is taken from a *pro forma* order of the superior court of Baltimore city, on a case stated for the opinion and order of that court, in a proceeding instituted by the appellee to obtain the writ of mandamus to compel the appellant to pay to the appellee, under a decree of the circuit court of Baltimore city, the sum of \$100 for the treatment of John P. Moran, an habitual drunkard residing in said city. The sole object of this appeal being to obtain from this court a determination of the validity *et non* of the Act of the General Assembly of Maryland, chapter 247, passed January Session, 1894, entitled "An act to provide for the treatment and cure of habitual drunkards." The act by its first section provides that any inhabitant of this state, who is of kin to or a friend of an habitual drunkard, as defined in the fifth section of this act, may apply by petition to the circuit court of the county or the circuit court of Baltimore city, where such drunkard resides, for leave to send such drunkard at the expense of the county or city as the case may be, to an institution located in Maryland for the medical treatment of drunkenness, as said court may designate. The first section further provides that the petition shall be verified by the applicant and contain the name, age, and condition of the habitual drunkard and show that neither he nor his petitioning kin is financially able to incur the expense of his cure, and further that said petition shall contain the written agreement of said drunkard to take such treatment and obey the rules of the institution to which he may be sent. The 2d section provides that the court shall be satisfied of the truth of the facts stated in the petition before sending the drunkard to an institution, and that the charge for the treatment shall in no case exceed the sum of \$100, and it then further provides that the court shall thereupon order the expense of such treatment to be paid out of the treasury of the county or the city of Baltimore, as the case may be, in the same manner as other claims for the administration of justice are paid. The 3d section has no direct bearing on this subject in controversy here. The 4th section provides that the officers of the institution to which a drunkard is sent shall become sworn officers, without compensation of the court sending the drunkard for treatment. The 5th section defines a drunkard to be "any person who has acquired the habit of using spirituous, malt, or fermented liquors, cocaine or other narcotics to such a degree as to deprive him or her of reasonable self-control." This statement gives substantially all the material facts necessary for the purposes of this controversy.

It is contended that the act is in conflict with the constitution of this state, for that the legislature has no power to compel the city of Baltimore, without its consent, to tax its citizens for the treatment of habitual drunkards at an inebriate asylum.

37 L. R. A.

By the provisions of article 16, section 47, of the Code, whenever by petition under oath, any person shall be alleged to be a drunkard, incapable of taking care of himself or herself, or his or her property, any circuit court of this state and also the circuit court of Baltimore city, shall have the power, in its discretion, on such preliminary examination or inquiry as it may think proper to make *ex parte*, to issue a warrant to the sheriff of the county or city, to arrest and bring the person so charged before such court. Then follows the summons of a jury in like manner with the established practice in cases of lunatic paupers under article 59 of the Code. Under either article of the code the proceeding is *ex parte*, and the questions to be passed upon are submitted to the finding of a jury instead of the court. These two provisions of the code have been in force in this state for many years, and have been especially with respect to lunatic paupers of well-recognized service. The law now under consideration, in so far as it relates to the liberty of the drunkard, does not require the intervention of a jury, for the reason that he voluntarily and in advance agrees in writing that the court may send him to any institution in the state for the medical treatment of drunkenness. We are very clear that the law does not in the remotest possible sense curtail any right of the drunkard. Do the provisions of the law requiring the city to pay for the medical treatment of the drunkard improperly or injuriously affect any right of the city of Baltimore any more than the tax which is imposed for the maintenance of courts, civil and criminal, is found to be as well as other taxes are, an exaction for the benefit of the public good? We fail to recognize the force of this objection, especially in its application to the lunatic paupers of the state. The principle invoked has just the same force in its application to the condition of an habitual drunkard as to a lunatic pauper. The law is general in its application, and is intended alike for city and county.

The ninth section of article eleven of the Constitution declares that it "shall not be so construed, or taken as to make the political corporation of Baltimore independent of or free from the control which the general assembly of Maryland has over all such corporations in the state." This court in the *Regent's Case*, 9 Gill & J. 397, 31 Am. Dec. 72, says: "A public corporation is one that is created for political purposes with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in cases of cities, towns, etc." And, again, in the same case, folio 401, it says; "Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchisees." Whilst it is not claimed that the legislature has absolute and unlimited control over the

appellant, there can be no doubt as to the power of the legislature to require the payment by the city of a sum requisite to defray the expense of maintenance and medical treatment of habitual drunkards residing within the corporate limits and committed under the provisions of the law now under consideration.

If the legislature has authority, which we do not question, to treat habitual drunkards, as a class of citizens who are entitled to be restrained or medically cared for by placing them in institutions for treatment it would naturally follow that in so far as the law applies to the citizens of Baltimore, the expense of the treatment of its habitual drunkards ought reasonably be borne by it. It was held as already stated in the *Regents Case*, *supra*, that the government "has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises." It is one of the gravest conditions of the century in which we live and of which legislators have been compelled to make observation, that the victims of the excessive use of alcoholic stimulants, narcotics, etc., have grown to be legion, not of healthy robust manhood, but of broken, debauched, and decrepit men, against whom and for whom as a class, public sentiment has a right to appeal to the legislature for protection. *Lord Bacon* has said; "That all the crimes on earth do not destroy so many of the human race, nor alienate so much property, as drunkenness." *Mr. Justice Harlan*, delivering the opinion of the court in *Mugler v. Kansas*, 123 U. S. 623, 81 L. ed. 205, says: "There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are in some degree, at least, traceable to this evil."

Mr. Tiedeman, in his work on the Limitations of Police Powers says: "It is the policy of some states, notably New York, to establish asylums for the inebriate, where habitual drunkards are received and subjected to a course of medical treatment, which is calculated to effect a cure of the disease of drinking, as it is claimed to be. A large part of human suffering is the almost direct result of drunkenness, and it is certainly to the interest of society to reduce this evil as much as possible. The establishment and maintenance of inebriate asylums can, therefore, be lawfully undertaken by the state."

We think the legislature was possessed of ample power to deal with the subject-matter of the law, and that in what they did they in no respect violated any provision of the constitution of the state or of the United States.

There is nothing in the contention that the title to the act violates article 8, section 29, of the Constitution, which provides that every

law enacted by the general assembly shall embrace but one subject, which shall be described in its title. The title provides for the treatment and cure of habitual drunkards, and it is claimed that this contains more than one subject, and that in the provisions of the act nothing is said about "cure," but reference alone is made to the treatment of habitual drunkards. But we think the legislature must have been influenced by the conviction that the cure would in some instances, at least, follow the treatment, and that cure and treatment constitute but one subject. We entertain the same view.

In respect to the writ of mandamus, we think it properly issued as the remedy appropriate under the circumstances. It follows that the order must be affirmed.

Order affirmed with costs.

John J. SHANFELTER, Trading as C. DUFFY & CO., Appt.,

Mayor, etc., of BALTIMORE.

(.....Md.....)

1. A court cannot take judicial notice of the contents of a city ordinance.
2. Mere references to ordinances by numbers and dates is not sufficient to comply with the established rules of pleading.
3. An ordinance vesting in a committee the power to condemn property within a square selected as the site for a courthouse if unable to agree with the owners, and a mere delay in acquiring title after request and warning by a landowner, and after the city had acquired title to a considerable part of the square, gives no claim for damages because of the uncertainty of tenure and injury to business to the owner of a long lease of property on such square which is in use for a hotel, since the ordinance is not the beginning of condemnation proceedings.

(February 23, 1895.)

APPPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendant in an action brought to recover damages for defendant's refusal to proceed to the assessment of the damages which it must pay for the acquisition for public use of plaintiff's interest in certain property in the city of Baltimore. *Affirmed.*

The facts are stated in the opinion.

Mr. R. S. Culbreth for appellant.

Messrs. Thomas G. Hayes and W. S. Bryan, Jr., for appellees.

Boyd, J., delivered the opinion of the court:

This appeal is from a judgment of the Baltimore city court sustaining a demurrer of the appellee, the defendant below, to the declaration. The appellant, who was the plaintiff below, alleges that he is the lessee "for a long term of years" of a property known as the Imperial Hotel, on the square bounded by Calvert, St. Paul, Fayette and

NOTE.—In connection with the above case, see *Foster v. Scott* (N. Y.) 18 L. R. A. 543, which holds that a statute denying compensation for a house built after filing a map of a proposed street but before commencing condemnation proceedings was unconstitutional.

Lexington streets, in the city of Baltimore, which square has been selected by the city authorities, under certain ordinances passed in pursuance of an act of the general assembly of Maryland for the erection of a new court-house, and that, although all interests except the plaintiff's in said square had been obtained for the purposes mentioned in the act of assembly and in the ordinances, "the building committee of the new court-house" neglected, delayed, and failed to complete the purchase or condemnation of his interest in said property from the first day of May, 1893, to the time of the institution of the suit, although repeatedly requested and warned so to do. He avers that he has been greatly damaged, injured, obstructed, and prejudiced in his business as hotel keeper, by reason of the delay in the use and enjoyment of his property.

The claim intended to be presented by the declaration is the right to recover damages for what is alleged to be an unreasonable delay in acquiring plaintiff's property after the passage of the ordinance selecting as a site for the new court-house the square which includes the said hotel property, notwithstanding the requests and warnings of the plaintiff.

It is contended, however, on the part of the city, that the declaration is technically defective in not setting out, at least, the legal import of the ordinances upon which appellant bases his right to recover. They are only referred to by numbers and dates, and not even the substance of them is given. The court cannot take judicial notice of their contents, and hence it is not informed by the declaration what duties are imposed or powers conferred by them. Without the provisions of the ordinances on which the plaintiff relies being before the court, it is impossible for it to determine whether they impose such duties on the defendant as to render it liable for failure to perform them. We do not think, therefore, that the references to said ordinances are sufficient to comply with the well-established rules of pleading adopted in this state.

But as we would have the power to remand the case, so that the declaration could be amended to meet our views as to mere matters of form, which we need not state more fully, we will determine the main question intended to be presented, as it has been fully argued and the ordinances have been, for the purposes of the argument, treated as if before us.

The appellee having been authorized by an act of assembly, passed Ordinance No. 100, approved October 7, 1892, by which the commissioners of finance were authorized and directed to issue bonds of the city to the amount of \$6,000,000, from time to time, as the same might be required for the purposes therein mentioned.

One million seven hundred and fifty thousand dollars, or so much thereof as might be required, of the proceeds of the sales of said bonds were directed to be used for the purchase of ground, erecting thereon and properly furnishing a new court-house and record office. By Ordinance No. 81, approved April 20, 1893, the square above mentioned was se-

lected as the site, and the mayor, comptroller and register were directed to acquire title to a portion of the property included within the bounds of the square, on which John F. Carter held an option for the sum of \$132,500, to be paid out of the \$1,750,000. Ordinance No. 83, approved April 20, 1893, authorized the building committee of the new court-house (to be thereafter appointed), in case it could not agree with the owner or owners of any lot or portion of this square, or any interest therein, or if the owners were under age, etc., to condemn the same, and then minutely prescribed the course of proceeding in the event of condemnation. The second section of that ordinance limited the total amount to be expended by the building committee to \$1,617,500, to be paid out of the sum appropriated for the new court-house, and directed the commissioners of finance to sell, from time to time, as the same were needed, as many of said bonds as should be required to supply the said sum.

Ordinance No. 103, approved May 1, 1893, named the building committee of the new court-house, and authorized them to advertise in Baltimore and other cities inviting the submission of drawings, plans, and specifications. Ordinance No. 187, approved May 25, 1893, further defined the duties and powers of the building committee.

It authorized them to employ a competent architect; gave them power to provide for the erection of the new court-house upon the site already selected, when it shall have been acquired, and to do all acts and make all contracts essential in their judgment to the best and most successful accomplishment and carrying out of the design of building the new court-house; provided that the full amount expended for all purposes should not exceed \$1,617,500, which sum, it will be observed, is the difference between the total amount appropriated and the amount paid for the property held under the John F. Carter option.

The above are all the ordinances referred to in the declaration and cited in argument, and hence we need not refer to any others. It is apparent from an examination of them that it was contemplated to erect a large and expensive building. Considerable time was necessarily required to perfect the plans for the building, and the only money at the command of the building committee must be raised by the commissioners of finance from sales of the bonds authorized for the purpose. The members of the committee were only named in the ordinance approved the 1st day of May, 1893. The delay complained of by the plaintiff was from that date until a day not later than the 7th day of April, 1894, at which time the declaration was filed, although the record does not disclose whether the suit was instituted then or prior to that time. If the passage of the ordinances selecting the site, appointing the committee, etc., gave the plaintiff a cause of action, as contended by him, unless executed without any unreasonable delay, it would seem to be rather a severe construction of what is to be deemed unreasonable to require the committee, at the peril of rendering the city liable for damages, to acquire all the property nec-

essary and perform all the other labor incident to the early part of their work within eleven months from their appointment.

We cannot assent to the doctrine sought to be established by the plaintiff that the mere passage of the ordinances, without any execution of them so far as the plaintiff is concerned, gives him a right to action. It may be true that the selection, as a site for the new court-house, of the square which includes the property in which plaintiff has an interest, may make his tenure uncertain and may affect his business to some extent, but if that be conceded, we do not think it follows that under the circumstances of this case the city is liable to him merely because it has not proceeded to acquire his interest. The determination on the part of the city authorities to adopt that particular site is not a taking of the plaintiff's property, nor is it even a declaration of their intention to take it *in invitum*, as long as he holds it. The building committee has no authority under these ordinances to condemn it without first making a proper effort to agree with him. It may be that his term will expire before the property is needed, or negotiations for a purchase, if fairly conducted on both sides, may result in an agreement and save the necessity of condemnation.

However this may be, passing the ordinances cited cannot properly be deemed a beginning of condemnation proceedings and no such proceedings can be instituted until some attempt to agree is made.

That is a condition precedent to the exercise of the right of eminent domain by the building committee, as ordinance No. 88 only gives them the power to condemn in case they cannot agree with the owners, excepting those laboring under some disability, nonresidents, and unknown heirs.

We think it clear therefore that it cannot properly be said that these ordinances were the commencement of condemnation proceedings, but they only vest the power to condemn in the building committee and prescribe their mode of procedure.

As well might it be said that a charter of a railroad company authorizing it to construct a road between two given points and vesting it with the power of eminent domain, is to be treated as a commencement of such proceedings, because it authorizes the company to adopt them.

It is claimed, however, on the part of the appellant that the case of *Baltimore v. Black*, 56 Md. 338, which had been previously in this court as reported in [*Black v. Baltimore*], 50 Md. 235, 33 Am. Rep. 320, established the doctrine contended for by him. It may be true that the language of the learned judge who delivered the opinion of the court, both in 50 Md., and 56 Md., may give some ground for that contention if the facts of the case be not borne in mind. But the statement of facts in the opinion reported in 50 Md., shows that an ordinance had been passed on the 10th day of June, 1871, to condemn and open Pressman street, from Gilmor to Monroe street. On the 12th day of the same month, the commissioners for opening streets gave notice, as required by the City Code

(1869), of their intention to meet on July 13, and proceed to execute the ordinance.

The Blacks owned land lying between Gilmor and Monroe streets, which would be divided by Pressman street, and claimed compensation for the whole of two lots of ground, a part of which was required for the bed of the street. They then surrendered the two lots to the city, and the street commissioners sold the parts thereof not included in the bed of the proposed street, under the provisions of the city code. No further action was taken in the premises until the 20th day of May, 1875, when the ordinance of June 10, 1871, was repealed, and the proposed improvement abandoned.

It was very properly held, under those circumstances, that an action would lie for damages caused by the unreasonable and unauthorized delay, provided some steps had been taken to put the city in default, such as remonstrances, complaints, or applications by the owners to the city authorities to proceed with the work or repeal the ordinance. In point of fact, the proceedings had not only been commenced, but nothing remained to be done but to pay the damages or abandon the work. Although it is held that the city can abandon such improvements, even after the assessment of damages, yet if an owner of property has been injured by an unauthorized delay, and the city has been made aware that he is not satisfied to let his title to the property remain in that unsettled condition, he is not without remedy. So although it is said in that opinion that when an ordinance for condemning and opening a street has been passed and remains unexecuted, or but partially carried into effect, the property owner cannot maintain an action for such alleged negligence on the part of the city, unless he has done something to put it in default, it is apparent that it was not intended to say that if he did take such action and the ordinance remained wholly unexecuted as to the particular property in controversy, it necessarily followed that an action would lie.

But the ordinances now being considered differ materially from the one before the court in the *Black Case*. In the latter the law provided that before the mayor and city council should pass any ordinance for the opening of a street, they should give sixty days' notice of the application for the passage of such ordinance in two daily newspapers published in the city of Baltimore. Then when the ordinance was passed the street commissioners (who were annually appointed as other city officers) were required to give thirty days' notice of the object of the ordinance under which they proposed to act and of the day, hour and place of the first meeting to execute the same.

The commissioners were then required to meet at the time and place named and proceed to award damages, assess benefits, etc. They were not vested with the power to negotiate with the owners and in case of failure to agree then to proceed to condemn, but they at once fixed the damages, subject of course to certain rights of appeal, etc.

In this case the building committee had not even been appointed when the site was

determined upon, and as already stated their duty relative to the acquisition of the property was to purchase it, if they could at such a price as they deemed just and the appropriation would permit of, and in event of a failure to reach an agreement they could then proceed to condemn. They are vested with large discretion which the nature of their duties required.

We have thus devoted considerable space to the consideration of *Black's Case* as the counsel for the appellant earnestly and forcibly contended that it sustained the position taken by him. But if we gave the fullest and broadest meaning to the language there used, without applying and limiting it to the facts of the case which we must do, we would still be met with the marked difference between an ordinance for opening a street under the provision of the City Code of 1869 and the ordinances now before us, as above indicated.

Without prolonging this opinion by discussing *Graff's Case*, 10 Md. 544, and *Norris's Case*, 44 Md. 598, we need only to say that the property involved in them had been actually condemned and they do not in any wise conflict with the views herein expressed by us. On the contrary they and *Musgrave's Case*, 48 Md. 272, sustain the conclusion reached by us.

In *Leiss v. St. Louis & I. M. R. Co.*, 2 Mo. App. 110, so much relied on by the appellant, the company had filed its petition and had commenced condemnation proceedings. The facts of the hypothetical case therein stated by the learned judge who delivered that very able opinion, which is quoted in the brief of the appellant, would amount to bad faith on the part of the condemning company.

We do not mean to say that an owner of property cannot under any circumstances have relief unless the company or municipality has actually commenced condemnation proceedings. It may be possible that a case might occur which would show such a de-

liberate effort and determination to depreciate the value of property for the purpose of subsequently acquiring it by condemnation at a reduced and insufficient price as to render the company or municipality liable on the ground of fraud. If such case is ever presented it will be time enough to determine how far relief can be given, but in this case it is not alleged or intimated that the members of the building committee were not acting in perfectly good faith. We have found no authority which sustains the right of the property owner to recover damages under such circumstances as those before us.

The appellant has not been disturbed in his possession, and if the prospective use of the property for a new court-house has affected him injuriously, it is only of that character of loss that any one having an interest in property may sustain by reason of the provisions of law which require all persons to hold their property subject to be taken for public purposes or by those authorized to exercise the right of eminent domain for what are deemed to be at least quasi public purposes upon the payment or tender of just compensation.

If no ordinance selecting a site had been passed but the defendant had simply been authorized to erect a new court-house, and the city authorities and the prevailing sentiment of the community favored the use of this square for the purpose, by reason of its central locality, and the fact that the city already owned a considerable part of it, the plaintiff might suffer the same character of loss he now complains of, yet it would hardly be contended that the city would in such case be liable to him, however much he may have urged and insisted upon the authorities taking definite and final action. It would be in that as it is in this case *damnum absque injuria*.

It follows from what we have said that the judgment must be affirmed.

Judgment affirmed with costs to the appellee.

MISSOURI SUPREME COURT, (Division 2).

WYETH HARDWARE & MANUFACTURING CO., *Plff. in Err.*,

H. F. LANG & CO.

(.....Mo.....)

1. Service by publication only upon a nonresident may be sufficient to sustain garnishment of his debtor, although the indebtedness is by its terms payable at the residence of the nonresident.

2. A debt may be garnished at any place where suit thereon may be brought by the creditor if the laws of the place authorize it.

(March 5, 1895.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of

defendants in a proceeding brought to enjoin them from prosecuting an attachment suit in the state of Kansas. *Affirmed*.

The facts are stated in the opinion.

Messrs. Johnson & Wilson and George N. Elliott, for plaintiff in error:

Where a court has jurisdiction of the parties injunction will lie against them to prevent the annulment of the laws of its own state by the action of any one of the parties outside of the state.

Missouri Pac. R. Co. v. Sharitt, 8 L. R. A. 385, 43 Kan. 875; *Cole v. Cunningham*, 183 U. S. 107, 83 L. ed. 538; *Needham v. Thayer*, 147 Mass. 536; 8 Am. & Eng. Encyclop. Law, p. 523, and note; 8 Am. & Eng. Encyclop. Law, pp. 1254, 1255.

Comity and public policy cannot require of the courts of Missouri a deference and respect

NOTE.—As to jurisdiction for garnishment of debt to nonresident, see note to *Illinois Cent. R. Co. v. Smith (Miss.)* 19 L. R. A. 877; also *Douglas v. 37 L. R. A.*

Phenix Ins. Co. of Brooklyn (N. Y.) 20 L. R. A. 118; *Bragg v. Gaynor (W. Va.)* 21 L. R. A. 151; *Neufelder v. German-American Ins. Co. (Wash.)* 23 L. R. A. 287.

See also 30 L. R. A. 364; 36 L. R. A. 549, 640; 40 L. R. A. 237; 41 L. R. A. 331; 42 L. R. A. 283; 44 L. R. A. 101; 45 L. R. A. 257; 48 L. R. A. 452.

to the judgment of a Kansas court which they shall not show to be a domestic judgment.

Todd v. Missouri Pac. R. Co. 83 Mo. App. 110; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Fielder v. Jessup*, 24 Mo. App. 91; *Missouri Pac. R. Co. v. Maltby*, 34 Kan. 125; *Missouri Pac. R. Co. v. Sharitt, supra*; *Osgood v. Maguire*, 61 N. Y. 524; *Williams v. Ingersoll*, 89 N. Y. 508; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 188; *Baylies v. Houghton*, 15 Vt. 681.

The rule that a finding of a court as to its own jurisdiction in a cause is conclusive or *res judicata*, is limited to domestic judgments.

Crone v. Dawson, 19 Mo. App. 214; *Matson v. Field*, 10 Mo. 103; *Marz v. Fore*, 51 Mo. 74, 11 Am. Rep. 432; *Eager v. Stover*, 59 Mo. 88; *Barlow v. Steel*, 65 Mo. 619; *Napton v. Leaton*, 71 Mo. 366; *Missouri Pac. R. Co. v. Sharitt, supra*; *Thorn v. Salmonson*, 37 Kan. 441; *Litovich v. Litovich*, 19 Kan. 455, 27 Am. Rep. 145; *Pennyot v. Foote*, 27 Ohio St. 618, 22 Am. Rep. 340; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Renier v. Hurlbut*, 14 L. R. A. 562, 81 Wis. 24; *Southern Ins. Co. of New Orleans v. Wolverton Hardware Co. (Tex.)* April 26, 1892; 3 Am. & Eng. Encyclop. Law, p. 521; *Black, Judgm.* §§ 275, 289, 376, 385, 897-901, 918, 919, 923; *Freem. Judgm.* § 588 *et seq.*; 12 Am. & Eng. Encyclop. Law, pp. 1480 *et seq.*

A judgment rendered without jurisdiction of the person or subject-matter is absolutely void and may be attacked at any time in a collateral proceeding.

Barlow v. Steel, 65 Mo. 619; *Napton v. Leaton*, 71 Mo. 366; *Carr v. Lewis Coal Co.* 96 Mo. 155; *Hope v. Blair*, 105 Mo. 85; *Bigelow, Estoppel*, pp. 21-25; *Black, Judgm.* § 813; *Story, Conf. L.* §§ 589-592; 3 Am. & Eng. Encyclop. Law, p. 528.

A nonresident cannot be garnished unless he has property of the defendant in his possession, or is bound to pay his money in the state where garnished.

Keating v. American Refrigerator Co. 32 Mo. App. 293; *Renier v. Hurlbut, supra*; 21 Cent. L. J. 425; *Browne, Jur.* § 150, and *note*; *Dacey, Domicil*, 37, 264; *Story, Conf. L.* § 400a.

Messrs. Henry Wollman and Alexander New, for defendant in error:

The courts of one state will only enjoin proceedings in other states where the defendant in the injunction proceeding has gone out of the state to deprive a party of some right or to evade some law of his own state, and in no other case.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538; 1 High, Inj. 8d ed. § 107.

Courts will never enjoin a judgment for any error or mistake in rendering it, or even fraud in the cause of action, but only for some fraud in the procurement of the judgment against which the defendant exercising his best efforts and diligence, could not have protected himself.

Bassett v. Henry, 34 Mo. App. 556; *Murphy v. DeFrance*, 101 Mo. 151.

No injunction will be granted where there is a perfectly adequate remedy or defense at law.

Chicago & A. R. Co. v. Maddox, 92 Mo. 471; 37 L. R. A.

Sayre v. Tompkins, 23 Mo. 445; *Mechanics Bank v. Kansas*, 73 Mo. 559; *St. Louis, I. M. & S. R. Co. v. Reynolds*, 89 Mo. 147; 1 High, Inj. 8d ed. § 125.

If the Kansas court had no jurisdiction over the garnishees or over the Wyeth Company—then, although the garnishees may make payments under such judgment, these payments would be no protection to them or defense on their behalf when the Wyeth Company claimed of them the amounts which they owed it, so the Wyeth Company could not at all be injuriously affected by this judgment against these garnishees and against itself, in the garnishment proceeding which they claim is void.

Dunn v. Missouri Pac. R. Co. 45 Mo. App. 86.

A debt may be garnished at the residence of the debtor.

Tingley v. Bateman, 10 Mass. 348; *Fielder v. Jessup*, 24 Mo. App. 95; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Plimpton v. Bigelow*, 93 N. Y. 592; *Green v. Farmers & Citizens Bank*, 25 Conn. 455; *Drake, Attachm.* § 597; *Burlington & M. R. R. Co. v. Thompson*, 31 Kan. 195, 47 Am. Rep. 497; *Hannibal & St. J. R. Co. v. Orune*, 102 Ill. 258, 40 Am. Rep. 581; *Berry Bros. v. Davis*, 77 Tex. 191; *Harcey v. Great Northern R. Co.* 17 L. R. A. 84, 50 Minn. 405; *Nichols v. Hooper*, 61 Vt. 295; *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395; *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599; *Vollmer v. Chicago & N. W. R. Co.* 86 Wis. 305; *Bragg v. Gaynor*, 21 L. R. A. 161, 85 Wis. 468; *Neufelder v. German-American Ins. Co.* 22 L. R. A. 287, 6 Wash. 336; *Wabash R. Co. v. Dougan*, 143 Ill. 248; *Boyd v. Royal Ins. Co.* 111 N. C. 372; *Blake v. Williams*, 6 Pick. 314, 17 Am. Dec. 372.

Burgess, J., delivered the opinion of the court:

This is an injunctive proceeding instituted by plaintiff to enjoin and restrain defendants from prosecuting suit against it in the state of Kansas by attachment, and the garnishment of debts due it by various of their customers and debtors in that state, the plaintiff and defendants being residents of this state. From a judgment for defendants on demurrer, plaintiff took the case to the Kansas City court of appeals by writ of error, where the judgment of the circuit court was affirmed in an opinion by Smith, P. J. The case was then certified to this court because of a conflict in the opinion with the decisions of the St. Louis court of appeals in *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91. The opinion in this case is reported in 54 Mo. App. 147. The statement of facts, and that part of the opinion necessary to a disposition of the case by this court, are as follows: "The petition in this case, which is for an injunction, alleged that both plaintiff and defendants were business corporations organized and existing under the statutes of this state. It was further alleged that the defendants had sued the plaintiff by attachment in one of the courts of the state of Kansas, and had procured the process of garnishment in said suit to be served upon certain debtors of

the plaintiff, who were its customers, and had become indebted to it for merchandise sold by it to them in this state where such indebtedness, by the terms of the sale of such merchandise for which it was incurred, was made payable; that the plaintiff here, who was the defendant in the attachment suit, was notified thereof by publication, and that judgment had been severally pronounced against the defendant and the garnishees therein. The petition fails to disclose the nature of the claim upon which the attachment proceedings were grounded. It appears that the plaintiff is a solvent corporation, and that the defendants are about to take steps to compel, by execution, the garnishees, to satisfy the amount of the judgments against them; that the garnishees, who are plaintiff's customers, are in great danger of having to pay their indebtedness to plaintiff twice, which would frustrate the trade relations between the former and the latter, to the great injury of the latter, etc. The prayer was that defendants be enjoined and restrained from enforcing and collecting the judgments against plaintiff and the garnishees, etc. The defendants interposed a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff electing to abide by its petition, judgment was given accordingly. The plaintiff's insistence is that the proceedings of the Kansas court are void for want of jurisdiction, for the reason that the debts garnished had no *situs* in that state, and that consequently they were not liable to be attached there. Contracts respecting personal property and debts are now universally treated as having no *situs* or locality, and they follow the owner in point of right. They are deemed to be in the place and are disposed of by the law of the domicile of the owner, wherever, in point of fact, they may be situate, in accordance with the maxim, '*mobilia non habent situm*.' Story, Conf. L. §§ 362, 399; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 820, 21 L. ed. 187; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562; *Wallace v. McConnell*, 88 U. S. 18 Pet. 186, 10 L. ed. 95; *Rio Grande R. Co. v. Vinet*, 132 U. S. 485, 83 L. ed. 402; *American Bank v. Rollins*, 99 Mass. 318; *Troubridge v. Means*, 5 Ark. 185, 89 Am. Dec. 868.

It has been ruled, in effect, that a debt, without reference to where payable, is deemed attached to the person of the owner, so as to have its *situs* at his domicile; yet this fiction always yields to laws for attaching the property of a nonresident, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicile. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided the laws of such place authorize it. *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Nichols v. Hooper*, 61 Vt. 295; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 258, 40 Am. Rep. 581; *Berry Bros. v. Davis*, 77 Tex. 191; *Wabash R. Co. v. Dougan*, 142 Ill. 248; *Boyd v. Vanderbilt Ins. Co.* 90 Tenn. 212; *Burlington & M. R. R. Co. v. Thompson*, 81 27 L. R. A.

Kan. 180, 47 Am. Rep. 497, and cases there cited; *Plimpton v. Bigelow*, 93 N. Y. 592. According to the rulings in the cases just cited, it would seem quite obvious that the Kansas court had the requisite jurisdiction to impound the plaintiff's credits there by the attachment proceedings. And this doctrine seems just and reasonable; for, if the defendant cannot reach the plaintiff's credit by the attachment process in Kansas because they have a *situs* in this state, he cannot reach them in this state, because there can be no service of notice had on the garnishees in this state, so that it results that plaintiff's credits cannot be attached at all. But we are confronted with contrary rulings of the St. Louis court of appeals, to the effect that the *situs* of the debt is the place where the debtor resides, *unless the debt by the terms of the contract is made payable elsewhere, and in the latter event such situs is at the place where the debt is payable.* *Keating v. American Refrigerator Co.* 82 Mo. App. 293; *Green's Bank v. Wickham*, 28 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91. And to the exception to the rule, as indicated by the italicized words thereof, we cannot agree, for the reasons already stated. We think the rule declared in *Harvey v. Great Northern R. Co.*, and the other cases cited which are in accord with it, will better subserve interstate trade and business relations than that embraced in the foregoing exception."

That part of the opinion of the Kansas City court of appeals herein quoted is adopted as the opinion of this court, being, as we think, supported by reason and the weight of authority.

All concur.

George S. DRAKE *et al.*, *Repts.*,

v.

Gerard A. CRANE *et al.*, *Appts.*

(.....Mo.....)

A donation from trust funds to aid in building a hotel when this is necessary to secure its location near real property belonging to the trust estate, the value of which will be largely enhanced thereby, is not beyond the power of trustees under a will where it creates a trust to continue until the death of all of certain annuitants and of testator's children and of his grandchildren living at his death, after which the estate is to be divided among his descendants then living, and which provides after paying certain annuities for a division of three fourths of the net income between testator's children, and for a reserve fund to be made of the remaining one fourth as security against losses by shrinkage, and where the trustees can pay the subscription from the reserve fund without disabling the performance of other provisions with respect to that fund, and the will expressly empowers them to invest and reinvest this fund, as well as to do all that the testator could lawfully do if living with

NOTE.—The above case seems to be a novel one. While the doctrine which approves a donation of trust property is a dangerous one, it is applied in the above case to peculiar facts which the court regards as showing that the so-called donation was in fact a profitable investment.

respect to a part of the real estate and the management thereof, and the investing and reinvesting of the proceeds thereof.

(March 5, 1895.)

APPEAL by part of the defendants from a judgment of the St. Louis Circuit Court in favor of plaintiffs in a proceeding brought to obtain a construction of the will of Gerard B. Allen, deceased, which would permit the trustees to subscribe part of the trust property for the erection of a hotel in the city of St. Louis. *Affirmed.*

The facts are stated in the opinion.

Messrs. Everett W. Pattison and John F. Green, for appellants:

The power of the court, sitting as a court of equity, is to construe the will, not to make a new will.

Marshall v. Hadley, 50 N. J. Eq. 547; *Adams Female Academy v. Adams*, 6 L. R. A. 785, 65 N. H. 225; 1 Perry, Tr. § 460.

A court of equity can no more authorize an act to be done which is in excess of the powers conferred by the will than can the trustees do such act.

Missouri Historical Soc. v. Academy of Science, 94 Mo. 459; *Ex parte Adamson*, L. R. 8 Ch. Div. 817; *Traphagen v. Leary*, 45 N. J. Eq. 451; *Griggs v. Veghte*, 47 N. J. Eq. 181; *Marshall v. Hadley*, *supra*; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Richardson v. Knight*, 69 Me. 288; *Fidelity Trust & Safety Vault Co. v. Glover*, 90 Ky. 855.

The words "invest," "reinvest" and "manage" as used in the will, and in the former decree of the circuit court, are words of ordinary import, and the testator will be presumed to have used them in their ordinary sense, a contrary intention being nowhere indicated in the will.

Kean v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671; *Sinking Fund Comrs. v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 438.

The words "invest" and "reinvest" *ex vi termini* import a placing of funds where the principal will be safe and will produce an income.

Neel v. Beach, 92 Pa. 226; *Una v. Dodd*, 39 N. J. Eq. 186; *People v. Utica Ins. Co.* 15 Johns. 392, 8 Am. Dec. 248; *People v. New York Tax Comrs.* 28 N. Y. 244; Black, Law Dict. p. 587.

The uniform construction which has been placed upon like provisions in a will is that they impose upon trustees the duty to so place the funds of the estate that they shall be, first, safe, and, secondly, productive.

Kimball v. Reding, 81 N. H. 352, 64 Am. Dec. 333; *Dickinson's App.* 9 L. R. A. 279, 152 Mass. 185; *Mason v. Bank of Commerce*, 16 Mo. App. 275, 90 Mo. 452; *Powell v. Hurt*, 108 Mo. 520; *Haydel v. Hurck*, 72 Mo. 253; *Davis v. Old Colony R. Co.* 181 Mass. 258, 41 Am. Rep. 221; *Peckham v. Newton*, 15 R. L. 821; *Budge v. Gummow*, L. R. 7 Ch. App. 719; *Tomkinson v. South Eastern Railway Co.* L. R. 35 Ch. Div. 675; 1 Perry, Tr. §§ 452, 456, 459.

The discretion vested in the trustees is not an unlimited discretion. They are bound to exercise such care, skill, and diligence as reasonably prudent persons give to their own affairs when seeking to reach similar results. 37 L. R. A.

Powell v. Hurt, 108 Mo. 507.

The words "as I might lawfully do if living," do not confer any additional power, nor extend the powers expressly granted.

Price v. Courtney, 87 Mo. 387, 56 Am. Rep. 453.

Messrs. Boyle & Adams for respondents.

Burgess, J., delivered the opinion of the court:

This is a suit instituted by the plaintiffs, trustees under the will of Gerard B. Allen deceased, against all the parties interested therein to obtain a construction of said will. The will devised all the testator's real property to the trustees named in the will, with certain powers therein mentioned. Among other powers given the trustees by the will were the following:

"To enter into the possession thereof, immediately after my death, collect the rents, with full power, subject to the limitations hereinafter imposed, to sell, lease, manage, and dispose of the same, and to invest and re-invest the proceeds of the sale thereof, and to do all and singular with respect to said real estate and the management thereof, and the investing and re-investing the proceeds of sales thereof, as I might lawfully do if living.

"2. My said trustees shall have no power to sell the real estate to me belonging, which is situated in the limits bounded by Walnut street on the south, Ashley street on the north, so far west as Ashley street extends and then Biddle street on the north, Twelfth street on the west, and the Mississippi river on the east.

"All the real estate in the second item of the seventh clause of my will being in the city of St. Louis and state of Missouri.

"3. All my real estate, wherever situated, and not herein disposed of otherwise, except mentioned in the last preceding item (item 2 of seventh clause) I give my said trustees full power to sell, lease, incumber or improve."

Then, after providing for the payment of certain annuities out of such rents, he directs as follows:—

"This trust shall cease on the happening of the three following events, to wit:—

"First, the death of the last surviving life annuitant mentioned herein; second, the death of the last survivor of my three children, Mary Frances Crane, George L. Allen, and Grace Dickson; and third, the death of the last survivor of my grandchildren living at the time of my death, by my said three children, Mary F. Crane, George L. Allen, and Grace Dickson.

"During the existence of this trust, from the time of my death until its termination by the happening of the three events as above provided, the net rents, issues, and profits arising from this trust estate, after paying taxes, insurance, for repairs and improvements, and the life annuities above mentioned, shall be annually divided into two portions, one of which shall consist of twenty-five per cent, as near as may be, of said net rents, to be called a reserve fund, and the other shall consist of the remaining

seventy-five per cent of said net rents, to be called the surplus fund. The said reserve fund my said trustees shall retain to guard against losses by shrinkage, or other contingencies, and they shall invest and re-invest the same from time to time, until the termination of this trust, and out of said reserve fund they may, if their judgment so approve, make advances from time to time, to any one or more of the male descendants of my said three children, Mary F. Crane, George L. Allen, and Grace Dickson, after said male descendants shall have arrived at the age of twenty-five years and given satisfactory evidence of industry, general morality, business habits and ability, to enable them to embark in business. And in like manner, should any of the female descendants of my said three children marry, then said trustees may make reasonable advances to said females so marrying to enable their husbands, if they have given satisfactory evidence of industry, general morality, business-like habits and ability, to embark in business or place the same in trust for the sole use and benefit of said female descendant so marrying. The amount, however, of advances thus made, to any one person, for such purpose, shall not exceed twenty thousand dollars. All such advances shall be regularly charged against the beneficiary, and equalized in the general settlement at the termination of this trust. From the time of my death until the termination of this trust as hereinbefore provided, I give and bequeath the surplus fund above specified, being seventy-five per cent of the net rents, issues, and profits arising from this trust estate to my three children, Mary Frances Crane, George L. Allen, and Grace Dickson, share and share alike, during their natural lives respectively."

Then, after making provisions in case of death of said beneficiaries, he directs as follows:—

"On the termination of this trust, at the happening of the three events as hereinbefore provided, all the real estate held in this trust and reserve fund, if any, on hand after equalizing the advances made therefrom, shall be divided, share and share alike, *per stirpes*, between the descendants of my said three children, Mary F. Crane, George L. Allen, and Grace Dickson, and if there be no descendants of either of my said three children then living, then the said real estate and reserve fund shall be divided equally, share and share alike, *per stirpes*, among the descendants of such of my said three children as having descendants then living."

A part of the estate vested in the trustees is denominated by the will as a "reserve fund" and it is with respect to this fund that this controversy arose. In 1888 the trustees filed a similar bill to obtain the same object that is a proper construction of the seventh clause of the will. In that case the court did construe the clause in question, and declared the powers of the trustee thereunder.

At the time of the execution of the will the testator was the owner of a large amount of real estate situate in the city of St. Louis,

a large portion of which was situated in close proximity to the site of the old Planters' House, on Fourth street between Chestnut and Pine streets.

In 1893 a corporation by the name of the Commonwealth Realty Company had determined to construct somewhere in said city a large hotel to cost at least a million dollars. There was much rivalry among the property owners in different localities to secure the location of this hotel, and to this end they offered the company which was proposing to build it sums of money of various amounts to induce the company to erect the hotel in their respective localities. The site of the old Planters' House was one of the points the company had in consideration, but were unwilling to erect the hotel there, unless the property owners on Fourth street would subscribe a sufficient amount. That sum was fixed at \$200,000 which was at the rate of \$100 a front foot for the property on Fourth street, between Washington avenue and Market street. The hotel company had already received from the Fall Festivities Association a bonus of \$100,000.

Of the real estate held by the trustees under the will, some of that which is on Fourth street is directly opposite the old Planters' House. The trustees were requested to donate from the reserve fund \$100 a front foot for all the trust property on Fourth street aggregating about 225 feet. Doubting their power under the will to do so, they declined, but decided to apply to the court for instructions.

Two of the trustees Allen and Holliday (the other one being absent from the city) were then consulted and as a result of the conference with them a paper was drawn up in which George Allen personally subscribed toward the hotel fund the sum of \$5,600 on condition that if the court should construe the will as conferring power in the trustees to make the donation he Allen should be released from his individual subscription. The other adult life tenants did not subscribe. In the same paper Allen and Holliday agreed to at once institute a suit to obtain a construction of the will and if it should be held that the trustees had the power under the will to make the donation out of the reserve fund, that they would at once do so and pay the sum subscribed.

The subscription paper begins as follows: "Subscription to the Commonwealth Realty Company as bonus or donation towards the building of hotel."

It contains the following language: "That they (the subscribers) will, each respectively pay into the said Commonwealth Realty Company, as contributions and donations to aid in the erection of said hotel building, the several sums subscribed for below and set opposite their respective names."

The hotel company accepted the subscription of George L. Allen and the promise of himself and his co-trustees to institute this suit, and proceeded at once to select and purchase the site of the old Planters' House, and with the erection of the hotel building.

After the site had been selected the trustees instituted this action and in their petition

set out substantially the foregoing facts: "The bill alleges that the frontage of property belonging to the Allen estate on Fourth street is 235 feet. The petition further alleges that it is the belief of the trustees that the building of a hotel, such as contemplated, on the Planters' House site, would largely increase the real value and the rental value of the property on Third and Fourth streets belonging to the trust estate, and would be a potent factor in preventing any further shrinkage in said real estate; and aver that they 'know of no other way of investing that amount of the reserve fund that would have so favorable an effect in keeping up and enhancing the rental and permanent value of said estate.' The prayer of the bill is that the trustees have authority to subscribe \$22,400, payable out of the reserve fund.

The answers of the infant defendants denied any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the bill, and prayed that their rights be protected. They also set up the former decree as a full adjudication of the matter.

The court held that the will gave the trustees the power to make the donation, and directed that they pay the Commonwealth Realty Company out of the reserve fund, the sum of \$22,400. Judgment by default was rendered against the life tenants from which they did not appeal.

The infant defendants who alone made defense are the grandchildren of the testator, some of whom were living at the time of his death, others have been born since that time. Those born since the testator's death are Allen R. L. Crane, Kenneth Dickson, and Isabel C. Allen, and are remaindermen. The case is in this court upon the appeal of the infant defendants.

The court made a finding of facts, which in so far as necessary for a determination of this case are as follows:

"And the court doth further find that said trustees undertook the trust aforesaid and are now acting as such trustees under the provisions of said will; that a large part of the real estate so devised is situated on Third and Fourth streets in said city and otherwise near to the site hereinafter described, for the location of a hotel, and that much of said real estate is situated on Fourth street in said city immediately opposite to said site.

"That for some time prior to the month of February, 1892, the value of said real estate last above referred to had depreciated, and the rents thereof had lessened and that a contingency hereby arose requiring said trustees, under the requirements of said will, to take some action to guard against such losses and shrinkage in values.

"That for some time prior to said month of February, 1892, the general tendency of improvements in the city of St. Louis had been in a westward direction, away from the location of said real estate so held by the plaintiffs as trustees aforesaid, and away from the proposed site of said hotel, and that thereby and by reason of the facts last aforesaid a contingency had arisen requiring

said trustees, the plaintiffs herein, under the requirements of said will, to take some action to guard against the losses and shrinkage in the value of said real estate, and the rents and profits to arise therefrom.

"That at or about the month of March, 1892, a certain corporation known as the Commonwealth Realty Company determined to erect a hotel in the city of St. Louis, to cost one million dollars, and to be in every way of first-class construction and appointment; that it was believed by owners of real estate lying in different portions of said city, that the location of such a hotel near to their property would largely enhance its value and availability, and for that reason such owners offered to pay the Commonwealth Realty Company certain large sums of money, providing it, the said company, would locate its said hotel in near proximity to their property; that, among the localities under consideration by said company for the purpose of constructing its hotel as aforesaid, and to secure the selection of which the neighboring owners of property were offering contributions, was that known as the Planters' House site, situated on Fourth street, between Pine and Chestnut streets, in said city.

"That at or about March 10, 1892, property owners who had interested themselves in and offered contributions to secure the location of said hotel on said Planters' House site, refused to proceed further by way of competing with property owners in different localities, which were being considered by said Commonwealth Realty Company and which were competing for said hotel, unless the plaintiffs herein as trustees as aforesaid would make a contribution commensurate and proportionate to the real estate so held by them as aforesaid and located near to said proposed site.

"That at that time the said trustees, plaintiffs herein, had reason to believe and did believe, that the location of said hotel on said Planters' House site would be largely beneficial to their said trust estate and would stay the shrinkage in the value thereof and in the rentals therefrom, and would have a great tendency to increase the values of said real estate, as well as the rentals thereof; that acting on such belief and also believing at the time that some action on their part was then absolutely necessary in order to secure the location of said hotel on said Planters' House site, two of these plaintiffs executed a paper in words and figures as follows:

"St. Louis, March 10, 1892.

"The undersigned, having read the subscription paper signed by the Laclede Building Company and others, the general purport of which is to contribute a bonus for the construction of a hotel provided the same is located on the Planters' House site, hereby undertakes and agrees as follows:

"To subscribe, and he does hereby subscribe, the sum of (\$5,600) five thousand six hundred dollars, on the conditions specified in said paper.

"The undersigned does also undertake, as one of the trustees under the will of Gerard B. Allen, to forthwith institute a suit in conjunction with his co-trustees, to secure a con-

struction of the said will, and a direction that out of a certain "reserve fund" therein provided, the said trustees proceed to make the subscription and to pay the sum contemplated in the paper so signed by the Laclede Building Company and others. And the undersigned agrees to proceed with all reasonable dispatch to secure the service upon the necessary parties, and to get the decree above specified at the earliest possible day. And the undersigned believes and has been so advised, that the court will give the direction to make the subscription and to pay out the money by the trustees. In witness whereof, I hereunto set my hand, at St. Louis, Missouri, this 10th day of March, 1892.

"(Signed) Geo. L. Allen.

"The undersigned, Samuel N. Holliday, being one of the trustees under the will of the late Gerard B. Allen, agrees to so much of the foregoing as relates to the action of the trustees under said will, and also believes, after a careful consideration of the matter, that the court will make a decree directing the subscription to said bonus and payment thereof.

"(Signed) Sam'l N. Holliday.

"Trustee under the will of Gerard B. Allen.

"In the event the said trustees be authorized to make, and do make the subscription above contemplated, the above subscription by Geo. L. Allen is to be inoperative.

"(Signed) Geo. L. Allen."

"That the paper therein referred to, as signed by the Laclede Building Company and others, is in the words and figures as follows:

"Subscription to the Commonwealth Realty Company as a bonus or donation towards the building of hotel.

"Know all men by these presents:

"Whereas, The Commonwealth Realty Company, a corporation created and existing under the laws of the state of Missouri, is about to erect a building adapted and to be used as a first-class hotel in the city of St. Louis, and

"Whereas, the undersigned subscribers hereto and hereafter designated as the parties of the first part, corporations, property owners, merchants, and citizens of and in the city of St. Louis, being desirous of securing site, to wit:

"A parcel of land situated in block No. 101 of the city of St. Louis, fronting 230 feet four and one half inches on the west side of Fourth street, by a depth of one hundred twenty-five feet, bounded north by Pine street, east by Fourth street, south by Chestnut street and west by private alley.

"Now, therefore, this agreement made and entered into by and between the undersigned subscribers hereto, as parties of the first part, and said Commonwealth Realty Company as party of the second part

"Witnesseth: That in consideration of the sum of five dollars unto each of said subscribers, parties of the first part, as aforesaid, paid by said party of the second part, receipt whereof they do each hereby acknowledge, and in consideration of the benefits, advantages, and profits accruing to said par-

ties of the first part and each of them, in event of the location and erection upon the property aforesaid of said hotel building, and in further consideration of the mutual promises of the subscribers hereto, said parties of the first part by these presents covenant and agree with said party of the second part and with each other as follows, to wit:

"Section 1. That they will each respectively pay unto said Commonwealth Realty Company, as contributions and donations to aid in the erection of said hotel building, the several sums subscribed for below and set opposite their respective names, said amounts to be payable in twenty equal installments of five per cent, each of said subscriptions to be represented by twenty promissory notes of said subscribers, each for one twentieth of their several subscriptions, payable to said Commonwealth Realty Company, bearing date July 1, 1892, and maturing in one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen and twenty months, after date. Said notes to be executed by the respective subscribers hereto and delivered into the custody of a trust company or bank of said city of St. Louis, designated by a majority in amount of the subscribers hereto, as soon as the site aforesaid is finally chosen for said hotel building, in trust, to be collected for said Commonwealth Realty Company as herein-after provided. If no trust company or bank be selected by a majority in number of said subscribers within thirty days from the final selection of said site as location of said hotel, then said Commonwealth Realty Company may nominate a bank or trust company of said city as depository of said notes, where same shall be payable.

"Section 2. Said subscriptions are made subject to the following conditions, to wit:

"First. That said site shall be chosen as the location of said hotel building, and in event that said Commonwealth Realty Company shall select another and different site therefor, all liability on the part of said parties of the first part and the said party of the second part towards each other respectively shall cease and determine.

"Second. That after the selection of said date for said hotel building and construction of a modern substantial first-class hotel building thereon of not less than ten stories in height and at a cost of not less than one million dollars, shall proceed with all reasonable dispatch, in good faith, to be completed within two years from the beginning of the building.

"Third. Each subscriber hereto shall only be liable for the amount of his own subscription and for no more.

"Fourth. After said site shall have been finally selected and said subscription notes delivered unto the trust company or bank selected in manner aforesaid, said trust company or bank shall proceed to collect said notes as they mature and shall disburse and pay over unto said Commonwealth Realty Company the proceeds thereof, in installments as follows: As the work on said building progresses, as rapidly as fifty thousand

dollars shall be expended towards the construction thereof (and of which expenditure the certificate of the supervising architect shall be conclusive evidence) for each installment of fifty thousand dollars so expended in said building, said company shall be entitled to receive and said trust company or bank shall pay over to it, five per cent of the total amount subscribed by the undersigned until the full subscription has been received and paid over.

"If said building be not commenced within six months from the selection of the site, or if by the first day of the year 1894 the sum of five hundred thousand dollars has not been expended towards the construction of said hotel, then said trust company or bank, custodian of said notes and of the proceeds of same, shall return the same or such portion thereof as has not become payable to said Commonwealth Realty Company under the provisions hereof, unto the subscribers, parties of the first part, each receiving his or its own subscription or such portion remaining thereof not payable to said Commonwealth Realty Company.

"In witness whereof, said parties of the first part have hereunto set their hands and seals in the City of St. Louis, State of Missouri, this — day of —, 1893'.

"That said two trustees, George L. Allen and Samuel N. Holliday, induced the said Commonwealth Realty Company to accept the said paper as and in lieu of an absolute contribution; that on the strength of said paper other owners of real estate located in the neighborhood of said site joined in the offer so made by said Laclede Building Company and others, and as a result thereof the requisite amount of contributions were secured and the said hotel was located on said Planters' House site.

"And the court doth further find that said trustee George S. Drake, upon being informed of the facts aforesaid, approved the action of his co-trustees in signing said paper.

"And the court doth further find from the evidence that the signing of said paper and the engagement to pay the contribution aforesaid to said Commonwealth Realty Company was a necessity in order to secure the location of said hotel on said Planters' House site as aforesaid, and that the location of said hotel on said site was largely beneficial to the estate so in the hands of said trustees as aforesaid, and that the location thereof on said site had a direct tendency and effect in the way of stopping the shrinkage in value of real estate in the neighborhood of said site, belonging to said trustees as aforesaid and in guarding against losses by shrinkage in the rentals and income arising from said real estate.

"And the court doth further find that a contingency arose within the meaning of said will, requiring said plaintiffs, as trustees as aforesaid in the proper management of the real estate in their hands as trustees, to make the contribution aforesaid for the purposes aforesaid.

"And the court doth further find from the evidence that the subscription aforesaid can

be paid out of the reserve fund provided for in said will, without in any manner disabling said trustees from conforming to any other provisions of said will, with respect to said reserve fund.

"And the court doth further find that the amount of money required to pay the contribution according to the true intent and meaning of said papers is \$22,400."

It may be conceded that a court of equity has no power to make a new will for a testator, and that the extent of its power is to construe the will as presented to it. And further, that such court can no more authorize an act to be done which is in excess of the powers conferred by the will than can the trustees therein do such act. As to these propositions there is or can be no question or doubt.

The questions to be determined in this case are, as to the duties and powers of the trustees as expressed by the testator in the will with respect thereto, to be gathered from the whole instrument, and not alone from some particular word, expression, or clause of the will, and, in passing upon these questions the condition of the property disposed of by the will, and surrounding circumstances, as well also as the scope and context of the will in all its provisions, may be taken into consideration. *Noe v. Kern*, 93 Mo. 867; *Long v. Timms*, 107 Mo. 512; *Schorr v. Carter*, 120 Mo. 418.

The will provides that the reserve fund shall be retained by the trustees in the will to guard against loss by shrinkage or other contingencies, and that they shall invest and re-invest the same from time to time until the termination of the trust.

Technical words when used in a will are to be interpreted in their established legal sense, and as the testator is presumed to employ them, unless a contrary meaning is plainly intended by the context of the will. *Kean v. Roe*, 2 Harr. (Del.) 103, 29 Am. Dec. 886; *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671. Invest has been judicially defined as follows, "To surround with or place in, as property in business." "To place so that it will be safe and yield a profit. It is commonly understood as giving money for some other property." *Neel v. Beach*, 92 Pa. 226.

Investment: "In its most comprehensive sense, it is generally understood to signify the laying out of money in such a manner that it may produce a revenue, whether the particular method be a loan, or the purchase of stocks, securities, or other property. In common parlance, it means putting out money on interest, either by way of loan, or the purchase of income producing property." *Una v. Dodd*, 39 N. J. Eq. 173; *People v. Utica Ins. Co.* 15 Johns. 392, 8 Am. Dec. 243.

To give the words "invest," and "investment" their legal meaning as thus defined in which the testator must be presumed to have employed them the trustees had no power under the will to donate to, or subscribe to the hotel fund any amount of money to be paid from the reserve fund of the estate, unless, a contrary intention is clearly indicated by its context, when construed in the light

of and in connection with the situation and condition of the property of the testator and circumstances surrounding him at the time of its execution. At that time that portion of the city near the site of the old Planters' Hotel in which the testator owned large real estate properties, was being deserted by business, rents shrinking, and property rapidly depreciating in value. By this will he directed that out of the rents, issues, and profits derived from his real estate there be paid annuities to the amount of nine thousand dollars, and also to make provisions for his children Mary F., George L., and Grace during their natural life and to make provision for advances from time to time to the descendants of said children, and for that purpose he purposed creating a trust fund which would in all probability continue for sixty or seventy years. He did not want that part of his property situated east of 12th street, north of Walnut street, and south of Ashley street, sold or mortgaged, but wanted it kept until the expiration of the trust, then to vest in the descendants of his children.

His purpose was to secure income from rents, and to that end by the seventh clause of the will he empowered the trustees:

"1. To enter into the possession thereof, immediately after my death, collect the rents, with full power, subject to the limitation hereinafter imposed, to sell, lease, manage, and dispose of the same, and to invest and re-invest the proceeds of the sale thereof, and to do all and singular with respect to said real estate and the management thereof, and the investing and re-investing the proceeds of sales thereof, as I might lawfully do if living.

"2. My said trustees shall have no power to sell the real estate to me belonging which is situated within the limits bounded by Walnut street on the south, Ashley street on the north, as far west as Ashley street extends, and then Biddle street on the north, Twelfth street on the west and the Mississippi river on the east. All the real estate in the second item of the seventh clause of my will being in the city of St. Louis and state of Missouri.

"3 All my real estate, wherever situated, and not herein disposed of otherwise, except mentioned in the last preceding item (item 2 of seventh clause) I give my said trustees full power to sell, lease, incur or improve."

It will be observed that the first clause of the will just quoted is very broad with respect to the general powers conferred upon the trustees in that they are vested with power to sell, lease, manage, and dispose of the real estate and to do all and singular with respect thereto and the management thereof, and investing and re-investing the proceeds of the sales as the testator might do if living. It would have been difficult to have employed language conferring larger and more general powers upon the trustees, and where their powers are intended to be restricted it is done in apt and no unmeaning terms. To guard against loss by shrinkage the trust fund was created, not it seems alone from decay and the ravages of time, but to prevent from de-

preciation from any other cause, that might be in the power and foresight of the trustees in the exercise of that degree of care, skill, and diligence that reasonably prudent persons similarly situated give to their own affairs, and such as the testator would in all probability have exercised had he been living. The property on Fourth street was rapidly depreciating in value, rents falling off, business going west, which the trustees could stay, if not in fact restore this property to its former prosperous and more desirable condition, if they had the power under the will to do so.

The "reserve fund" was to be created from the net rents, issues, and profits arising from the trust estate which remained after payment of taxes, insurance, for repairs and improvements and the life annuities before mentioned, and to this end it was necessary that the rental property be kept in condition, and its surroundings, such that it would be in demand, and readily rented at fair prices. Had the trustees the power under the will to prevent the decrease in values, and increase the revenues, that would be derived from the rents of the property to be affected by the hotel enterprise, by subscribing to, and paying out of the reserve fund to the Commonwealth Realty Company \$100 per front foot? The question is one not of expediency but of power.

We quite agree with counsel for defendants, and as abundantly shown by the authorities cited by them, in their brief that, where by the provisions of a will trustees therein named are empowered to invest and re-invest the funds of the estate a duty is imposed upon them to so place the money as it shall be safe and productive. *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508. And "the investment of trust property should be made with a view of permanency, and not in a spirit of speculation." *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Emery v. Batchelder*, 78 Me. 233; *Peckham v. Newton*, 15 R. I. 321; *Kimball v. Reding*, 81 N. H. 852, 64 Am. Dec. 333; *Dickinson's App.* 152 Mass. 184, 9 L. R. A. 279; 1 Perry, Tr. §§ 245, 456, 459.

While the subscription to the Commonwealth Realty Company for the purpose of building the hotel was in a sense an investment, the estate by reason thereof acquired no interest in the hotel property, but in consideration of the location of the hotel on the site of the old Planters' Hotel, the benefits, and advantages which would accrue to the trust property by reason thereof, plaintiffs as trustees proposed to subscribe, to be paid out of said trust fund, the sum of \$22,400.

The increase in business, rents, and values of the trust property near the hotel which has already been constructed, as shown by the evidence, has greatly redounded to the interest of the estate, and evinces the foresight, good judgment, and management of the trustees, in their desire to contribute to the fund for the erection of the hotel. The result of the investment has been a direct benefit to the estate by way of increasing the value of its property, and the increase in rents, and as shown by some of the witnesses

the best that could possibly have been made, but for which the hotel would have gone to some other point, and the trust property would have derived no benefit therefrom.

By item 2 of the seventh clause of the will it is provided that the trustees shall have no power to sell the real estate therein described, while by item 1 of the same clause they are given "full power to enter into the possession thereof, with full power to sell, lease, manage, and dispose of the same, and to invest and re-invest the proceeds of the sale thereof and to all and singular with respect to said real estate and the management thereof" as the testator might do if living, so that it seems clear that item 1 has no application to the property mentioned in item 2 which cannot be sold at all, while as to the property referred to in item 1 unlimited power is conferred upon the trustees as to the property to which that item has reference.

While the duty of the trustees to collect and disburse the income to the life tenants is no greater than their duty to preserve the corpus including the reserve fund for the remaindermen, yet the will provides that that fund shall be retained by the trustees to guard against losses by shrinkage or other contingencies, and that they shall invest and re-invest the same from time to time until the termination of the trust and out of said reserve fund to make certain advances, and if there be any of it remaining after equalizing the advances made therefrom it is to be equally divided among the three children named in the will. It thus appears that the trustees were vested with full power to use the whole amount of said fund if necessary to guard against losses by shrinkage and other contingencies, and in making the contem-

plated advances, in doing which it might be entirely consumed.

Our conclusion is that by the provisions of the will power was conferred upon the trustees therein named to make the subscription to the Commonwealth Realty Company, to be paid out of said reserve fund for the purpose of procuring the location and erection of the hotel on the site of the old Planters' Hotel and that the court below correctly so held; but it has been with much hesitancy that we have arrived at this conclusion.

It is claimed that the matter in issue here is *res adjudicata*.

That the former bill filed by the same parties was for the same purpose that the bill in the case in hand is for, that is to "construe the will of said Gerard B. Allen in regard to the powers of said trustees under said will, and among other things, in regard to their power over said twenty-five per cent net rents, called the reserve fund in said will." Upon the other hand it is contended: first, that the decree rendered in that case does not relate to the first source of power claimed by plaintiffs under the will; second, that it does not deal with the power conferred "to retain the reserve fund to guard against losses by shrinkage or other contingencies." From an examination of the decree in that case we are satisfied that the contention of plaintiffs with respect thereto is correct, and that the matter in issue here is not by reason of the decree in former case *res adjudicata*.

From what has been said it follows that the judgment should be affirmed, and it is so ordered.

All concur.

Rehearing denied.

TENNESSEE SUPREME COURT.

George B. GUILD, Impleaded, etc., *Appt.*,
v.
J. E. GOODWIN.

(.....Tenn.....)

The mayor of a city is not liable for malicious prosecution in attempting to enforce an unconstitutional ordinance which has not yet been judicially declared invalid, although opinion as to its validity is divided, if he acts in good faith in the discharge of his duty as he understands it and in the absence of any malice, oppression, or wanton disregard of the rights of the person prosecuted.

(March 1, 1895.)

A PPEAL by defendant Guild from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action

NOTE.—For rule as to liability of mayor for punishment or prosecution of accused person, see also *Boutte v. Emmer* (La.) 15 L. R. A. 63.

For liability of judicial officer for acts, see *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and *note*, also *Thompson v. Jackson* (Iowa) *ante* 92, and *note*. 27 L. R. A.

brought to recover damages for alleged false arrest and malicious prosecution. *Reversed*.

The facts are stated in the opinion.

Messrs. Smith & Dickinson, Barthell & Keeble, and J. D. Wade for appellant.

Messrs. Colyar, Williamson & Colyar and J. W. Gaines for appellee.

Wilkes, J., delivered the opinion of the court:

This is an action for false imprisonment and malicious prosecution. It was tried before a special judge in the court below, without the intervention of a jury, and a judgment rendered for \$1,500, — \$1,000 of which was awarded as actual and \$500 as exemplary damages, — and defendant has appealed, and assigned many errors, which need not be treated in detail. A short statement of the facts in the case is that plaintiff entered into a contract with the board of public works and affairs to construct a sewer in the city of Nashville. This contract, while dated April 14, 1892, appears to have been executed on the part of the board on April 18, 1892, and was in pursuance of a public letting to the lowest responsible bidder had before that date, and about April 2, 1892. The plain-

tiff secured the contract, and expected and intended to use convict labor in its execution, and there is proof tending to show that this fact was known to the board of public works and affairs at the time the contract was let to the lowest bidder. After the public letting on the 2d of April, the mayor and city council of Nashville, on the 14th day of April, 1892, passed an ordinance making it unlawful for any person to use or employ convict labor on any work to be executed under contract with the city of Nashville, under a penalty of \$50 for each violation. Defendant Guild was mayor of Nashville, and, being notified that plaintiff was using convicts upon the work under his contract with the city, on 23d of April, 1892, went before the recorder, and procured Mr. Cleary, street overseer, to make the necessary affidavit that plaintiff was violating the city ordinance by working convicts in the city limits under his contract, and thereupon the recorder and judge of the city court, at the suggestion of the said Guild, issued a warrant for plaintiff's arrest, which was given to a member of the police force, who met the plaintiff, read the warrant to him, and cited him to appear before the recorder on the next morning, which he agreed to do. No actual arrest was made by touching the plaintiff or taking him into custody, and no bond for his appearance was required. He did appear, was fined \$50, appealed to the circuit court, and was in that court tried and acquitted December 15, 1892, on the ground that the city ordinance was in contravention of an act of the general assembly, and hence was void, and gave no authority for plaintiff's arrest. Thereupon, November 16, 1893, plaintiff brought this action for damages for false imprisonment and malicious prosecution against the defendant personally and against the members of the board of public works individually and the mayor and city council of Nashville. On demurrer the action as to the mayor and city council was dismissed. The cause was tried, and resulted in the acquittal of the members of the board of public works, and in judgment against defendant Guild, as before stated.

It is conceded that the ordinance of the city under which the mayor proceeded was in contravention of the law, and was therefore void; but at the time these proceedings were taken it had not been so declared by any judicial tribunal, and defendant insists that he acted in perfect good faith in attempting to execute the ordinance as it was passed and stood upon the books of the city, and was actuated by no malice. The circuit judge, in his written opinion, found that defendant was actuated by no feelings of malice. It is said, however, that previous to this time the board of public works had considered this ordinance, and came to the conclusion that it was illegal, and had declined to enforce it, and so notified the mayor, and such is the fact. It is also said that the city attorney had given an opinion adverse to the legality of the ordinance, and that this had been sent by the board to the mayor, along with a record of their action declining to enforce the ordinance. The proof in regard

to this opinion is quite indefinite. It appears that such opinion was prepared by J. C. Bradford for the city attorney, Anderson, who felt himself incompetent to pass upon the matters; but at whose instance it was prepared, or to whom it was given, or by whom it was called for, does not definitely appear from the record. The defendant states emphatically that it was not called for by him or given to him, and that he never saw it; but, on the contrary, that he applied to the city attorney for an opinion, which the regular city attorney, Anderson, declined to give, because of relationship to some party indirectly interested. The opinion of the board of public works had no judicial force, but was merely the expression of a divided board upon a legal question, which they could pass upon for themselves, but could not settle for any one else, and the record wholly fails to fix the defendant with the receipt of the opinion of the city attorney or the special attorney, whose opinion appears to have been given, and afterwards lost in some unexplained manner. It does appear that there was a division of opinion as to the validity of the ordinance, and defendant states that his only object was to test the law, and execute it if valid, and that he had no other motive. It does not appear that he took any part in the proceedings after they were first instituted, but merely set on foot the proceedings to test and execute the ordinance. It is evident that this void ordinance could not justify the arrest of the plaintiff and his prosecution; still it was the duty of the mayor, as the chief executive of the city, to see its ordinances enforced, and, so long as he acted in good faith, and with no malice or improper motive, he cannot be held personally liable for a mere error in judgment. If he took advantage of his official position to oppress the plaintiff, either from ill will towards him or because of any other improper motive, he would be liable. The doctrine is tersely stated in *Kendall v. Stokes*, 44 U. S. 8 How. 87-98, 11 L. ed. 506-513, by Chief Justice Taney, in these words: "A public officer is not liable to an action if he falls into an error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake." In *Bishop on Non-contract Law* (section 787) it is said: "By the express or implied terms of an officer's authority he is to act honestly, carefully, and after the dictates of his own judgment, which, of necessity, being a human judgment, may err; therefore, when he has done what is thus commanded, whether the result is correct or not, he has exactly discharged his duty, and the law which compelled this of him will protect him, whatever harm may have befallen individuals." In 14 Am. & Eng. Encyclop. Law, p. 41, it is held that public officers called upon to act officially may be held liable for a malicious prosecution upon the same grounds as other persons. But malice and want of probable cause ought very clearly to appear in such cases. The presumption being strongly in their favor mere ignorance of the law or

overpersuasion by others is not sufficient. While we would not be understood as going to this length still it will not do to apply the same strict rules of liability to an executive officer whose duty it is to see the laws executed if he makes a mistake in judgment, that would be applied to an individual who has no public duty to perform in executing its laws. To hold this strict rule would paralyze the arm of every executive and peace officer; and while such officer, for any wanton or malicious abuse of legal process which is set on foot for the oppression of a citizen, must be held liable to the same, or possibly a greater, extent than a private individual, still there must be undoubted evidence of malice, oppression, and wanton persecution, with the absence of all probable cause or excuse, to hold a public official liable for errors in the execution of his official duties.

We cannot concur in the suggestion that the control of the police and the enforcement of this ordinance against convict labor rested exclusively with the board of public works. While it was made their immediate duty to execute the ordinance, the mayor was not thereby relieved, as chief city executive, from his duty under the charter to see this as well as all other ordinances enforced. The management of the penitentiary is vested in the superintendent, warden, and other officials in immediate charge, and it is their primary duty to see the laws enforced; but the governor of the state, as chief executive, is not thereby relieved from the duty of seeing that the laws in regard to the penitentiary and its convicts are enforced. He can neither delegate this duty to the prison officials nor can they take it from him. The action taken by the mayor was not in the strict, technical sense a criminal prosecution against the plaintiff. As was said in *Sparta v. Lewis*, 91 Tenn. 874, it is not a trial between the state and defendant, nor on a presentment or indictment by and before a jury. But it is in the nature of a suit for debt. It is not a prosecution, but a suing in court to recover a penalty for the violation of a city ordinance. It in no sense imputed to the plaintiff any corrupt, infamous, or degrading act, or any moral turpitude, but simply a disregard of an ordinance standing upon the records of the city; and, while the warrant was in form an order for the arrest of plaintiff, still it was executed by simply reading it to him, and citing him to appear before the recorder the next morning, which he agreed to do. He was not taken into custody, was subjected to no indignity, was not required to go to jail, or even give a bond for his appearance before the recorder. He was not restrained of his liberty, or hindered in going where he pleased. He was virtually unknown to defendant, who had no personal ill will towards him. While this is not necessary, still it is a circumstance throwing light upon the question whether defendant had any improper motive of any kind in doing what he did. We do not mean to be understood as holding that this ordinance was valid. It has already been held to be invalid. But while it stood among the

ordinances of the city the mayor cannot be held liable personally if in good faith he attempted to execute the same in the discharge of his duty as he understood it, and in the absence of any malice, oppression, improper motive, or wanton disregard of the plaintiff's rights; and we are unable from this record to find any evidence of such malice, oppression, or improper motive on the part of the defendant.

For these reasons *the judgment of the court below is reversed*, and the cause dismissed, at plaintiff's cost.

William BUSH & Wife, *Appls.*,

v.

Benajah McFARLAND, *Exr.*, etc., of
S. T. McFarland, Deceased.

(.....Tenn.....)

The signature of a witness who does not make any mark on the instrument, or touch the pen which makes the signature, although written for him at his request and in his presence, cannot be sufficient as that of a subscribing witness to a will of real property.

(March 7, 1885.)

A PPEAL by contestants from a judgment of the Circuit Court for Williamson County in favor of defendant in a proceeding brought to set aside an instrument which had been set up as the will of Mrs. S. T. McFarland, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. Baxter Smith and H. P. Fowlkes, for appellants:

A subscribing witness cannot have someone else to sign his name, and not touch, or hold the pen, or make his mark, and have no hand in, nor take any actual or physical part in, the signature of his name.

Simmons v. Leonard, 91 Tenn. 188.

One witness cannot subscribe for another.

Schouler, Wills, § 839; 1 Jarman, Wills, 218-215; 1 Greenl. Ev. 569a.

It was necessary that something should occur and that the subscribing witness should do some act (and that according to law), which, if remembered, would thereafter enable him to swear to the identity of the paper.

Simmons v. Leonard, 91 Tenn. 190.

Messrs. William House and J. H. Henderson, for appellee:

When an attesting witness is unable to write, his name may be written for him by another, at his request, in his presence and in the presence of the testator.

Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565; Pritchard, Wills, § 218; *Jesse v. Parker*, 6 Gratt. 68, 52 Am. Dec. 103; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Horton v. Johnson*, 18 Ga. 386.

A party subscribes an instrument if his name is underwritten by another person by his direction, and by him recognized as his signature.

Ford v. Ford, 7 Humph. 96.

NOTE—For signature to wills by mark, see note to *Re Guilfoyle's Will* (Cal.) 22 L. R. A. 370.

Wilkes, J., delivered the opinion of the court:

This case presents an issue of *devisavit vel non*, over the will of Mrs. S. T. McFarland. There was a verdict in favor of the will in the court below, and the contestant has appealed and assigned errors.

The only question involved is as to the attestation of the will by one of the subscribing witnesses.—James R. Barnes. The will purports to convey both personalty and land. It is admitted to be good and valid as to the personalty, but it is claimed to be inoperative as to the land, because one of the subscribing witnesses (James R. Barnes) did not write his name, nor did he make his mark, or touch the pen in the hands of the other subscribing witness, Battle, who signed his name for him in his presence and at his request, and in the presence and at the request of the testatrix. All other requirements as to request by the testatrix, and the other formalities necessary to make the execution of the instrument valid and perfect as a will, were complied with; the sole question being whether the attesting witness must make a mark upon the will to answer for and stand in place of his signature, where he is unable to write or sign his name himself, and requests another party to write it for him. Barnes was examined as a witness on the trial, and stated that while he could neither read writing, nor write, still he could recognize his name, when written, and he did identify the paper in controversy, as the paper to which he authorized his name to be subscribed. He made this identification both from the appearance of the name and the general appearance of the paper. The court was requested to charge the jury that if they found the paper writing in question was witnessed by one witness (Battle), subscribing his own name as a witness, at the request of the testatrix, and that this witness subscribed the name of another party (Barnes), at his request and that of the testatrix, the said Barnes not touching the pen, nor guiding the hand of the party signing the same, or making his mark, this would not be sufficient attestation to pass real estate. But this was refused. We think this was error. It has been held by this court in *Ford v. Ford*, 7 Humph. 96, that a person whose name is written by another, and who makes his mark thereto, is a good attesting witness to a will. This practice, however, is not to be encouraged or extended. 1 Jarman, Wills, 213. This case is apparently based on the idea that not only is the witness' name written by his authority, but in addition he takes a part in the signing similar to that where another person guides his hand, and he thus makes his own signature through another. But we are not inclined to extend the rule any further than it has already gone, and it has been expressly held that a writing of the name by authority is not sufficient unless it is accompanied by some mark or sign of the person who thus makes it his own signature. *Simmons v. Leonard*, 91 Tenn. 183. It is said this decision is a *dictum* on this point, the argument being that there were other questions involved in it, upon which the decision

could have been and would have been rested. Grant this to be so. It does not make the holding and opinion in that case a *dictum*. The question was fairly and directly involved, fully considered, and deliberately passed upon. The fact that the decision may have been rested on a different ground, even though one more satisfactory, does not place the decision in the category of a *dictum*, if the question was fairly raised and duly considered and decided, as was the case in *Simmons v. Leonard*. See *Clark v. Thomas*, 4 Helak. 422; *Bates v. Taylor*, 87 Tenn. 324, 325, 3 L. R. A. 316; *Porter v. Lee*, 88 Tenn. 791. Two or more questions properly arising in a case under the pleadings and proofs may be determined, even though either one would have disposed of the entire case on its merits without the other, and neither holding will be a *dictum* so long as it is properly raised and considered. It is said that making a mark thus "X," and touching the pen, are of practically no importance, and do not serve to aid the witness in identifying the paper in any way. This may be so, and it would be an argument against allowing marksmen to be attesting witnesses at all; but this is not the question before us, that having been decided in *Ford v. Ford*, and recognized in *Simmons v. Leonard*. But the witness must make some kind of mark upon the instrument, in order to make it his signature, and in place of his signature.

The judgment must be reversed and remanded, and the costs will be paid out of the estate.

NASHVILLE TRUST CO.

v.

J. C. SMYTHE *et al.*,
C. L. S. CROWNINSHIELD *et al.*, Petitioners, *App'ts.*

(.....Tenn.)

1. The whole or any part of the mortgage or vendor's lien which secures negotiable notes may be assigned to secure any part of the notes which may be assigned, whether they be the first or last maturing, or the intermediate notes of the series.
2. Bona fide holders of promissory notes secured by mortgage or vendor's lien may hold the security as well as the notes unaffected by equities between prior holders and the mortgagor.
3. An agreement for preference in the security given to an assignee of a part of a series of negotiable notes secured by mortgage or vendor's lien is valid as against subsequent assignees of other notes in the series.
4. Assignees of several notes secured by mortgage or vendor's lien share *pro rata*, if there is nothing in the contract of assignment, or in the intention of the parties, to vary the rule.
5. The assignment of notes secured by vendor's lien is governed by the same rule as the assignment of notes secured by mortgage.

NOTE.—For priority of notes secured by mortgage, see also note to *Horn v. Bennett* (Ind.) 24 L. R. A. 800.

6. An assignee of negotiable notes is not a bona fide purchaser as between himself and a prior assignee of other notes secured by the same mortgage or vendor's lien, with respect to rights in such security.

(March 3, 1896.)

APPPEAL by petitioners from a judgment of the Chancery Court for Davidson County, disallowing their claim to a preference out of the proceeds of certain property which was sold under a trust deed securing promissory notes; petitioners claiming the preference by reason of a contract made at the time some of the notes were assigned by the payee to them. *Reversed.*

The facts are stated in the opinion.

Mr. J. S. Pilcher, for appellants:

A vendor of lands who holds a series of notes given for the purchase money, where a lien is expressly retained upon the face of the deed, or a mortgagee who holds a number of notes which are secured by mortgage, in assigning one or more of such notes has the power by parol contract to give to the assignee of such note or notes a preference as to payment out of the proceeds of the property, and the subsequent assignees of the other notes can take no higher rights than the vendor himself had.

Menken Bros. v. Taylor, 4 Lea, 446; *Hicks v. Smith*, Id. 459; *Hill v. McLean*, 10 Lea, 107; *Christian v. Clark*, Id. 680.

The right and power of a vendor or mortgagor to give a preference as to the vendor's or mortgagee's lien by parol contract, in the assignment of a part of the secured notes made at a time when the vendor or mortgagor is the owner and holder of all the other notes, is a rule of property in Tennessee.

Nichol v. Levy, 73 U. S. 5 Wall. 433, 18 L. ed. 596; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 176, 17 L. ed. 520; *Lee County v. Rogers*, 74 U. S. 7 Wall. 181, 19 L. ed. 160; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594.

The rule adopted in Tennessee is that the assignees of the several notes share *pro rata*, if there is nothing in the contract of assignment, or in the intention of the parties, to vary the rule.

Graham v. McCampbell, Meigs, 53, 38 Am. Dec. 126; *Roberts v. Francis*, 2 Helsk. 133; *Smith v. Cunningham*, 2 Tenn. Ch. 569; *Andrews v. Hubbard*, 1 Lea, 693; *Ellis v. Roscoe*, 4 Baxt. 418; *Ewing v. Arthur*, 1 Humph. 587; *Wicks v. Caruthers*, 13 Lea, 353; *Bank of Bristol v. Bradley*, 15 Lea, 279.

The rule that the contract or intention of the mortgagee, vendor, or other lien holder, and the assignee of one of the lien debts, will control the equities of the parties, is nowhere more distinctly held than in Tennessee.

White v. Blakemore, 8 Lea, 49; *Whitby v. Whitby*, 4 Sneed, 473; *Gass v. Hawkins*, Thomp. Tenn. Cas. 243; *Perry v. Central Southern R. Co.* 5 Coldw. 138; *Mowry v. Davenport*, 6 Lea, 80; *Ruggles v. Williams*, 1 Head, 141; *James v. Fields*, 5 Helsk. 394; *Jones v. Jones*, 1 Head, 108; *Treevant v. Bettis*, 1 Tenn. Legal Rep. 48; *Williams v. Love*, 2 Head, 80, 78 Am. Dec. 191.

Menken Bros. v. Taylor, *supra*, is conclusive of the question involved here.
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Whatever may be the general rule on the subject, there can be no doubt that a mortgagee may assign part of his debt and stipulate that the assignee may have the prior right of satisfaction.

Hicks v. Smith, 4 Lea, 464; *Hill v. McLean*, 10 Lea, 114; *Christian v. Clark*, Id. 637; *Bank of England v. Turliton*, 23 Misc. 173.

In Tennessee it is expressly held that the agreement to give the holder of one note preference may be implied.

Christian v. Clark, *supra*. See *Wright v. Parker*, 2 Aik. 212.

An assignment of a debt and lien to secure it may be by parol.

White v. Downs, 40 Tex. 232; *McAlpin v. Burnett*, 19 Tex. 500.

The agreement made the lien in favor of the assignee superior to that of the other note.

Whitehead v. Fisher, 64 Tex. 642.

In assigning one of the lien notes preference might be given as to the lien and this might be by parol.

Miller v. Washington Sav. Bank, 5 Wash. 200; *Jones, Liens*, §§ 1119, 1120; *Jones, Mortg.* § 822; *Pensel v. Brookmire*, 51 Ark. 105; *Oulium v. Erwin*, 4 Ala. 452; *Grattan v. Wiggins*, 23 Cal. 20; *McLean & Jackson's App.* 103 Pa. 258; *Foley v. Rose*, 123 Mass. 557.

The assignee of a mortgage or deed of trust does not occupy the position of an assignee of commercial paper, but takes and holds the same subject to all the equities that could be urged against it in the hands of the original owner.

Olds v. Cummings, 81 Ill. 183; *Walker v. Dement*, 42 Ill. 272; *Oramer v. Willets*, 61 Ill. 481; *Haskell v. Brown*, 65 Ill. 29; *Shippen v. Whittier*, 117 Ill. 282.

The privileged character of negotiable paper does not extend to a mortgage by which it is secured.

Oster v. Mickle, 35 Minn. 245; *Johnson v. Carpenter*, 7 Minn. 176; *Hostetter v. Alexander*, 22 Minn. 559; *Blumenthal v. Jassoy*, 29 Minn. 177; *Richardson v. Woodruff*, 20 Neb. 183; *Crane v. Turner*, 67 N. Y. 487; *Horstman v. Gerker*, 49 Pa. 283, 38 Am. Dec. 501; *Twitcheall v. McMurtrie*, 77 Pa. 383; *Atchison v. Butcher*, 3 Kan. 104; *Shippen v. Whittier*, *supra*; *Fernon v. Farmer*, 1 Harr. (Del.) 32; *Edwards, Prom. Notes*, 165; 2 Dan. Neg. Inst. 432.

An assignee of notes secured by mortgage takes them subject to any equities between the mortgagor and mortgagee.

Abele v. McGuigan, 78 Mich. 415; *Harrison v. Burlingame*, 48 Hun. 212.

Where one of several mortgage notes is assigned, the mortgage lien passes as an incident, but this incident is nothing but an equity.

Anderson v. Baumgartner, 27 Mo. 80.

Where the vendor or mortgagee assigns a part of the mortgage debt, giving preference to the holder of the assigned note, a subsequent assignee of other notes can stand on no higher ground than the mortgagee or vendor, because the latter can convey to his assignee no higher right than he himself possessed.

Menken Bros. v. Taylor, 4 Lea, 445; *Foley v. Rose*, 123 Mass. 557; *Bank of England v. Turliton*, 23 Misc. 173.

Messrs. Smith & Dickinson for Fourth National Bank.

Messrs. Granbery & Marks for the other appellees.

Snodgrass, Ch. J., delivered the opinion of the court:

The question in this case arises under a bill filed July 30, 1892, by the Nashville Trust Company, as agent of Mrs. Martha M. Reed, against J. C. Smythe *et al.*, to enforce a lien for the purchase money evidenced by negotiable promissory notes executed as consideration for certain real estate sold and conveyed on the 20th of December, 1890, by defendant Everett to Mrs. Marlin. There were 126 of these notes, for \$20 each, except the last, which was for \$25, payable by Marlin and wife to Everett. They bore interest from date, and matured, respectively, on the 1st day of each succeeding month after their date, until the end of 126 months. They were secured by lien expressly reserved on the face of the deed of Everett to Mrs. Marlin. The complainant alleged that Mrs. Reed became the owner of forty of said notes maturing on and after April 1, 1896. The bill was filed on her behalf and that of all other holders of said notes, and sought to sell the real estate for the amounts due on all. Other note holders came in by petition, among them Miss C. L. S. Crowninshield, as guardian of C. G. and Caroline Underhill, and James S. Pilcher. They alleged that thirty of said notes, the thirteenth to the forty-second inclusive, were assigned by said Everett to C. L. S. Crowninshield, as said guardian, on the 22d day of January, 1891, to secure the payment of \$366.67, she, on that day, lent Everett; that at that time Everett was the owner of the entire series of notes; and that in the assignment of said thirty notes a preference was given over the other notes as to the vendor's lien to secure the same. The instrument giving the preference was in writing, and was as follows: "Nashville, Tenn., Jan. 22, 1891. Twelve months after date, we promise to pay to the order of Miss C. L. S. Crowninshield, as guardian of C. G. and Caroline C. Underhill, three hundred and sixty-six dollars and sixty-seven cents (\$366.67), for value received, having pledged on deposit, as collateral security for the payment of this note, thirty notes out of the series of one hundred and twenty-six notes given by A. J. Marlin and Ella May Marlin for lot number 81 in B. F. Brown's subdivision; said thirty notes being numbers 13-42, inclusive, of said series, and preference is given to said thirty notes over the other notes of the said series as to the vendor's lien to secure the same. [Signed.]"

These petitioners show that the remainder of said sixty-five notes held by said guardian and James S. Pilcher were also held as collateral on said loan for \$366.67, and that all of said sixty-five notes, after satisfying said loan of \$366.67, were the property of James S. Pilcher; and they asserted priority for the thirty notes. Proof was taken, and it appeared that, at the time of the execution of this instrument, Everett was the owner of all the notes of the series, all of which were transferred by him before maturity, for valuable considerations, after January 22, 1891, 27 L. R. A.

the date of the assignment quoted, and no other preferences were attempted to be given. The assignees of the other notes had no actual notice that the preference had been given as to the thirty notes assigned to Miss Crowninshield. The property was sold, and the amount brought was insufficient for the payment of all the notes. The chancellor decreed that no preference should be allowed to petitioner Crowninshield, guardian, and that all the note holders were entitled to share equally in the proceeds of the sale. Petitioners Crowninshield and Pilcher appealed, and assign as error that the court did not decree that, as to so much as was due to C. L. S. Crowninshield on said note for \$366.67, she was entitled to be first paid out of the proceeds of the property, basing said assignment on the following propositions of law: "First. A vendor of lands who holds a series of notes given for the purchase money, where a lien is expressly retained upon the face of the deed, or a mortgagee who holds a number of notes which are secured by mortgage, in assigning one or more of such notes, has the power by parol contract to give to the assignee of such note or notes a preference as to payment out of the proceeds of the property and the subsequent assignee of the other notes can take no higher rights than the vendor himself had; and citing *Menken Bros. v. Taylor*, 4 Lea, 445; *Hicks v. Smith*, Id. 459; *Hill v. McLean*, 10 Lea, 107; *Christian v. Clark*, Id. 630. Second. The right and power of a vendor or mortgagee to give a preference as to the vendor's or mortgagee's lien by parol contract, in the assignment of a part of the secured notes made at a time when the vendor or mortgagee is the owner and holder of all the other notes, is a rule of property in Tennessee; citing *Nichol v. Levy*, 72 U. S. 5 Wall. 488, 18 L. ed. 596; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 176, 17 L. ed. 520; *Lee County v. Rogers*, 74 U. S. 7 Wall. 181, 19 L. ed. 160; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594, and averring that the assignment of the notes in question, made January 22, 1891, when Everett held all other notes wherein the preference was given to Miss Crowninshield, guardian, etc., was a contract which, in effect, embodied the rule established in the cases in 4 and 10 Lea cited above, and the same was and is a rule of property as to all such contracts made since said decisions."

The question of the case, therefore, involved in this assignment, is whether the assignee of the last assigned notes, they being negotiable promissory notes taken before maturity without actual notice of prior assignment and lien contract, and for valuable considerations, took them subject to any equity between the vendor and vendee of the land or the prior assignee of the first notes assigned. The assignment of error treats it as though it were only a question whether the assignor passed his rights; and it is assumed, that being settled affirmatively, the subsequent assignee takes no higher right than the assignor himself had. In support of this assumption and contention, appellants lay down two propositions: That the assignee of a mortgage or deed of trust does not oc-

copy the position of an assignee of commercial paper, but takes and holds the same subject to all the equities that could be urged against it in the hands of the original owner; citing *Olds v. Cummings*, 81 Ill. 188; *Walker v. Dement*, 42 Ill. 272; *Cramer v. Willetts*, 61 Ill. 481; *Haskell v. Brown*, 65 Ill. 29; *Shippen v. Whittier*, 117 Ill. 282; *Abele v. McGuigan*, 78 Mich. 415; *Harrison v. Burlingame*, 48 Hun. 212; and that the privileged character of negotiable paper does not extend to a mortgage by which it is secured; citing *Oster v. Mickleley*, 35 Minn. 245; *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120); *Hostetter v. Alexander*, 22 Minn. 559; *Blumenthal v. Jassoy*, 29 Minn. 177; *Richardson v. Woodruff*, 20 Neb. 182; *Orane v. Turner*, 67 N. Y. 487; *Horstman v. Gerker*, 49 Pa. 288, 88 Am. Dec. 501; *Trotchell v. McMurtrie*, 77 Pa. 388; *Atchison v. Butcher*, 3 Kan. 104; *Shippen v. Whittier*, *supra*; *Fernon v. Farmer*, 1 Harr. (Del.) 82; *Edwards*, Prom. Notes, 165; 2 Dan. Neg. Inst. 432. These propositions will be found advanced and maintained in many of the cases cited, to which more could be added if necessary. They are based to some extent on a failure to discriminate between the case of a mortgage to secure a debt expressed merely in the face of the mortgage, or to secure accounts or other non-negotiable debts, and that of a mortgage to secure negotiable paper. Respecting those which hold that the same rule prevails where the debts secured are negotiable notes, they are based upon the theory that, although the mortgage notes are negotiable, the mortgage itself is only assignable in equity, and therefore the assignee, having to resort to equity to enforce his rights, is compelled to do equity towards the mortgagor, and allow him all the rights of defense he had against the mortgagees. Courts so holding make no distinction between mortgages securing negotiable and nonnegotiable paper. But this view, Mr. Jones, in his work on Mortgages (5th ed. § 888), says and shows is contrary to the general doctrine, and that the assignment of negotiable paper carries with it the security of the mortgage, and is unaffected by the equities between the mortgagor and the mortgagees. This latter he declares to be the generally accepted doctrine. Section 840. This has been recognized and declared by the Supreme Court of the United States. *Carpenter v. Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 818. In that case, Judge Swayne, who delivered the opinion of the court, calls attention to the distinction between the assignment of claims secured which were negotiable and nonnegotiable, and to the confusion which has resulted from ignoring the character of claims secured by lien or mortgage. He thoroughly explodes the fallacy that an assignment of such negotiable paper for a valuable consideration, before maturity, without notice, does not carry to the assignee a right superior to that of the assignor. "The transfer of the note," he says, "carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceed-

ing, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where such relation of dependence exists. "*Accessorium non ducit sequitur principale*." This case was followed and approved by the same court in the case of *Kennicott v. Wayne County* *Supra*. 83 U. S. 16 Wall. 452, 21 L. ed. 319. The whole subject will be found treated and cases collected in the nineteenth chapter of Mr. Jones' work on Mortgages, before referred to. We do not deem it necessary to go into a more extended citation or discussion. It is sufficient to say that we have no hesitation whatever in holding that such assignee of such notes does stand on higher grounds than the assignor, both in respect to the note assigned and to its mortgage security. If this were a question, therefore, merely between the assignee of the note and the payor of the note who has paid it to the assignor before the assignment, there would be no question that the right of the assignee would be superior, although the assignor's right would, of course, be inferior, or rather the assignor's right to collect the note out of the payor would not exist. It remains to inquire later on whether this concession is a settlement of the question involved in this case. Before reaching that question, however, it is proper to consider the rights of parties generally under such assignments of debts secured by vendor's lien or mortgage.

Counsel for appellants treats, properly, the assignment of notes secured by vendor's lien as governed by the same rule as the assignment of notes secured by mortgage; the two being analogous, and governed by the same principles, so far as the question under consideration is concerned; but, as has been shown, he erroneously treats the question as though there were no distinction in the character of claims assigned. On the general subject, the law of the case is very fully cited, and the observation is just that there is, perhaps, no question on which there is greater conflict of authority than that relating to the rights of different assignees of a series of notes which are secured by mortgage, vendor's or other liens. There are three

different views taken by the courts, and many decisions can readily be found to support each view. The supreme court of Arkansas has clearly set forth this matter in the following language and citations: "One class holds that the notes shall be paid in the order of their assignment (*McClintic v. Wise*, 25 Gratt. 448, 18 Am. Rep. 694; *Cullum v. Bruin*, 4 Ala. 452; *Griggsby v. Hair*, 25 Ala. 327; *Waterman v. Hunt*, 2 R. I. 298); another, that the notes should take precedence in the order of their maturity (*Mitchell v. Ladew*, 36 Mo. 526, 530, 88 Am. Dec. 156; *Sargent v. Howe*, 21 Ill. 148; *Vansant v. Allmon*, 28 Ill. 30; *Koester v. Burke*, 81 Ill. 436; *State Bank of Indiana v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486; *Doss v. Ditmars*, 70 Ind. 451; *Marine Bank of Buffalo v. International Bank*, 9 Wis. 57, 64; *M'Yay v. Bloodgood*, 9 Port. (Ala.) 547; *Richardson v. McKim*, 20 Kan. 346, 350; *Hinds v. Mooers*, 11 Iowa, 211; *Walker v. Schreider*, 47 Iowa, 529; *Wilson v. Hayward*, 6 Fla. 171, 190; *Kyle v. Thompson*, 11 Ohio St. 616; *Winters v. Franklin Bank of Cincinnati*, 33 Ohio St. 250); and a third class, that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment (*Donley v. Hays*, 17 Serg. & R. 400, 404; *Cowden's App.* 1 Pa. 278; *Mohler's App.* 5 Pa. 418, 420, 47 Am. Dec. 418; *Perry's App.* 22 Pa. 43, 45, 60 Am. Dec. 63; *Grattan v. Wiggins*, 23 Cal. 16; *Dixon v. Clayville*, 44 Md. 575, 578; *English v. Carney*, 25 Mich. 178, 181; *McCurdv v. Clark*, 21 Mich. 445, 448; *Parker v. Mercer*, 6 How. (Miss.) 320, 324, 33 Am. Dec. 438; *Cage v. Iler*, 5 Smedes & M. 410, 43 Am. Dec. 531; *Pugh v. Holt*, 27 Miss. 461; *Andrews v. Hobgood*, 1 Lea, 698; *Paris Exchange Bank v. Beard*, 49 Tex. 363; *Delephine v. Campbell*, 52 Tex. 4; *Wilson v. Eigenbrodt*, 30 Minn. 4; *Penzel v. Brookshire*, 51 Ark. 105.

The rule adopted in Tennessee is that the assignees of the several notes share *pro rata*, if there is nothing in the contract of assignment or in the intention of the parties to vary the rule. *Graham v. McCampbell*, Meigs, 52, 33 Am. Dec. 126; *Roberts v. Francis*, 2 Heisk. 183; *Andrews v. Hobgood*, 1 Lea, 698; *Ellis v. Roscoe*, 4 Baxt. 418; *Ewing v. Arthur*, 1 Humph. 587; *Wicks v. Caruthers*, 13 Lea, 353. This rule is in accord with the great weight of authority. Among the cases above cited, to which many others might be added, in affirmance of the rule as to equality of lien of note holders, we call special attention to *Parker v. Mercer*, 6 How. (Miss.) 320, as reported in 33 Am. Dec. 438. To this case, the editor of the American Decisions appends a most valuable and elaborate note, in which many cases are collected. The question and cases are thus stated: "Several notes may be secured by one mortgage or deed of trust, and, when so secured, may be assigned to different persons. The question, then, arising is, Which note is entitled to precedence in payment out of the proceeds of the security? The answers to this question are irreconcilable, and may be arranged under three classes: (1) Those which, like the principal case, affirm that the proceeds should be applied

pro rata to the several notes, irrespective of their dates of maturity or of assignment, on the ground that each note, according to the proportion it bears to the whole debt, is secured by the whole mortgage, and continues so secured, whether assigned or not, in the absence of any stipulation to the contrary: *Keyes v. Wood*, 21 Vt. 331; *Pattison v. Hull*, 9 Cow. 747; *Phelan v. Olney*, 6 Cal. 478; *Donley v. Hays*, 17 Serg. & R. 400; *Bels v. Heebner*, 1 Penr. & W. 280; *Hancock's App.* 34 Pa. 155; *Cooper v. Utmann*, Walk. Ch. (Mich.) 251; *English v. Carney*, 25 Mich. 178; *McCurdv v. Clark*, 27 Mich. 445; *Wilcox v. Allen*, 36 Mich. 160; *Dixon v. Clayville*, 44 Md. 573; *Cage v. Iler*, 5 Smedes & M. 410, 43 Am. Dec. 531; *Henderson v. Herrod*, 10 Smedes & M. 631; *Jefferson College Trustees v. Prentiss*, 29 Miss. 46; *Bank of England v. Tarleton*, 23 Miss. 173; *Stevenson v. Black*, 1 N. J. Eq. 338; *Page v. Pierce*, 26 N. H. 817; *Ewing v. Arthur*, 1 Humph. 536; *Andrews v. Hobgood*, 1 Lea, 698; *Smith v. Cunningham*, 2 Tenn. Ch. 568; *Tinsley v. Boykin*, 46 Tex. 592; *Paris Exchange Bank v. Beard*, 49 Tex. 358. (2) Those which affirm that in the event of the assignment of the notes, or of any of them, the assignees take precedence over the assignor with respect to the notes retained by him, and that, as between several assignees, they are entitled to precedence in the order of their several assignments: *McClintic v. Wise*, 25 Gratt. 448, 18 Am. Rep. 694; *Griggsby v. Hair*, 25 Ala. 327; *Saleman v. His Creditors*, 2 Rob. (La.) 241; *Barkdull v. Heroig*, 30 La. Ann. 618; *Waterman v. Hunt*, 2 R. I. 298. (3) Those which treat several notes secured by one mortgage as having precedence in the order in which such notes mature: *Richardson v. McKim*, 20 Kan. 346; *Wilson v. Hayward*, 6 Fla. 171; *Vansant v. Allmon*, 28 Ill. 30; *Punk v. McReynolds*, 33 Ill. 481; *State Bank of Indiana v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486; *Murdock v. Ford*, 17 Ind. 52; *Ilett v. Lucas*, 17 Iowa, 503; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Thompson v. Field*, 38 Mo. 320; *Ellis v. Lamme*, 42 Mo. 153; *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230; *Marine Bank of Buffalo v. International Bank*, 9 Wis. 57; *Lyman v. Smith*, 21 Wis. 674. "Of course, there may be special equities arising out of the assignments, or out of the intention of the parties as manifested therein; and, when this is the case, the general rule of law will be considered inapplicable, and the special equities will be recognized and enforced. It will be seen from the foregoing citations that the conflict of decisions on this subject is remarkable, that the cases falling within the first and those falling within the third class are so nearly equal that no decided preponderance appears. Those belonging to the second class are less numerous."

It will be observed that all these cases recognize the right of the vendor in the one case, or mortgagee in the other, to give a priority among notes secured by liens in a vendor's deed or in a mortgage, accordingly as he may contract with any assignee. This doctrine is well recognized in Tennessee.

Here it is also held that such an assignment is good as between the assignor and the assignee, and that it need not be in writing, as appears to be the general rule. *Hicks v. Smith*, 4 Lea, 459. In this connection, it is proper to say that to the extent noted, and only to that extent, have the Tennessee cases gone. It has not been established as the law of this state, and therefore, of course, not as a rule of property, that the transfer of a negotiable promissory note secured by mortgage, made in connection with contract giving to such assignee a prior lien, will vest in such assignee an equity superior to that of a subsequent assignee of one of said notes, who is a purchaser for value, and without notice of the former assignment and lien contract. The two cases cited in 4 Lea, and urged as holding that doctrine, were not cases of assignments to purchasers for value, but were assignments to pay pre-existing debts. So far, therefore, the question here presented is an open one in this state.

We return now to a discussion of that question. Without regard to conflict or difference of opinion in cases cited, it appears that several questions are definitely settled, the principal one with which we are concerned being that the vendor or mortgagee may by contract, in writing or parol, assign the whole or any part of the mortgage or vendor's lien to secure any part of the notes assigned, whether they be the first or last maturing or the intermediate notes of any series. It has been seen, also, that without respect to the question of the effect of the assignment of a portion of one note, or a part of a series of notes, secured in a mortgage (conditions involving other and different considerations), many cases assert the proposition that an assignment, when made of a single note, though negotiable and the entire debt secured, does not carry the equity of the mortgage security, so as to prevent an assertion of the equities between the original parties. We have, however, shown that the weight of authority is, and the clear rule of reason is, that, as between the original parties,—the vendor and the vendee, and the mortgagor and mortgagee,—the assignment of such a negotiable note by vendor or mortgagee may vest in the assignee a right superior to that of the assignor, the vendor, or mortgagee. There is, however, a different condition of fact, which requires the assertion of a different equity, between the subsequent assignee of one of a series of negotiable notes without actual notice of a prior assignment, with lien of contract priority, as between the two assignees, than that which would prevail between such an assignee and the mortgagor. It does not follow that because the assignee of one of a series of mortgage notes, which had been transferred and delivered to him by the mortgagee, and which had been paid by the mortgagor before such transfer and delivery, takes such note freed of all equities of the mortgagor, that he would therefore take it free of all equities of a prior assignee of another note of the same series, which had been transferred with a preference lien contract. In the first case the assignee's right would

undoubtedly be superior to that of the mortgagor, because, as between these parties, the note itself is a single and perfect obligation. If the mortgagor had paid it off, he should have taken it up, and not left it in the hands of the mortgagee, with power to transfer to one who might be a bona fide purchaser before maturity upon a valuable consideration; thus enabling the mortgagee to give to such bona fide purchaser a perfect title, secured by the mortgage, upon which the purchaser had a right to rely, without actual notice of anything to the contrary, and without any condition of facts which would put him upon inquiry and charge him with notice. When the assignee found such note, so secured, still in the hands of the mortgagee, apparently unpaid, he had the right to assume that it was unpaid, and no duty devolved upon him, as between him and the payor, to make further inquiry. But such is not the rule if conditions of facts requiring its application do not exist, as between a subsequent and a prior assignee of one of a series of negotiable notes secured by the same mortgage. If the mortgagee holding any part of said notes proposed to assign them to another assignee, and at the same time to give to such assignee a preference over the lien of all other notes to the amount of those to be assigned, and the assignee has notice that the note proposed to be indorsed to him is one of a series of notes secured by the same deed, he is presumed to know the law that the mortgagee can give to another assignee priority of lien. As a matter of fact, he knows that the mortgagee either has the other notes in his own hands unassigned, or that they are out of his possession, and in the hands of others claiming them, with or without preference of lien. He may not know the actual fact that any such notes have been assigned, or he may not be informed of it at the time by the assignor; but the mortgage deed itself, securing a number of notes, gives him notice that all are outstanding. He is charged, therefore, with constructive notice of another prior assignment, if one has been made, for he can demand of the mortgagee the production of the other notes of the series; and, if the mortgagee cannot produce them, he will know that they either have or may have been assigned, and, being presumed to know the law, will know that they may have been assigned under contract giving preference of lien. He is therefore charged with constructive notice of what, upon such investigation, he might have discovered. If, for instance, he calls upon the mortgagee to know where the other notes are, and the mortgagee produces them unassigned, he could, of course, then buy those of the series proposed to be sold to him, without danger of subjecting himself to loss on account of prior equity. If the mortgagee failed to produce the other notes, but insisted that they were not transferred to others, and that no prior liens had been given, the assignee could, but only at his peril, take the notes proposed to be assigned to him. The mortgage itself was notice of the existence of the other notes, and his presumed knowledge of the law is that some of them may have been assigned with

lien preferences. These conditions require him, so far as the equities between him and the prior assignees are concerned, to ascertain before purchasing whether any prior assignment has been made, and whether, in connection with it, a superior lien had been by contract given to any prior assignee. A failure to make such inquiry is at the peril of such assignee. If he purchases one or more of the series of such notes without such inquiry, and loses the benefit expected therefrom by reason of prior assignment of lien, it is his own fault. He was not, as between himself and a prior assignee, about whose rights the facts and the law require inquiry, a bona fide purchaser. *Wilson v. Eigenbrodt*, 30 Minn. 4; *Moore v. Ware*, 38 Me. 496; *Phelan v. Olney*, 6 Cal. 478; *Keyes v. Wood*, 21 Vt. 381; *Roberts v. Halstead*, 9 Pa. 82, 49 Am. Dec. 541.

Upon the theory, therefore, that the assignees of such of the one hundred and twenty-six notes as were assigned after the transfer of the thirty-two notes and prior lien to Miss Crowninshield were not bona fide purchasers without notice of such assign-

ment, we hold that her equity is superior to theirs, and she is entitled to have these notes fully paid before any portion of the proceeds of the sale is applied in satisfaction of the other notes. The argument that this holding impairs the negotiability of paper is not well founded. The conclusion itself is based upon the fact that purchasers of such notes (parts of a series secured in a mortgage) are charged with notice that the others may have been or may be assigned under a special contract giving priority. Such a result may be avoided by mortgage drawn in such form as to prevent preferential assignments. Where this is not done, however, it is clear that the courts, under the rules of law established, are compelled to give these assignments effect according to the contract and intention of the parties.

The decree of the chancellor is therefore reversed, and decree will be entered here in accordance with this opinion. The costs of the court below will be apportioned between the parties according to their respective interests in the notes, and the costs of this court will be paid by the appellees.

ARKANSAS SUPREME COURT.

B. W. FLINN, *Appt.*,
v.
PRAIRIE COUNTY.

(.....Ark.....)

Compensation for expert testimony on behalf of the state in a criminal case includes

only the usual witness fees unless further provision is made by statute.

(January 23, 1895.)

A PPEAL by claimant from a ruling of the Circuit Court for Prairie County affirming the disallowance by the county officers of his

NOTE.—Compensation of expert witnesses.

- I. As to matters of fact.
- II. As to requiring examination or preparation.
- III. Cases denying the right to additional compensation.
- IV. Cases affirming the right to additional compensation.
- IV. Reasons given for the different rulings.
- VI. Statutory provisions.
- VII. By whom paid.
- VIII. The English rule.
 - a. In common-law courts.
 - b. In courts of chancery.
 - c. The modern rule.

I. As to matters of fact.

The professional witness in the discharge of his duty as a good citizen, is, like any other person, compellable to attend court in obedience to process, and testify as to what he may know, for the same statutory fees as other witnesses. *Larimer County Comrs. v. Lee*, 3 Colo. App. 177; *Walker v. Cook*, 33 Ill. App. 561.

As to facts within his knowledge, a physician or surgeon, or other scientific or professional witness stands upon an equality with other witnesses. *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75.

And professional men are entitled to no extra compensation under statutes providing therefor when they are called to testify to an opinion founded upon special study or experience, or to state the result of scientific or professional examinations, where they are called simply because they happen to know facts respecting which any one else would be equally competent. *Snyder v. Iowa City*, 40 Iowa, 648.

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Thus, a physician called to testify as to the reasonable value of professional services rendered cannot recover from the person in whose behalf he was subpoenaed on a promise to pay him more than the regular fee allowed by law for attendance as a witness, as the value of such services is a question of fact and not of science calling for a professional opinion. *Walker v. Cook*, *supra*.

A physician employed professionally to attend an injured person, who in the ordinary practice of their profession acquire knowledge of the facts as to the nature and extent of his injuries and who are called upon to testify as to such nature and extent and as to their probable effect, do not testify as experts within the meaning of the Minnesota statute providing for the allowance of extra compensation to expert witnesses. *Le Mere v. Mohale*, 30 Minn. 410.

And surveyors attending court as witnesses are entitled to no higher compensation than ordinary witnesses, unless there has been a view. *Lyon v. Wilkes*, 1 Cow. 581.

As to the English rule, which is different, see *infra*, under heading, *The English rule*.

II. As to requiring examination or preparation.

An expert witness meets the requirements of a subpoena if he appears in court and gives prompt answers to such questions as may there be put to him, but he cannot be required to examine the case and use his skill and knowledge to form an opinion, or to attend, hear, and consider the testimony given so as to be qualified to give a deliberate opinion on a question of science arising thereon without compensation in addition to

claim to compensation as an expert witness for the county in a criminal case in which it was interested. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. G. Thweat and John D. Shackelford, for appellant:

No rule or reason, based on justice and common sense, can be given for requiring a man, as an expert, to draw on his fund of knowledge and information, which has cost him toil and money to acquire, without proper compensation.

The learning and skill of any professional man is as much his property and capital stock as is the store of the merchant or the money of the banker. Who would expect or even think a merchant or banker should be required to

give up their property for the public good without proper compensation?

St. Francis County v. Cummings, 55 Ark. 419; *Allegheny County v. Watt*, 3 Pa. 462; *Northampton County v. Innes*, 26 Pa. 156; *United States v. Howe*, 12 Cent. L. J. 193; *Webb v. Page*, 1 Car. & K. 23; *Re Boelker*, 1 Sprague, 376; *People v. Montgomery*, 13 Abb. Pr. N. S. 207; 1 Taylor, Med. Jurisp. p. 19; *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75; *Blythe v. State*, 4 Ind. 535; *Webb v. Baird*, 6 Ind. 18.

Riddick, J., delivered the opinion of the court:

The appellant, B. W. Flinn, who is a physician, was summoned to testify on the part of

that allowed an ordinary witness. *People v. Montgomery*, 13 Abb. Pr. N. S. 207.

Thus a physician called upon as a witness cannot be legally required to do any particular thing, as to analyze the contents of a stomach or perform a post mortem examination, by the ordinary process of subpoena and the payment of an ordinary witness fee. *Larimer County Comrs. v. Lee*, 3 Colo. App. 177, dictum.

And while a medical expert who has made a post mortem examination may, under the Texas rule, be compelled to testify as to the results thereof on a criminal trial though compensation in addition to that allowed ordinary witnesses is refused him, he could not have been compelled to make the examination unless paid for it. *Summers v. State*, 5 Tex. App. 374, 32 Am. Rep. 573.

So in *St. Francis County v. Cummings*, 55 Ark. 419, holding that a coroner may when necessary to ascertain the truth concerning the death of a person over whose body he is required to hold an inquest, employ a physician to make an autopsy rendering the county liable for a reasonable compensation therefor, the court said that "he may summon a physician to testify and compel him to swear to his opinion on a superficial view of the body, but cannot compel him to touch it, or do the more nauseous and dangerous work of opening it, because such an act is not within the office of a witness.

III. Cases denying the right to additional compensation.

A number of the American cases have adopted the rule of the principal case, holding that a professional witness who attends in obedience to an ordinary subpoena may be compelled to express his opinion on hypothetical questions or on general medical or toxicological questions as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees. *Larimer County Comrs. v. Lee*, 3 Colo. App. 177; *Summers v. State*, 5 Tex. App. 374, 32 Am. Rep. 573.

And that he is punishable as for a contempt for refusing to testify as an expert without being paid for his testimony as for a professional opinion. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611.

And that the court in a criminal case cannot, in the absence of express legislative enactment, bind the county chargeable with the costs thereof by an order allowing compensation in excess of the statutory fees of ordinary witnesses to an expert to be called as a witness therein. *Larimer County Comrs. v. Lee*, *supra*.

Thus the refusal of a physician sworn as a witness at a coroner's inquest to give his opinion as to the effect of medicines administered and to describe the decedent's condition and symptoms, is held to be a contempt for which the coroner can

hold him to bail to answer and which is indictable as an obstruction of justice, but that the coroner cannot compel him to enter bail before a justice, in *Com. v. Higgins*, 5 Kulp, 309.

And in *Gaston v. Marion County Comrs.*, 3 Ind. 497, it was held that a physician is entitled to no compensation for traveling and giving evidence in obedience to a subpoena at a coroner's inquest beyond that of an ordinary witness.

But see Indiana cases cited, *supra*, under heading, *Cases affirming the right to additional compensation.*

So in *Attorney-General, Petitioner*, 104 Mass. 537, it was held that a medical expert who attends a criminal trial and testifies on behalf of the defendant is not entitled to an allowance of additional compensation therefor, under Mass. Gen. Stat., chap. 171, § 24, providing that the prisoner is entitled to process to summon witnesses necessary to his defense at the expense of the commonwealth as the fees for witnesses are fixed by chapter 157, section 8, thereof, and no authority is given for a further allowance.

Nor can the expenses and fees of experts appointed in capital cases by the counsel for the prisoner without the authority or approval of the attorney-general be allowed under Mass. Gen. Stat., chap. 115, § 17, authorizing it to receive, examine, and allow accounts for services and expenses incident thereto, or under Mass. Stat. 1880, chap. 191, providing for the taxation of certain specific fees including fees of witnesses and none other except such as the court shall deem reasonable not therein specifically provided for, but may allow a reasonable compensation approved by the attorney-general to experts so employed with his assent to make investigations, give opinions, or testify on the trial. *Ibid.*

So in *Faulkner v. Hendy*, 79 Cal. 265, which was an action for dissolution of a partnership in which an expert accountant was employed to examine the books of the firm and render a statement of their condition, it was held that the expense of an expert employed by and who acts for one of the parties to an action should not be charged against the losing party as a part of the costs of the action.

But it was said that if the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by and act under the direction of the court in order to secure his fair and disinterested services, thus implying that in such case the expenses would have been allowed. *Ibid.*

And in *Smith v. McLaughlin*, 77 Ill. 506, holding that a physician subpoenaed by a coroner to attend an inquest and make a post mortem examination cannot recover therefor against the estate of the deceased person, it was said that a witness or officer of the law has no right to recover on a quantum meruit for services rendered under the require-

the state, as an expert, in a criminal case pending in the Prairie circuit court. He obeyed the summons, but, on being called as a witness, he asked the court to allow him his fees as an expert before compelling him to testify. The court refused to make such allowance, and required him to testify. Flinn afterwards presented to the county court of said county a claim against the county for the sum of \$150 for his attendance and testimony in said case. The court rejected his claim, and on appeal to the circuit court the judgment of the county court was affirmed. An appeal was taken to this court.

The only question for us to determine is whether an expert who testifies as such on be-

half of the state in a criminal case may demand compensation in addition to the usual fees allowed witnesses in such cases. We have no statute authorizing the payment of extra compensation to experts. Our statute makes no distinction between different classes of witnesses. In the absence of a statute regulating it, the question is one of some doubt, for the decisions of the courts of the different states upon it are very conflicting. "In this country," says Prof. Rogers in his work on Expert Testimony, "the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without ad-

ments of the law. For such services he is limited to the fee or compensation fixed by the statute.

A physician called as a witness in Illinois who states the condition of a patient whom he had visited professionally without objection cannot then refuse to give his opinion as to the cause of the symptoms he had described unless a professional fee is paid or secured to him on the ground that a professional opinion was called for, as the opinion asked for was pertinent to the subject about which he had voluntarily testified. *Wright v. People*, 112 Ill. 540.

In *Larimer County Comrs. v. Lee*, 8 Colo. App. 177, the court distinguishes the cases previously decided allowing additional compensation to experts, upon the ground that in all of them the question was as to the right of the witness to refuse to express his professional opinions until he is paid a greater compensation than that fixed for ordinary witnesses, while in the case at bar the testimony was given without objection in reliance upon an order of the court for additional compensation, and the question arose upon presentment of the claim therefor to the board of county commissioners for allowance, but said that the authorities adjudging the contrary were much more satisfactory.

IV. Cases affirming the right to additional compensation.

The right of expert professional and scientific witnesses to compensation in addition to that allowed ordinary witnesses is upheld, however, in at least an equal number of the American cases on the subject, including those of the federal courts.

Thus, that a physician or surgeon cannot be called upon as a witness and compelled to give a professional opinion without compensation other than the ordinary fees of witnesses was held in *Buchman v. State*, 50 Ind. 1, 26 Am. Rep. 75; *Dills v. State*, 50 Ind. 15; *United States v. Howe*, 12 Cent. L. J. 138.

And that the refusal of a physician or surgeon to testify as an expert concerning letters of medical science unless he is first compensated by a reasonable fee cannot be punished as a contempt of court, in *United States v. Howe*, *Buchman v. State*, and *Dills v. State*, *supra*.

And in *United States v. Howe*, and *Dills v. State*, *supra*, it was held that he is entitled to his professional fee before testifying.

But see *State v. Teipner*, 36 Minn. 535, decided under the Minnesota statute set forth under heading, *Statutory provisions*.

So the district attorney has power to procure the attendance of skilled witnesses to testify in criminal actions in appropriate cases for a special compensation. *People v. Montgomery*, 13 Abb. Pr. N. S. 207; *People v. Cortland County* *Supra*. 39 N. Y. S. R. 313.

And bind the county court by an agreement to pay such compensation. *People v. Cortland County* *Supra*. *supra*.

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The test of the right to do so being the necessity thereof. *Ibid*.

Such an employment and agreement to compensate is authorized by 1 N. Y. Rev. Stat. (Birdseye's ed.), p. 732, providing for the allowance of all expenses necessarily incurred by him in criminal cases arising within the county and of moneys necessarily expended by any county officers in executing the duties of his office when no specific compensation is provided by law. *Ibid*.

So a verdict against the defendant in a criminal action is not affected by the fact that a medical expert attended the trial and gave testimony thereon under agreement with the district attorney, for a considerable compensation which was not known to the defendant. *People v. Montgomery*, *supra*.

And the amount paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial though it might affect the credit of the witness with the jury. *Ibid*.

A physician or surgeon when giving his professional opinion in court does not occupy the position of a witness testifying to facts and is not embraced within the term "witness" as used in section 12 of the Indiana Bill of Rights, providing that in all criminal prosecutions the accused shall have the right to have compulsory process for obtaining witnesses in his favor. *Buchman v. State*, 50 Ind. 1, 26 Am. Rep. 75.

So the court will not compel the attendance of an interpreter or expert who has neglected to pay a subpoena unless in case of necessity. *Re Roelker*, 1 Sprague, 276.

And an allowance may be made for a reasonable number of expert witnesses as to the extent of gold deposits upon gold sought to be condemned by the United States under a statute providing that the attendance fees of witnesses shall be paid by the United States as a cost incident to the condemnation. *United States v. Cooper*, 21 Wash. L. Rep. 182.

An agreement by which a person qualified to testify as an expert is to be paid a stipulated sum for giving his testimony on condition that it enables the other contracting party to win the suit, besides his traveling expenses and the usual *per diem* allowance of an expert, however, is illegal and wholly void, and the expert cannot recover even his traveling expenses and fees as an expert. *Pollak v. Gregory*, 9 Bosw. 116.

V. Reasons given for the different rulings.

In *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611, the court stated as a reason for the rule that additional compensation should not be allowed, that the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouse, the broker from change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician or surgeon or skilled apothecary to testify to a like matter when relevant

ditional compensation." Rogers, Expert Testimony, 2d ed. 435. In a recent case decided by the Colorado court of appeals, the rule was stated as follows: "The professional witness, in the discharge of his duty as a good citizen, is like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process,

and to testify as to what he may know, whether it be observed facts or accumulated knowledge, acquired by study and experience." *Larimer County Comrs. v. Lee*, 3 Colo. App. 177. This view is supported by the following cases: *Ex parte Dement*, 53 Ala. 889, 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 374, 83 Am. Rep. 578; *State v. Toipner*, 86 Minn.

to a cause pending for determination in a judicial tribunal.

Summers v. State, 5 Tex. App. 374, 83 Am. Rep. 578, follows *Ex parte Dement*, *supra*, quoting the above reason and placing its decision upon the ground that the law allows no excuse for withholding evidence which is relevant to the matters in question before his tribunal, and that the administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it as a matter of public duty.

So in *Larimer County Comrs. v. Lee*, 3 Colo. App. 177, it was said that the authorities which adjudge additional compensation to be the right of the expert and which assert his privilege to refuse to testify until paid, are not in harmony as to the basis on which their conclusions are rested, some declaring that he is entitled to the extra pay because his professional opinions are his own property which cannot be extracted from him except for an honorarium which shall be satisfactory to the witness and others being placed on the ground that the time of a professional witness called as such has a value beyond that of a witness who is called to testify to a fact regardless of his business or his status.

And in *Ex parte Dement*, *supra*, it was said that the English cases on the subject only indicate that persons summoned to testify as experts ought to receive compensation for their loss of time and that it had not been adjudged in any of the cases cited that a physician or other person examined as an expert is entitled to be paid for his testimony as for professional opinions.

On the other hand, the rule allowing additional compensation is placed upon the ground that one's skill and professional experience are so far his individual capital and property that he cannot be compelled to bestow them gratuitously upon any one, and that services in the line of his profession or trade cannot be expected from him without adequate compensation, in *United States v. Howe*, 12 Cent. L. J. 193.

And in *Re Roelker*, 1 Sprague, 276, the decision was placed upon the ground that to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved, and that the most eminent physicians might be compelled merely for the ordinary witness fees to attend from the remotest part of the district and give their opinion in every trial in which a medical question arose.

These reasons of *Re Roelker*, *supra*, were repeated in *Buchman v. State*, 50 Ind. 1, 26 Am. Rep. 76, and the further reason given that in giving a professional opinion a witness is performing a particular service within constitutional prohibitions against demanding particular services without compensation.

VI. Statutory provisions.

Several of the states have enacted statutes regulating the question of the compensation of expert witnesses and authorizing or restricting the right to additional compensation beyond that allowed ordinary witnesses, most of them conferring or upholding the right thereto.

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Thus Louisiana Code of Practice, section 423, specially empowers the court to determine, in a civil matter growing out of a criminal proceeding, whether the witnesses had been heard as experts and what compensation they were entitled to receive. See *State v. Cole*, 33 La. Ann. 1356.

And Iowa Code of 1878, section 8314, provides that witnesses called to testify only to an opinion founded on special study or experience in any branch of science or to make scientific or professional examinations and state the result thereof, shall receive additional compensation to be fixed by the court with reference to the value of the time employed and the degree of learning or skill required. See *Snyder v. Iowa City*, 40 Iowa, 646.

And North Carolina Act of 1870-71, chap. 123, § 133, provides that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, in its discretion, order.

And Minn. Gen. Stat. 1878, chap. 70, § 2, provides that the judge of any court of record in the state before whom any witness is summoned or sworn and examined as an expert in any profession or calling may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable.

And R. I. Pub. Stat. 1882, § 15, p. 728, provides that in addition to the fees allowed to ordinary witnesses, persons summoned and testifying as experts in behalf of the state before any justice of the supreme court, trial justice, or coroner may be allowed and paid such sum as such justice or coroner may deem just and reasonable, provided that the allowance so made by any trial justice or coroner shall be subject to the approval of a justice of the supreme court.

Physicians or other professional persons by whom testimony is given are not entitled to extra compensation under Iowa Code, section 8314, when it is not made to affirmatively appear that they were called because they were professional persons for the purpose of testifying to an opinion founded on their special study and experience. *Snyder v. Iowa City*, *supra*.

The Minnesota statute leaves the matter of allowing or disallowing extra compensation to expert witnesses wholly to the discretion of the trial judge and an order refusing such an allowance will not be reversed on appeal unless there has been a most palpable and gross abuse of discretion. *Le Mere v. McHale*, 30 Minn. 410.

And applies where the witnesses are called upon to testify to an opinion founded on special study or experience in any profession or calling or to make a scientific or professional examination of some matter connected with the issues involved in the case and then state the results, and not to cases where a witness, skilled in some profession or calling, is called upon to testify as to facts within his personal knowledge, though he may have acquired the knowledge while in the ordinary practice of his profession, and though his professional skill may have enabled him to observe such facts more intelligently and narrate them more correctly. *Ibid*.

And a physician and surgeon on the stand as a witness cannot under that statute refuse to answer a question on the ground that his answer will be what is known as expert evidence as that statute

635; *Allegheny County v. Watt*, 8 Pa. 462; *Northampton County v. Innes*, 26 Pa. 156; *Israel v. State*, 8 Ind. 467.

The question has never been directly determined by this court, but there are dicta in some of the cases which seem to support the theory that the expert cannot lawfully demand of the county extra compensation. In one

has reference to an allowance to be made after the witness has been summoned and dismissed without examination, or after he has been sworn and examined. *State v. Teipner*, 36 Minn. 535.

So under the North Carolina statute one summoned to give evidence in a criminal action is entitled to extra compensation therefor. *State v. Dollar*, 66 N. C. 623.

And the compensation of witnesses in a criminal case who testified as experts may be fixed by the trial judge in an *ex parte* proceeding under the Louisiana statute. *State v. Cole*, 33 La. Ann. 1356.

In Indiana, however, the Statute (Ind. Rev. Stat. 1881, § 504, p. 94) provides that a witness who is an expert in any art, science, trade, profession, or mystery, may be compelled to appear and testify to an opinion as such expert, in relation to any matter whenever such opinion is material evidence, relevant to any issue or trial before a court or jury, without payment, or tender of compensation other than the *per diem* and mileage allowed by law to witnesses, under the same rules and regulations by which he can be compelled to appear and testify to his knowledge of facts relevant to the same issue.

This statute was enacted since the decision of *Buchanan v. State*, 59 Ind. 1, 26 Am. Rep. 75, and *Dills v. State*, 59 Ind. 15, set forth under heading, *Cases affirming the right to additional compensation*, and evidently changes the rule therein laid down.

VII. By whom paid.

The liability for additional compensation to expert witnesses would seem to rest solely with the party employing them.

Thus the compensation of experts called by a party in his own behalf cannot be taxed under U. S. Rev. Stat., §§ 823, 938, as costs, extra allowances, or disbursements against the losing party, as the liability is not incurred through any action of the court. *The William Branfoot*, 8 U. S. App. 120, 52 Fed. Rep. 390.

And sums paid to expert witnesses as compensation in excess of the fees allowed by law to ordinary witnesses are not taxable under the New York code as "necessary disbursements." *Mark v. Bufalo*, 37 N. Y. 184.

And the compensation of experts properly and necessarily employed by the district attorney in criminal cases is a county charge under N. Y. Rev. Stat. (Birdseye's ed.) p. 732, making the county chargeable with the fees of the district attorney and all expenses necessarily incurred by him in such cases. *People v. Cortland County Supra*, 39 N. Y. S. R. 318.

So in Louisiana where the trial judge in a criminal case has determined that certain witnesses therein testified as experts and fixed the amount of their compensation, the parish in which the case was tried is bound therefor and the judge has power by mandamus to require the payment thereof by the parish treasurer. *State v. Cole*, 33 La. Ann. 1356.

So in *Faulkner v. Hendy*, 79 Cal. 265, it was held that it is not proper to charge the expenses of an expert against the losing party as a part of the costs of the action where the expert is employed by and acts for one of the parties to the action.

In *Smith v. McLaughlin*, 77 Ill. 596, it was held that physicians subpoenaed by a coroner to attend an inquest and make a *post mortem* examination of

case it was held that an attorney may be compelled, without compensation, to defend persons charged with crime, who are unable to employ counsel. *Arkansas County v. Freeman*, 31 Ark. 266. In another case the court, in discussing the power of a coroner while holding an inquest, said: "He may summon a physician to testify, and compel him to

a body cannot recover as upon a *quantum meruit* or otherwise against the estate of such deceased person where the statute makes no provision for the payment of witnesses' fees in such a case.

But it is to be observed with reference to this case that it belongs to the class of cases holding that expert witnesses are not entitled to additional compensation, and that, therefore, it would probably not have been regarded as recoverable from any source. See Illinois cases cited *supra*, under heading, *Cases denying the right to additional compensation*.

As to the English rule under which such compensation would seem also to be usually taxable as costs, see *infra*, under heading, *The English rule*.

VIII. The English rule.

a. In common-law courts.

The common-law rule as laid down by some of the cases was that a witness called in an action to depose in a matter of opinion depending on his skill in a particular trade had before he was examined a right to demand from the party calling him a compensation for his loss of time. *Webb v. Page*, 1 Car. & K. 23.

And that an expert witness was not bound to attend and give testimony as such upon being served with a subpoena, though as to matters of fact within his knowledge he might be compelled to attend and testify. *Betts v. Clifford*, *Warwick Lent Assizes*, 1856.

And that professional witnesses had the right to demand compensation for loss of time before the commencement of the examination, as otherwise inducements might be held out to influence their testimony by threats to withhold it. *Clark v. Gill*, 1 Kay & J. 19, 23 L. J. Ch. 711, 2 Week. Rep. 652.

In *Webb v. Page*, *supra*, the decision was placed upon the ground that there is a distinction between a case of a man who sees a fact and is called upon in a court of justice to prove it, and of one who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life, as without the testimony of the former justice must stop, but there is no such necessity for the evidence of the latter and therefore the party who selects him must pay him.

And in *Turner v. Turner*, 5 Jur. N. S. 590, it was said that the right of a professional witness to additional compensation was founded upon the fact of his being abstracted from his functions, the court holding that a barrister was *prima facie* entitled to the expenses of a professional man when called upon as a witness without proof of his being in practice.

And under the Statutes of 5 Eliz., chap. 9, requiring the attendance of witnesses in payment according to their calling of their reasonable costs and charges, regard being had to the distance of the places, a professional witness was held to be entitled to his expenses on the scale allowed to persons of his professions although not called upon to give professional evidence. *Parkinson v. Atkinson*, 31 L. J. C. P. 190.

In this case the court by Mr. Chief Justice Earl disapproved of the rule said to prevail in criminal cases that a surgeon called to give evidence which is not of a professional character is only entitled to the expenses of an ordinary witness. *Ibid*.

swear to his opinion on a superficial view of the body." *St. Francis County v. Cummings*, 55 Ark. 421. All persons who, by study or practice in an occupation or profession, have become skilled therein, and possessed of knowl-

edge peculiar to the same, are, in law, called "experts." There is not an art, trade, profession, or vocation that does not have them. It is evident, therefore, that if all such witnesses are entitled to extra compensation when

But compensation for loss of time by scientific witnesses should be allowed, not according to the number of fees they may obtain in one day, but according to the average rate. *Severn v. Olive*, 3 Bro. & B. 72, 6 J. B. Moore, 235.

In *Wills v. Peckham*, 1 Brod. & B. 515, 4 J. B. Moore, 300, however, it was held that a witness attending a trial under subpoena is not entitled to a compensation for loss of time, although the party requiring his attendance had expressly promised to pay him for such loss.

And in *Collins v. Godefroy*, 1 Barn. & A. 681, 1 Dowl. P. C. 226, it was held that one subpoenaed as a witness cannot recover compensation for loss of time in an action against the party who subpoenaed him although such party has promised to pay for it.

This apparent conflict of authority was noticed and commented on in a later case. *Nokes v. Gibbon*, 26 L. J. Ch. 208, 8 Jur. N. S. 223, 5 Week. Rep. 216, the court saying that the principle was that a witness was not entitled to anything for loss of time, but that he was entitled to his traveling expenses and expense of maintenance if kept away from home for some time, and that the amount of such expenses were to be ascertained with reference to the witnesses' position in life, a larger allowance being made to the professional man than the laborer.

But such compensation for loss of time to scientific witnesses, where permitted, was allowed to physicians and attorneys only. *Severn v. Olive*, 3 Brod. & B. 72, 6 J. B. Moore, 235; *Lowry v. Doubleday*, note to 5 Maule & S. 159; *Moor v. Adam*, 5 Maule & S. 159; *Lopes v. DeTastet*, 7 J. B. Moore, 120, 3 Brod. & B. 232.

And not to merchants and others. *Lowry v. Doubleday*, *supra*.

Or to merchants coming from abroad as witnesses. *Moor v. Adam*, *supra*.

Or to brokers attending court as witnesses. *Lopes v. DeTastet*, *supra*.

Though in *Loneragan v. Royal Exch. Assur. Co.*, 7 Bing. 729, 1 Dowl. P. C. 223, 5 Moore & P. 805, upholding an allowance in the costs for the loss of time of a foreign witness necessary to the success of the cause who is not accessible by subpoena, it was said by Tindal, Ch. J., that there is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends upon their own exertion.

The table of fees framed by the common-law judges under 15 & 16 Vict., chap. 76, however, allows different sums to different witnesses according to their vocation and station in life. *Nokes v. Gibbon*, 26 L. J. Ch. 208, 8 Jur. N. S. 223, 5 Week. Rep. 216.

And under that scale of fees the amount of the allowance for the expenses of a witness did not depend upon the value of the particular witnesses' time. *Ibid*.

Thus costs on the higher scale were required to be allowed in patent cases where scientific witnesses were necessarily called. *Ellington v. Clark*, 58 L. T. N. S. 818; *Mosely v. Victoria Rubber Co.*, 57 L. T. N. S. 142.

And a solicitor who was summoned as a witness before the registrar of a county court in a bankruptcy proceeding and received only his traveling expenses was held entitled to recover against the official receiver by whom he was summoned for the amount allowed by the appendix to the county

court rules to a professional witness. *Chamberlain v. Stoneham*, L. R. 24 Q. B. Div. 113.

And an attorney who was subpoenaed by both parties and remained in London eleven days in consequence of the subpoena of the loser who refused to pay his fees which were paid by the winner upon the understanding that he would pay back such part thereof as were not taxed, might after disallowance of a part of his fee on the ground that he had been told by the winner that he could go home at the end of five days and after his repayment of the amount disallowed, maintain an action against such losing party for the balance thus disallowed. *Hale v. Bates*, 12 Bl. & El. 575, 23 L. J. Q. B. 14, 4 Jur. N. S. 1106.

So in *Duke of Beaufort v. Earl of Ashburham*, 11 Week. Rep. 237, 13 C. B. N. S. 598, 32 L. J. C. P. 97, 9 Jur. N. S. 822, 7 L. T. N. S. 710, an allowance for the costs of an expert in searching for and translating old documents which related to matters in the case and were pertinent to the issue was upheld.

And in *Clark v. Gill*, 1 Kay & J. 19, 23 L. J. Ch. 711, 3 Week. Rep. 652, it was said that a medical witness residing in London was entitled to require for his expenses for attending to give evidence in London one guinea a day and no more. If the witness has to come to London from a distance then three guineas a day, and what is paid for traveling expenses.

And in *Nokes v. Gibbon*, 26 L. J. Ch. 208, 8 Jur. N. S. 223, 5 Week. Rep. 216, an engineer was held entitled to one guinea per day while giving testimony.

But in taxing cost between party and party the master did not allow expenses incurred by scientific or skilled witnesses in qualifying themselves to give evidence. *May v. Selby*, 4 Mann. & G. 142, 4 Scott, N. R. 727, 1 Dowl. N. S. 708, 6 Jur. 52; *Mackley v. Chillingworth*, 26 L. T. N. S. 514, 46 L. J. C. P. Div. 484, L. R. 2 C. P. Div. 273, 25 Week. Rep. 650.

Thus the sums paid to witnesses for inspecting, measuring, and valuing improvements upon lands would not be allowed in addition to the charges for the affidavit made by them. *Murphy v. Nolan*, 7 Ir. Eq. Rep. 493.

And a plaintiff would not be allowed for the time of scientific persons who had been sent to a distant place to inspect a building though he could not safely proceed to trial without their testimony grounded upon such examination. *Bayley v. Beaumont*, 11 J. B. Moore, 497, following *Severn v. Olive*, 6 J. B. Moore, 239, 3 Brod. & B. 72.

Nor should an allowance be made for sums expended in making experiments and compensating scientific and professional men employed in making them to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, who were called as witnesses in an action in an insurance policy upon a building in which such new process was used. *Severn v. Olive*, 3 Brod. & B. 72, 6 J. B. Moore, 235.

And a plaintiff in an action involving an inquiry into a mass of accounts, who pays an accountant who makes an examination of the matters in question under order of the court or arbitrator, was not entitled upon final award in his favor to have the costs of the accountant taxed against the defendant, though the investigation and the report of the accountant to the arbitrator resulted in saving much expense. *Nolan v. Copeman*, 43 L. J. Q. B. 44, L. R. 8 Q. B. 84, 27 L. T. N. S. 799, 21 Week. Rep. 263; *Hawkins v. Rigby*, 29 L. J. C. P. N. S. 223, 6 Jur. N. S. 1208, 6 C. B. N. S. 271.

they testify as experts, the cost of criminal trials, in cases where such testimony is needed, will be much increased. In the case at bar the witness attended six days, and claims \$150.

Nor would a plaintiff in an action for the agreed price of plans for a railway, who has the ground examined by engineers and calls them as witnesses to prove that the plans were correct, be entitled to the expenses of the journey and surveys of the engineers, as they are mere expenses of preparing witnesses to give evidence and not costs of litigation chargeable to the losing party. *Small v. Batho*, 21 L. J. Q. B. 264, 16 Jur. 529, 1 Bail Ct. Cas. 43.

And the same rule was applied when the defendant sent engineers to examine the ground to prove that the work was badly done, in *Gravatt v. Attwood*, 21 L. J. Q. B. 215, 1 Bail Ct. Cas. 27, the court allowing their costs of attendance, but rejecting the costs of the journey and surveying.

So a surgeon could only be allowed the usual fees for attendance at the trial of an indictment for manslaughter and not for his fee for opening the body by order of the coroner. *Rex v. Taylor*, 5 Car. & P. 301.

b. In courts of chancery.

In courts of chancery the practice has been to allow expenses for qualifying witnesses in taxing costs as between party and party. *Mackley v. Chillingworth*, 46 L. J. C. P. Div. 484, L. R. 2 C. P. Div. 273, 25 Week. Rep. 650.

Order XL, Rule 23 of Chancery Consolidation Orders of 1860 authorized the allowance of taxation of costs between party and party of all such just and reasonable expenses as seemed to have been properly incurred in procuring evidence and the attendance of witnesses. *Ibid*.

The taxing master decided upon the sum to be allowed to a scientific witness attending before an examiner in equity in each case according to its circumstances. There was no positive rule in equity as to the amount. *Smith v. Buller*, L. R. 19 Eq. 476, 31 L. T. N. S. 873, 45 L. J. Ch. 69, 23 Week. Rep. 322.

And the rules of taxation in force in the common-law courts were not binding upon courts of equity though they were regarded as a useful guide. *Batley v. Kynock*, 44 L. J. Ch. 565, L. R. 20 Eq. 682, 38 L. T. N. S. 45.

Though under the scale of fees framed by the common-law judges under 15 & 16 Vict., chap. 76, practically the same scale was allowed in courts of chancery and of common law. *Nokes v. Gibbon*, 26 L. J. Ch. 208, 3 Jur. N. S. 282, 5 Week. Rep. 216.

Thus a fair claim for remuneration for loss of time by a medical witness attending during the examination of other witnesses may be paid to him and charged to the opposite party on taxation of costs. *Ryan v. Dolan*, 7 Ir. Eq. Rep. 92.

And expenses of an expert properly employed will not be disallowed merely because he was not called as a witness. *Churton v. Frewen*, 15 Week. Rep. 559.

So a defendant in a patent suit was held entitled to an allowance in respect to the charges of scientific witnesses not limited by the rules of taxation at common law where the plaintiffs after the briefs were delivered but before the hearing took the common order dismissing their bill with costs. *Batley v. Kynock*, L. R. 20 Eq. 682, 44 L. J. Ch. 565, 38 L. T. N. S. 45.

And an allowance to a skilled person for deciphering and translating ancient documents with relation to the matters in controversy and for journeys and reports of other experts upon dismissal of the bill with costs should not be set aside on summons to review, especially where the dismissal was caused by the evidence thus produced. *Churton v. Frewen*, *supra*.

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If the legislature had intended that such a large class of witnesses should receive additional compensation, it seems reasonable to believe that some provision would have been

So an auctioneer summoned as a witness in a chancery proceeding was held to be entitled to receive one guinea a day for loss of time as a professional witness and first-class railway fare from his residence to the place of examination, and to refuse to give evidence until a sufficient sum is tendered him, in *Re Workingmen's Mut. Soc. L. R. 21 Ch. Div. 881*, 30 Week. Rep. 938, 51 L. J. Ch. 650; *Wiltshire v. Marshall*, W. N. 1866, p. 80.

And the daily fee allowed to a professional witness on taxation between party and party was not necessarily limited to £3, 3s. In this case a fee of £3, 3s. a day was allowed to an engineer and architect of eminence employed under direction of the court. *Robb v. Connor*, 9 Ir. Eq. Rep. 373.

So in *Sollery v. Flewker*, 27 L. J. Exch. 11, it was held that the master might disallow the claim of an agent who charges more than the ordinary charge of a witness for his attendance on a taxation between attorney and client or between attorney and agent where there was no reservation of the question of liability, unless there is some special agreement to pay a reasonable remuneration, in which case it is for him to say what is reasonable.

And in *Re Lafitte & Co. L. R. 20 Eq. 650*, 33 L. T. N. S. 91, 24 Week. Rep. 7, 44 L. J. Ch. 683, the master disallowed the costs, charges, and expenses of an accountant employed in an action for breach of contract of sale of a business for recasting the books and balancing the profit and loss account for many years and translating and rendering the result in a supplemental book of account on the ground that it was wholly unnecessary.

This case distinguishes *Smith v. Buller*, L. R. 19 Eq. 473, 31 L. T. N. S. 873, 45 L. J. Ch. 69, 23 Week. Rep. 322, on the ground that there was no occasion for a scientific witness and that an accountant could hardly be considered one.

c. The modern rule.

Rule 8 of V.L. Order of Council of 1875, adopted pursuant to the Judicature Act of 1875, directs that such reasonable charges and expenses as appear to have been properly incurred in procuring evidence are to be allowed on taxation of costs. *Mackley v. Chillingworth*, 36 L. T. N. S. 514, 46 L. J. C. P. Div. 484, L. R. 2 C. P. Div. 273, 25 Week. Rep. 650.

This rule is said to be a reproduction of Order XL, Rule 23 of Chancery Consolidation Orders of 1860, set forth *supra*, under heading, *In courts of chancery*. See *Mackley v. Chillingworth*, *supra*, and *note*.

It gives the master a discretion as to what allowances should be made for the attendance of scientific witnesses in court untrammelled by the old scale of charges. *Turnbull v. Janson*, L. R. 3 C. P. Div. 264, 47 L. J. C. P. Div. 284, 26 Week. Rep. 815.

Which discretion will not be interfered with without good ground for so doing. *Ibid*.

And authorizes him to allow, for expenses of procuring skilled and expert witnesses and qualifying them to give evidence, such sum as in his discretion he shall deem reasonable according to the old rule of the court of chancery. *Mackley v. Chillingworth*, *supra*.

Thus under that rule the expenses of procuring surveyors and a builder to inspect a house before the trial of an action between the lessor and lessee thereof with a view to qualify them to give evidence as to its state of repair should be allowed. *Ibid*.

The term "procuring evidence," used in Rule 8, is not confined to procuring the attendance of witnesses but includes the going to examine when the thing in dispute is incapable of removal to the court. *Ibid*.

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made for it in the statute. After considering the matter, we have concluded that under our statute a physician who testifies as an expert in a criminal case is not entitled to extra compensation from the county. It is the duty of every citizen to assist, within reasonable limits, in enforcing the criminal law of the state; and it is not unreasonable that he should be required, on behalf of the state, to give such information as he may possess towards the elucidation of any question arising in a criminal trial, whether that information be in the nature of expert evidence or not. He cannot be required to make any examination or preliminary preparation, nor can he be compelled to attend the trial, and listen to the testimony, that he may be better enabled to give his opinion as an expert. For any service of this kind he may demand extra compensation. But such information as he already possesses, that is pertinent to the issue, he can be made to give, whether such information is peculiar to his trade or profession, or not. There is very little probability of any great hardship being

imposed on physicians by reason of this rule. The subpoenas for witnesses are under the control of the court, and, as there are physicians in almost any town or village in the state, it cannot often be necessary for a court to compel one to attend beyond the limits of the county in which he practices, for the purposes of testifying as an expert, unless he is also a witness to other facts material to the case.

The appellant did not ask the court to excuse him on the ground that it was any special hardship for him to attend and testify in said cause. He only claimed extra compensation for the reason that he testified as an expert. In giving the state the benefit of such information as he possessed, he performed a service which every citizen may be required to render for the public good. In the absence of a statute allowing it, the only compensation, beyond the usual witness fees, a physician who thus testifies can get, is that approbation which comes to all who "have done the state some service." Finding no error, the judgment of the Circuit Court is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

John BROWN
v.
Charles H. EPPS.
(.....Va.....)

The right to a jury trial on appeal from a justice of the peace or a police justice, with an absolutely free and untrammelled right to such appeal, satisfies a constitutional provision that "a man hath a right . . . to a speedy trial by an impartial jury" in a criminal case, at least when the accused has the right to elect whether he will be tried in the first instance before the justice or in the higher court.

(February 14, 1895.)

PETITION for a writ of habeas corpus to obtain the release of petitioner from the custody of defendant, the sergeant of Richmond, to which he had been committed for violation of a city ordinance. *Refused.*

The facts are stated in the opinion.

Messrs. Coalter & Wise and *Charles W. Dunston* for petitioner.

Mr. R. Taylor Scott, Atty. Gen., for respondent;

The argument and authorities relied upon by respondent will be found in 15 L. R. A. p. 442, in connection with the case of *Miller v. Commonwealth*.

Keith, P., delivered the opinion of the court:

John Brown filed a petition complaining that he was unlawfully detained in custody by Charles H. Epps, sergeant of the city of

Richmond, and praying for a writ of habeas corpus from this court, which was awarded. The serjeant answers that he holds Brown by virtue of a mittimus from J. J. Crutchfield, police justice for the city of Richmond, which is appended to the return, and made a part thereof. Brown, by counsel, demurs to this return as insufficient in law, and for cause of demurrer claims that section 4106 of the Code of Virginia of 1887 (as amended by Acts Leg. 1893-94, p. 480) and sections 4107 and 4108 of the Code are null and void, as being repugnant to section 10 of article 1 of the Constitution of Virginia, which declares "that in all capital or criminal prosecution a man hath a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." The case of *Miller v. Com.*, reported in 88 Va. 618, 15 L. R. A. 441, was decided upon the law as set out in sections 4106-4108 of the Code, and the amendment to section 4106 found in Acts Assem. 1893-94, was designed to cure the defect which this court declared to exist in that section on account of its repugnancy to the constitutional provision just quoted. The amendment consists in inserting after the words "conservators of the peace" the words, "whenever the person charged with any of the offenses hereinafter mentioned elects to be tried by such justice," so that the act now reads: "The several police justices and justices of the peace of this commonwealth, in addition to the jurisdiction exercised by them as conservators of the peace, whenever any of the persons

NOTE.—For jury trial on appeal as satisfying the constitutional right to trial by jury, see note to *Miller v. Com.* (Va.) 15 L. R. A. 441, which case is disapproved if not overruled by the present decision.

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hereinafter mentioned elects to be tried by such justice, shall have concurrent jurisdiction with the county and corporation courts of the state of all cases of assault and battery not felonies, petit larceny," etc. Counsel for the petitioner contends that this amendment does not cure the vice, and therefore it will be proper to examine first into the true construction of the statute prior to its amendment, and then to consider the effect of the words introduced by the legislature in the amendment referred to.

Cases involving the jurisdiction of justices of the peace under this and similar statutes have been frequently before this court, and in every instance, save in the case of *Miller v. Com.*, *supra*, the validity of the judgment based on the statute has been upheld. See *Thomas' Case*, 22 Gratt. 912; *Read's Case*, 24 Gratt. 618; *Wolcorton v. Com.* 75 Va. 910; and *Harrison v. Com.* 81 Va. 491. Inasmuch, however, as it does not appear that the constitutional question here under consideration was presented to the court in any of those cases, it is contended that they are not authorities binding upon us, and it is conceded that their weight as authority is impaired for the reason stated. It does appear, however, that the question of jurisdiction was considered by the court, and, indeed, underlies the exercise of jurisdiction by all courts in all cases, whether specifically presented or not; so that, where it appears that courts of all grades in the state from justices of the peace to this court have gone on uninterruptedly for many years to exercise jurisdiction under a statute, and that during all that time there has been no doubt entertained nor question raised as to the constitutionality of the law, when all this has been done in the presence of an able and inquisitive bar, a strong presumption is raised that the attack has not been made upon the constitutionality of the law, because, in the judgment of the courts and of the profession, no such ground of objection existed. The same class of cases has been considered in our sister states, notably in the cases of *Jones v. Robbins*, 8 Gray, 329; *Shafer v. Mumma*, 17 Md. 381, 70 Am. Dec. 656; *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186; *Moundsville v. Fountain*, 27 W. Va. 205; *Emporia v. Volmer*, 12 Kan. 622; *Wong v. Astoria*, 18 Or. 538; *Moore v. State*, 22 Tex. App. 117; *Byers v. Com.* 42 Pa. 89; *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697. The states whose decisions are here quoted base their jurisprudence upon the common law derived from the same fountains from which ours flows, and their decisions, which are evidence of the common law among them, are strongly persuasive, at least, of the common law as it exists here. Contemplating for a moment the situation in the colonies at the time of the Revolution, we find that the evils complained of by them were the same, the means taken to redress them and guard against their recurrence were identical; therefore their adjudications are entitled to great influence in the construction of similar statutes in our own states. In some of the cases cited prosecutions were for petit larceny, in some for keeping houses of ill fame, and in others for less serious viola-

tions of the law. The case from 22 Tex. App. is a very curious one in this: that the court reversed the judgment of the lower court because it had compelled the accused to go before a jury when the statute authorized a trial by a court without a jury, and the prisoner had demanded to be tried in accordance with the statute. The Texas constitution is almost identical in its terms with ours. The offense charged there was an aggravated assault and battery and the court was unanimous. The principle of all these cases is that a statute which confers jurisdiction upon a justice of the peace to try such offenses as are embraced in section 4106 of the Code are constitutional, provided, by a simple procedure, a trial by a jury can be had on appeal to a higher court. 3 Am. & Eng. Encyclop. Law, p. 781, and 4 Am. & Eng. Encyclop. Law, pp. 812, 818. The law is so stated by Bishop on Criminal Procedure, § 893; Sedgw. Stat. & Const. Law, chap. 497. In the case under consideration, not only is the procedure simple, but it is an absolutely free and unfettered right of appeal. The prisoner is brought before the justice. The warrant makes known to him the cause and nature of the accusation against him. He is confronted with accusers and witnesses. He is permitted to call for evidence in his favor. He is not compelled to give evidence against himself, and a judgment is rendered against him. If he feels that that judgment is just, he submits to it; if aggrieved by it, he appeals; and by the assertion of his right of appeal the whole force and effect of the judgment is destroyed. That which, by his assent, implied from his silence, would have been a final judgment, pleadable in bar to any future prosecution for the same offense, has, by his act, become of no effect, and he stands as free as before his arrest, subject only to the requirement that he must give bond for his appearance in the appellate court. Now, what is the substance of all this? Does not the determination of the defendant—in which determination he is an absolutely free agent—wholly set at naught the judgment just rendered against him, and transfer the controversy to another forum, and convert the proceedings before the justice into a proceeding preliminary to a trial which is thereafter to take place in the appellate court, and deplete it of all similitude to a final trial? It seems to me that, looking to the reality, and not the form, of things, to their substance, and not to the names by which they are called, that is the conclusion to which we are inexorably driven. Follow the accused one step further, when in obedience to his recognition, he presents himself before the trial court, under section 4108, and there we find that the language of the statute is, "The accused shall be entitled to a trial by a jury in the same manner as if he had been indicted for the offense in said court;" that is to say, he has the same guarantees thrown around him to secure to him a fair trial by an impartial jury as is given to all other persons accused of crime, and he stands before that jury innocent until his guilt is proved. But it is said that the prisoner is entitled to a speedy trial, and in the

Miller Case, so often cited from 88 Va. the word "speedy" would seem to be considered as equivalent to "immediate," which would have a tendency to limit the discretion of the legislature in prescribing the stages through which a prosecution should pass from the arrest to the conviction of the prisoner. I do not understand the word to have been so used in the constitutional provision which is now being inquired into.

Up to a recent date the procedure in the enforcement of criminal law, beginning with the arrest of the accused, and passing through the various stages to his final trial before a jury, has been more elaborate, and therefore more dilatory, than at present. Until recently the initial step was either the warrant of arrest from the justice of the peace, or a bench warrant from a court, issued upon an information, or upon a presentment or indictment of a grand jury. The office of the bench warrant was to cause the apprehension of the accused, who was then to be taken before a justice of the peace to be examined. By the justice he was sent on to an examining court, and by the examining court was acquitted or remanded for trial. Compare this elaborate procedure with the simplicity of the present day. The accused is arrested, is examined by a justice, is sent to a grand jury, and is then put upon his trial; or, if the prosecution begins with the indictment or presentment, he is tried at once, without an examination before a justice. The utmost simplicity prevails, while every constitutional right is carefully preserved, and the prisoner is secured a "speedy trial before an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty." To my mind, the legislature has taken ample and most satisfactory steps to secure to the accused his constitutional right of a "speedy trial," not by limiting or confining the legislation as to the mode of procedure by which it has been thought wise to guard at once the rights of the prisoner and the interests of the commonwealth, but by providing that there shall be no undue delay in taking the successive steps in the procedure. Thus, in section 4001 the accused is discharged from imprisonment "if a presentment, indictment, or information be not found or filed against him before the end of the second term of the court at which he is held to answer," unless the failure is due to certain causes set out in the statute, and which need not be here enumerated; and, "if he be charged with a felony he shall be forever discharged if four terms of the county, corporation or hustings court shall pass without a trial," unless the failure to try be for reasons specified in the statute, and which must be made to appear of record. These are means which the legislature has thought sufficient to secure a "speedy trial" within the meaning of the constitution; that is, a trial without delay. If it be said that the statute last cited refers only to felonies, the reply is that that statute, almost in its present form, may be traced back to the birth of our constitutions, and gives much color to the idea that runs through many adjudged cases that the protection of the constitutions

was intended only to apply to the graver classes of offenses, such as treason and felony.

I should have no difficulty in declaring section 4106 of the Code of 1887 constitutional were it a case of first impression; but, as I before observed that statute came under judgment before this court in the very recent case of *Miller v. Com.*, Judge Lewis delivering the opinion, and was held to be repugnant to the constitutional provision above cited. I entertain for the learned judge who delivered that opinion the greatest respect, and I differ from him with a most unaffected distrust in the correctness of my own judgment; and when his position appears to be fortified by the Supreme Court of the United States, always entitled to the highest consideration, and its force in this case heightened, to me at least, by the estimation in which I hold the justice who delivered its opinion in *Callan v. Wilson*, 127 U. S. 540, 83 L. ed. 228, I feel that distrust greatly intensified. *Callan v. Wilson* passes upon the constitutionality of an act of congress which conferred upon the police justices of the District of Columbia powers very similar to those granted justices of the peace by section 4106, but there, to my mind, the similarity between the two cases ends. The Constitution of the United States is a source and grant of power to the congress of the United States. It is an enabling, and not a restraining, instrument. Congress can do nothing except what the constitution, either directly or by reasonable construction, authorizes it to do; while the legislature of Virginia possesses all legislative power not prohibited by the fundamental law. By the Constitution of the United States (article 3, sec. 2, subsec. 3) it is declared that "the trial of all crimes except in cases of impeachment shall be by a jury." A jury, therefore, is an essential, an indispensable requisite, an integral part of every court held under the authority of the government of the United States for the trial of all crimes. There can be no trial in those courts of a person accused of crime without a jury, by virtue of the plain and unambiguous language above quoted. The presence of a jury becomes, then, a jurisdictional question, and Justice Harlan was well warranted in saying in *Callan v. Wilson* "that a judgment of conviction not based upon a verdict of guilty by a jury is void," under the laws of the United States. The case of *Callan v. Wilson* refers also to article 6 of the Amendments of the Constitution, and the learned judge seems to find a sufficient support for the conclusion reached in the language there used, which is as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." It may be well to inquire here why the sixth

amendment to the constitution was adopted. Certainly it was not necessary in order to secure a trial by a jury; that had already been done, as we have seen, by article 8, sec. 2, subsec. 8, of the Constitution, as originally framed, in language plain and emphatic. "The trial of all crimes except in cases of impeachment shall be by a jury" is the direct and positive mandate of article 8, sec. 2, subsec. 8, while the sixth amendment says "that in all criminal prosecutions a man shall enjoy the right to a speedy and public trial by an impartial jury;" the provision first quoted putting it beyond the power of congress to create a court for the trial of criminal offenses without a jury, while the language of the amendment recognizes the right of the accused to the enjoyment of a trial by a jury, a right which he could waive if congress saw fit by law to permit him to do so and this amendment stood alone. He could waive the right either expressly or by conduct upon his part necessarily implying a purpose to do so. The sixth amendment, therefore, could not have been intended to secure a trial by a jury.

It is equally certain that it was not the intention of those who insisted on its adoption to weaken or impair the right of trial by a jury. The motive for its adoption is therefore to be looked for in the other provisions of the amendment. For instance, that the accused shall enjoy the right to a jury trial in the state or district in which the crime shall have been committed, which district shall have been previously ascertained by law; the right to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. It was to imbue those rights into the organic law—rights not less sacred than that of a trial by jury; rights, indeed, necessary to the complete enjoyment of all the benefits of a trial by jury—that the sixth amendment was adopted. It does not alter or affect in any way the construction of article 8, sec. 2, subsec. 8. It is a part of the constitution, it is true, entitled to the same weight as other provisions of the constitution, "to be construed and applied in harmony with all the provisions of that instrument." See *Pointer v. Greenhow*, 114 U. S. 286, 29 L. ed. 191. The language of our bill of rights differs from each and both of these provisions. It does not declare that "the trial of all crimes shall be by a jury;" it does not declare that "the accused shall enjoy the right to a trial by an impartial jury," but its language is "that a man hath a right to a speedy trial by an impartial jury,"—that is, he has a legal claim to a trial by a jury. A trial by a jury is his privilege. The existence of the presence of a jury is not made a jurisdictional fact without which a court is not duly organized for the trial of criminals, as is the case in all courts of the United States.

Hitherto I have considered this case upon the law as found in the Code of 1887, and it has seemed to me that prisoners had not been denied, under the law as it then existed, any

of their constitutional rights; that the proceeding against them before the justice was in the nature of the jurisdiction exercised by an examining court, unless acquiesced in by them, and it was merely a preliminary, and not an unreasonably dilatory preliminary, to the final trial by jury, to which the prisoner had a free and unfettered right, with every guaranty and protection thrown around him to enable him to submit his case to an impartial jury of his country; that, in its essence, the judgment of the justice rested upon the implied assent of the accused, because one word of objection upon his part annulled the judgment rendered, and transferred the controversy to another forum; and I have been constrained to the conclusion that this statute in no wise denied or abridged the constitutional rights of the citizen. If this effect is to be attributed to the failure upon the part of the prisoner to make objection to the exercise of the jurisdiction by the justice by appealing therefrom, *a fortiori* would his express election to be tried by the justice have that effect. That a prisoner may waive many of his constitutional rights is beyond a doubt. The right to a trial by a jury is only one among the several rights enumerated in section 10 of article 1 of the Constitution. They all stand upon an equal footing. They are all necessary to the complete enjoyment of that personal liberty which is our birthright, and which it is the duty, not only of the courts, but of every citizen, to jealously guard. They are all designed, the one not more than the other, to safeguard the accused in all criminal prosecutions, so that no man may "be deprived of his liberty except by the law of the land or the judgment of his peers." He cannot be compelled to give evidence against himself, and the law which would require him so to do would be unconstitutional. And yet it is clear that he may waive this immunity. See *Cullen's Case*, 24 Gratt. 624. And so, also, it is declared by text-writers and adjudged cases that a prisoner charged with a misdemeanor may waive a trial by a jury, where the waiver is expressly authorized by the legislature. I therefore have no difficulty in holding that the act as it now stands is constitutional. It is for those who question the validity of the statute to show that it is invalid. It is not denied that there is a strong presumption in favor of the constitutionality of the law, and in every case, if the law admits of two constructions, by one of which its constitutionality may be sustained, while upon another it would be declared unconstitutional, the courts are held down to accept that construction which maintains its validity. It is said "that to accord to the accused a right to be tried by a jury in an appellate court after he has been once fairly tried otherwise than by a jury in a court of original jurisdiction, and sentenced to pay a fine, or be imprisoned for not paying, does not satisfy the requirement of the constitution." This language is used by Justice Harlan in the case of *Cullen v. Wilson*, and is cited with approval by Judge Lewis in *Miller v. Com.*, 88 Va. 618, 15 L. R. A. 441. For the reasons already given I do not

consider this judgment as authority in construing the constitution of Virginia, and I must say, also, that to my mind it does not show a full appreciation of the value of a jury as an instrumentality in the administration of justice. Long experience with juries has satisfied me that all the encomiums passed upon them have done them no more than justice, but, if it be true that the judgment of the justice, rendered, it may be, upon other evidence than that adduced before them, in the face of the law which requires them to try the prisoner as though upon an indictment, and to consider him innocent until he is proven guilty; if I say, in the face of that plain duty under the law, a jury is so easily swayed and influenced in its judgment, and is so incapable of being controlled by the law and evidence before them,—then my estimate of the value of jury trials must be reconsidered. My experience, however, is that, while juries have faults, those faults do not lie in the direction of ready subservience to authority. They are very much more apt to disregard the direct instructions of the court presiding at the trial than to attribute any, even the slightest, weight to the judgment of the justice. But, even if it were so, grant that the jury is prejudiced by the judgment of the justice, is that the fault of the law? The law declares that the prisoner shall not be so prejudiced. If a jury, in disregard of the law, visits upon the prisoner the consequences of the judgment from which he has appealed, it is due, not to any vice in

the law, but to the infirmity of human nature; but I think those who have had a large experience with juries would be ready to acquit them of any such imputation, and would decline to share the distrust in the integrity, intelligence, and impartiality of juries manifested by those who indulge the apprehension which seems to be indirectly expressed in the paragraph last quoted from *Callan v. Wilson*. The former conviction could not be said to constitute an impairment of the right of trial by jury, unless it worked a prejudice to the prisoner; and with a free and unfettered appeal to a jury it could work no prejudice to the accused unless the jury, recreant to its sworn duty under the law, disregarding the plain mandate of the statute, heedless of the instructions of the court, should try him, not upon the law and evidence before them, but upon the judgment of the justice which had been annulled and effaced. This apprehension appears to me to be strained and fanciful in the extreme, and must rest as its ultimate support upon a distrust in the integrity of that tribunal which has been for centuries regarded as the great bulwark of the liberties and immunities of the citizen against encroachment from any quarter. A weak defense it would prove were it so ignorant, so feeble, or so corrupt.

We are therefore of opinion that *the writ of habeas corpus should be denied*, and that the prisoner should be remanded to the custody of the serjeant of the city of Richmond.

KENTUCKY COURT OF APPEALS.

Nannie SHIELDS, *App't.*,
v.
LOUISVILLE & NASHVILLE R. CO.
(Two Cases).

(.....Ky.....)

The obstruction of a highway by an excursion train on a side track is not the proximate cause of injury to travelers on the highway from insulting and terrifying misconduct of the passengers on such train, or of another injury received in jumping from their buggy in fear of being turned over when passing over a rough road in the dark, which was made necessary by the delay.

(March 9, 1905.)

APPEALS by plaintiffs from judgments of the Circuit Court for Spencer County, in favor of defendant in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

NOTE.—The relation of an obstruction to a crossing as the proximate cause of an injury resulting is illustrated also in *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 23 L. R. A. 654.

As to liability in general for obstruction of crossings see also *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154, and *note*.

27 L. R. A.

Mr. G. G. Gilbert, for appellants:

This obstruction of the public highway was a public nuisance.

Louisville & N. R. Co. v. Com. 18 Bush, 388; *Tennessee & A. R. Co. v. Adams*, 3 Head, 596; *Angel v. Pennsylvania R. Co.* 38 N. J. Eq. 58.

Plaintiffs were especially damaged and may sue.

6 Lawson, Rights, Rem. & Pr. § 2959, and cases cited; Wood, Nuisances, p. 736, and cases cited.

The special damage if it exists need not be considerable to enable him who suffers to have an injunction against a nuisance.

Forty-Second Street & G. Street Ferry R. Co. v. Thirty-Fourth Street R. Co. 20 Jones & S. 252; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160.

Where the nuisance is proved the law imports damages and nominal damages are recoverable without proof.

6 Lawson, Rights, Rem. & Pr. § 2978; *Lippincott v. Lasher*, 44 N. J. Eq. 120; *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 181, 21 Am. Rep. 496; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 789; *Duncan v. Hayes*, 29 N. J. Eq. 26; *Rhodes v. Dunbar*, 67 Pa. 275, 98 Am. Dec. 231; *Davidson v. Isham*, 9 N. J. Eq. 186; *Dennis v. Eckhardt*, 8 Grant, Cas. 390.

Nominal damages should have been awarded to appellants at all events.

It is sufficient to show the violation of the right.

Bosworth v. Brand, 1 Dana, 377; *Paul v. Blason*, 23 Vt. 281, 54 Am. Dec. 75; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Hood v. Palm*, 8 Pa. 289; *Seat v. Moreland*, 7 Humph. 576.

Whenever the common law gives a right or prohibits any injury it also gives a remedy by action.

Sedgw. Damages, p. 29; 3 Bl. Com. chap. 8, p. 128.

The plaintiffs have shown special injury.

Carley v. Lancaster, 5 Ky. L. Rep. 40; *Cosby v. Owensboro & R. R. Co.* 10 Bush, 288; *Allen v. Ormond*, 8 East, 4; *Story v. Hammond*, 4 Ohio, 876; *Williams' Case*, 5 Coke, 72; *Rose v. Miles*, 4 Maule & S. 101; *Greasy v. Codling*, 2 Bing. 263; *Lansing v. Wiswall*, 5 Denio, 213; *Paine v. Partrich*, Carth. 191.

An obstruction placed across the public street is a public nuisance for which the offender may be indicted and fined. But such an obstruction is also a particular injury to the shop keeper in the immediate vicinity, and he may maintain an individual action for diverting his trade, while another person living on another street could not do so.

Wilkes v. Hungerford Market Co. 2 Bing. N. C. 281; *Quincy Canal Proprs. v. Newcomb*, 7 Met. 276; *Hughes v. Heiser*, 1 Binn. 463, 2 Am. Dec. 459; *Pittsburgh v. Scott*, 1 Pa. 309.

For any damage different from that suffered by the general public a private citizen may sue.

Stone v. Fairbury, P. & N. W. R. Co. 68 Ill. 394, 18 Am. Rep. 556; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 31 Am. Rep. 806; *Severy v. Central Pac. R. Co.* 51 Cal. 194; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Brewer v. Boston, O. & F. R. Co.* 113 Mass. 52; *Callanan v. Gilman*, 20 Jones & S. 112; *Patterson v. Detroit, L. & N. R. Co.* 56 Mich. 173; *Young v. Detroit, G. H. & M. R. Co.* Id. 480; *Murray v. South Carolina R. Co.* 10 Rich. L. 227, 70 Am. Dec. 219.

No rule of law requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded.

Meagher v. Driscoll, 99 Mass. 281, 93 Am. Dec. 759; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 388; *Emblen v. Myers*, 6 Hurlst. & N. 54; *Sutherland, Damages*, p. 72, and cases cited; *Adams v. Louisville & N. R. Co.* 10 Ky. L. Rep. 758; *Louisville & N. R. Co. v. Logan*, 3 L. R. A. 80, 88 Ky. 282.

The circumstances of indignity attending this wrong should be considered.

Louisville & N. R. Co. v. Wiley, 5 L. R. A. 855, 11 Ky. L. Rep. 420; *Tyson v. Booth*, 100 Mass. 238; *Louisville & N. R. Co. v. Ballard*, 2 L. R. A. 694, 88 Ky. 159; *Louisville & N. R. Co. v. Welsh*, 13 Ky. L. Rep. 733; *City Transfer Co. v. Robinson*, 12 Ky. L. Rep. 555; *Louisville & N. R. Co. v. Grundy*, Id. 293.

Mental suffering is to be taken into consideration in assessing damages in two general classes of cases: (1) Whenever the mental suffering is connected with bodily pain caused by the negligence of the defendant; and (2) whether there is any bodily pain or not whenever the injury is accompanied by circum-

stances showing malice, insult, oppression, or a reckless disregard of the rights of others.

Pierce, Railroads, 802; *Field v. Chicago & R. I. R. Co.* 71 Ill. 462; *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 463; *Fairchild v. California Stage Co.* 13 Cal. 599; *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 314, 24 Am. Rep. 748; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 138; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Masters v. Warren*, 27 Conn. 293; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 658, 17 Am. Rep. 504.

A railroad company will be held liable for injuries inflicted on the cars by disorderly persons, or for injuries resulting from the disorderly conduct of passengers while under the charge of the conductor, and which the conductor makes no effort to prevent.

Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; 2 Rorer, Railroads, 960; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 31 L. ed. 745.

The injury sustained from driving home after night is not too remote.

King v. Shanks, 12 B. Mon. 420; *Munford v. Taylor*, 2 Met. (Ky.) 600; *Louisville & N. R. Co. v. Wade*, 89 Ky. 255; *Harrison v. Berkley*, 1 Strobb. L. 525, 47 Am. Dec. 578; *Bosworth v. Brand*, 1 Dana, 378; *Pateh v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186.

Mr. Edward W. Hines, for appellee:

No individual can maintain a private action for damages on account of a public nuisance unless he alleges and proves special damage to himself distinct from that suffered by the public.

Seifried v. Hays, 81 Ky. 380, 50 Am. Rep. 167.

The fright suffered by plaintiffs by reason of the disorderly conduct of persons on the highway was not the proximate consequence of the obstruction which caused the delay.

Dubuque Wood & Coal Assn. v. Dubuque City & County, 90 Iowa, 176; 1 *Sutherland, Damages*, p. 49; *Selleck v. Lake Shore & M. S. R. Co.* 58 Mich. 195; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Pittsburgh, C. & St. L. R. Co. v. Staley*, 41 Ohio St. 118; *Pain v. Patrick*, 3 Mod. 289; *South Carolina S. B. Co. v. South Carolina R. Co.* 4 L. R. A. 209, 80 S. C. 539; *Barr v. Stevens*, 1 Bibb, 293.

There can be no recovery for the fright alone. 8 *Sutherland, Damages*, p. 664; *Chapman v. Western U. Teleg. Co.* 90 Ky. 365.

The rule that plaintiffs were entitled to recover nominal damages on account of the invasion of their right cannot apply when an individual seeks to recover damages on account of a public nuisance.

1 *Sutherland, Damages*, p. 766; *Elliott, Roads & Streets*, p. 501; 16 Am. & Eng. Encyclop. Law, p. 976; *Wood, Nuisances*, § 674; *Barr v. Stevens*, *supra*; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Crook v. Pitcher*, 61 Md. 515; *San José Ranch Co. v. Brooks*, 74 Cal. 463; *South Carolina S. B. Co. v. South Carolina R. Co.* *supra*.

Messrs Ashton & Harcourt also for appellee.

Grace, J., delivered the opinion of the court:

These two suits, by mother and infant

daughter, arise upon the same state of fact, grow out of the same transaction, and involve the same issues, and were heard together in the court below, and may be considered together by this court. Mrs. Nannie Shields and her daughter Mamie, residents of Spencer county, had on Sunday, the 9th day of July, 1893, been visiting some relations; and when returning home on that day, along a public turnpike road, and not being long before sundown, approached a crossing of the Louisville & Nashville Railroad and this turnpike road, at Wakefield, where they found the turnpike obstructed by the passenger coaches of defendant corporation, who it seems on that day was running an excursion train for the colored people of Louisville down to Bloomfield, south of the point indicated, and that, on returning to Louisville, it found a southbound passenger train late, and had side-tracked the excursion train to allow the passenger train to go by on the regular track; and it appears from the evidence that in this way these plaintiffs were delayed some thirty minutes, possibly more, by reason of the obstruction; that plaintiff Mrs. Shields saw no conductor, nor any of the servants of appellee, near by; that, being so delayed, many of the negro passengers on the accommodation train got off of same, and were wandering about, near the station, up and down the track, and up and down the turnpike, where the plaintiff was delayed, cursing, swearing, using obscene, vulgar language, fighting, throwing rocks, one of which came near her and her little daughter in her buggy, a pistol being fired off in the mêlée, and all this to the terror and alarm and annoyance and insult of herself and little girl; that after being delayed for quite a while in this way, and under these circumstances, for between half an hour and an hour, and just as the sun was setting, or a little after, and when the trains passed, and this accommodation train passed out, off of the turnpike, plaintiffs, proceeding on their way home, found a nearer way barred by a locked gate, and being then compelled to go around a greater distance, some two and a half miles, to their home, darkness came on them, and, the road being rough, she became alarmed at the danger of turning over, and in jumping from her buggy (the mother) injured her knee, and that then, and since to the trial, it had been inflamed, swollen, and had greatly pained her, and was to some extent stiffened; that, by reason of the alarm and fright from the conduct of the negroes at the station, both she and her little daughter had been made nervous, and suffered greatly, the little girl not being able to sleep soundly for some nights; and all this plaintiffs say was by reason of the negligence and wrongful acts of the defendant in obstructing said public passway, and in suffering and permitting the drunken, vicious negroes to go at large, on and near its roadway, and on and near the turnpike, where she was detained, and all to the great damage of both plaintiff and her little daughter; wherefore, in appropriate separate suits, they claim damages. Defendant, after demurring, filed its answer, denying that by gross negligence it obstructed the turnpike; denied that it

wholly obstructed it at all; denied that its officers abandoned the train, or the control or management of same; denied that it had any knowledge of the misconduct of the negro passengers, as complained of by plaintiffs, in any particular; in a second paragraph charging that plaintiffs by their own negligence contributed to any injury they may have sustained, and in a third paragraph charging that this delay and obstruction of the turnpike were rendered necessary by the approach of the southbound passenger train, and that this was the only place in that vicinity where it could side-track this train, and allow the other to pass, and that all this was well known to plaintiffs, and that they only stopped on this turnpike a short time and for this purpose. Of course defendant denies liability. A jury having heard the evidence of plaintiff sustaining substantially her petition, the court, on motion of the defendant, gave a peremptory instruction to find for defendant. Exceptions were taken by plaintiffs, motion for a new trial overruled, and appeal filed. Defendant corporation, by its attorneys in their brief, contends that if it did obstruct the turnpike road, and travel on the same, it was a public nuisance, and for which it is subject to indictment, but that the private citizen, unless he has sustained special damage, other than mere detention, cannot sue; that any injury he sustained, by delay only, being common to all travelers, will not support an action. And again it says that any possible damage or injury by reason of the misconduct of any of its passengers (if such there was) while off its train was beyond its control and beyond its authority or duty or power to restrain or prevent; neither was the same of any damage to plaintiffs or either of them, nor the necessary or natural result of such delay or obstruction; or, in other words, that any negligence of the railroad company in obstructing the turnpike was not the proximate cause of the injury to plaintiffs, but that the misconduct of its passengers towards plaintiffs caused such injury. Neither was the negligence of defendant the proximate cause of plaintiff Mrs. Shields' injury on her way home. Defendant cites numerous authorities along this line and in support of its contention; an early case in Kentucky being *Barr v. Stevens*, 1 Bibb, 293, in which the court says: "Upon general principles, that common interest, which belongs equally to all, and in which the parties suing have no special or particular property, will not maintain a suit. Thus a public nuisance is not the subject of a suit by a private individual, unless he has sustained some special injury thereby. As if a man fell trees in a highway, whereby it is stopped up, to the annoyance of the passengers, it is a nuisance common to all,—a public nuisance,—for which, at common law, he might be prescribed by the commonwealth, and punished; but a suit against him could not be maintained by a private individual, who had only sustained the injury, common to all, of being turned out of the way; but that if, in attempting to ride over the trees fallen in the road, and individual's horse should be

thrown, whereby himself or his horse is wounded, he can maintain an action for the special damage. The reason why he cannot, without special damage, maintain his suit for the nuisance against the wrongdoer, is that, if one could sue, all might, and this would be ruinous." This doctrine, then, clearly and early announced, seems to have been kept steadily in view in Kentucky, and the following cases may be cited in support or recognition of same: *Seifried v. Hays*, 81 Ky. 380, 50 Am. Rep. 167, was a slaughter-house case, damages being allowed only to those showing special damage. 1 Sutherland, Damages, p. 766, maintains the same general principle. Elliott, Roads & Streets, p. 501, says mere delay, caused by an obstruction, unaccompanied by any special damage or injury, does not, as a rule, give any right to an action for special damage. And in 16 Am. & Eng. Encyclop. Law, p. 976, it is said that for mere delay in a journey, or from being compelled to take a circuitous route, by reason of an obstruction in a river or a road, it would seem, from the weight of authority, that a cause of action does not arise. Wood, Nuisances, § 674, is cited to the same effect.

On the other question, as to whether any injury to the feelings, or by reason of any alarm or fear excited in either of the plaintiffs, by reason of the misconduct of the negro passengers, was so connected with any negligence in defendant, in obstructing the turnpike way, as that it may be fairly said to be the proximate cause of the same, and so to hold defendant liable, we find the general doctrine on this subject announced (16 Am. & Eng. Encyclop. Law, p. 428) to be that "it is a maxim that the law looks at the proximate, and not at the remote, cause of an injury, and that out of the application of this maxim grows the liability or nonliability of a defendant charged with the infliction of an injury by his negligence, and, unless the alleged negligence of the defendant was the proximate cause of the injury of which plaintiff complains, there can be no recovery. For consequences of which his act or omission was only a mere condition or remote cause the defendant is not liable." The same work also recites (page 431) that there is no fixed, unbending rule that in every case will clearly distinguish proximate and remote causes, and discriminate between active, efficient causes, and apparent causes, that are merely conditions, and not causes of the injuries that follow. It follows that, to constitute actionable negligence there must not only be a causal connection between the negligence complained of and the injury suffered, but the injury must be by a natural and unbroken sequence, without intervening efficient causes, so that, but for the negligence of the defendant, the injury would not have occurred; that it must not only be a cause, but the proximate—that is, the direct and immediate efficient—cause of the injury.

In *Louisiana Mut. Ins. Co. v. Troced*, 74 27 L. R. A.

U. S. 7 Wall. 44, 19 L. ed. 65, *Justice Miller* said: "We have cited to us a general review of the doctrine of the proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." So that, after all, we can but return to the facts of this case, and say whether any negligence of the defendant in obstructing this passway, at the time and place, was the proximate cause of any alarm, fright, or injury arising or growing out of the misconduct of the passengers on said railway train at the time. This obstructing train was but a thing,—an inanimate thing, a physical fact, or force, or power,—barring the passing of plaintiff. It was not a person,—not a thing of life. The injury of which plaintiff complains was committed by persons, free moral agents, sentient beings, yet drunk as charged and offending the moral feelings of plaintiff by blasphemy and card playing and affrighting her by fighting, throwing rocks, and firing pistols. How can it be said that the railroad train was doing any or either of these things? It is not claimed that defendant's agents were employed in or participating in these wrongful acts. It should further be considered that these officers of the railway train were not civil officers. They had no right or power to arrest or imprison or determine the guilt or innocence of any particular individual, nor to inflict punishment on the guilty, if identified. Why, then, should it be said that they did themselves the things complained of, or that they suffered and permitted them to be done, to the injury of the plaintiffs, or so as to hold the railway company liable to plaintiffs for any damage sustained thereby? We recognize the fact that in certain limited cases these railway officers have a certain limited power or authority in the protection of the property of their employer, and in protecting from injury, violence, or annoyance the passengers on their trains, under their immediate custody and control, but beyond this we know of no such authority or power. If plaintiff's moral sensibilities were outraged, or if she was put in fear by the wrongful acts of others, her remedy is against those who injured her, and not against the railway company. As to the injury sustained by plaintiff Mrs. Shields by jumping out of her buggy, this is still further removed from any possible connection with the negligence of defendant in obstructing the passway. This negligence was not the proximate cause of either injury complained of. This was doubtless the view taken by the judge below in dismissing the petition of plaintiffs.

The judgment is affirmed.

NEW JERSEY SUPREME COURT.

STATE of New Jersey; TIDE WATER
PIPE CO., LIMITED, *Prosecutor*,

STATE BOARD OF ASSESSORS.

(.....N. J.)

1. "Partnership associations" organized under the Pennsylvania Statute of June 2, 1874 are invested with the essential characteristics of corporations, and may be taxed as corporations in this state.
2. Such an association doing business in New Jersey is taxable under our corporation tax act.
3. The tax imposed by our corporation tax act on foreign pipe-line companies engaged in the transportation of oil from points in Pennsylvania and New York to points in New Jersey is not an unconstitutional interference with interstate commerce.

(February 21, 1896.)

CERTIORARI to the State Board of Assessors to review an assessment which had been levied by them upon the property of prosecutor as a foreign corporation. *Affirmed.*

The facts are stated in the opinion.
Before Magle, Lippincott, and Dixon, JJ.
Mr. A. A. Clark for prosecutor.
Mr. William Y. Johnson for defendant.

Dixon, J., delivered the opinion of the court:

The Tide Water Pipe Company, Limited, having been taxed in the year 1888, under our Corporation Tax Act (Supp. Rev. p. 1016), has sued out this writ of certiorari to have the tax set aside. Its first contention is that it is not a corporation. It was organized under a statute of Pennsylvania entitled "An act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," approved June 2, 1874. Although associations formed under this act are called in Pennsylvania "joint-stock companies," and as such are probably included in the term "corporations" for the purposes of article 16 of the Pennsylvania Constitution, yet they do not seem to be regarded by the courts there as corporations, for in *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. 680, the supreme court speaking of the present prosecutor, said, "It is not a corporation, but a

limited partnership, organized under the Act of June 2, 1874." Even if this view be entertained in the domestic forum, it is not conclusive upon foreign jurisdictions; and, if the association is invested, by the laws under which it came into being, with the essential characteristics of a corporation, it may be treated as one in other states where it assumes to exercise corporate powers. *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 568, 19 L. ed. 1029. This association exists under legislative authority. It has a name of its own, under which it can hold, own, and convey real and personal property, transact business, sue and be sued. It can adopt and use a common seal. It can make by-laws and appoint officers for the management of its affairs. Its members are not responsible for its obligations, except to the extent of their unpaid subscriptions to its capital. Their interest in the association is personal estate, whatever be the nature of the company's property, and can be transferred to strangers without dissolving the association; and the association will continue during the term mentioned in its certificate, unless sooner dissolved by the vote of its members. *Purd. Dig.* p. 987. These powers comprise the substance of the general powers of corporations under the laws of Pennsylvania (*Purd. Dig.* p. 835), and also under the laws of New Jersey (*Rev. p.* 175). The association having come into this state to exercise its statutory privileges, it should be deemed a corporation within the meaning of our corporation tax act. *State v. Berry*, 52 N. J. L. 308.

The next objection to the tax is that the statute provides for a tax only against corporations doing business in this state, and the prosecutor, it is insisted, does no business in New Jersey, because its principal office is in Pennsylvania, and all the pecuniary proceeds of its business are received in Pennsylvania or New York. But, plainly, the company does business in New Jersey. Here it owns, maintains, and operates a pipe line across the state, a pumping station at Changewater, storage tanks, distributing apparatus, and a business office in Bayonne. All this it does as an artificial entity, distinct from the personal members who brought it into being, claiming the attributes which its Pennsylvania charter confers, and which, in our opinion, give it a corporate character. By taxing it as a corporation, the authorities of New Jersey acquiesce in this claim, but require the company to comply with the condition of such acquiescence. In this respect the company clearly comes within the intent and meaning of the statute. The last objection is that the imposition of the tax is an unconstitutional interference with interstate commerce. According to the facts agreed upon, the entire business of the company consists of the transportation of oil or petroleum from points in New York and Pennsylvania to points in New Jersey, and of matters incidental thereto, and consequently it seems to be merely interstate commerce. The tax

*Headnotes by DIXON, J.

NOTE.—For the general subject of limited partnership, see *notes* to *Jenning's Appeal* (Pa.) 2 L. R. A. 43; *Imperial Ref. Co. v. Wyman* (C. O. N. D. Ohio) 3 L. R. A. 503; *Fifth Ave. Bank v. Colgate* (N. Y.) 3 L. R. A. 712.

For distinction between joint-stock company and corporation, see *People v. Coleman* (N. Y.) 16 L. R. A. 183; *People v. Wemple* (N. Y.) 6 L. R. A. 308.

For exclusion of and restrictions upon foreign corporations, see *note* to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 229.

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See also 38 L. R. A. 225.

levied is designated by the statute as "an annual tax, for the use of the state, by way of a license for its corporate franchise," and consists of eight tenths of 1 per centum of "the gross amount of its receipts from the transportation of oil or petroleum through its pipes or in and by its tanks and cars in this state" during the year preceding the levy, the said gross amount being such proportion of its gross receipts for transportation of oil or petroleum over its whole line as the length of its line in this state bears to the length of its whole line. The question thus raised

is one to be decided according to the views of the Supreme Court of the United States. Those views have been recently expressed in a case which appears to be on all fours with the present case. I refer to *Maine v. Grand Trunk R. Co. of Canada*, 142 U. S. 217, 35 L. ed. 994, 8 Inters. Com. Rep. 807, which is so apposite for present purposes as to preclude the need or the utility of further investigation. Upon the authority of that decision I think the objection stated must be overruled.

The tax should be affirmed, with costs.

MINNESOTA SUPREME COURT.

Mary KROESSIN, *Resp't.*,

v.

Wilhelmina KELLER, *Appl't*.

(.....Minn.....)

"In this state a married woman cannot maintain an action simply in the nature of *crim. con.* against another woman.

(March 5, 1895.)

A PPEAL by defendant from an order of the District Court for Stearns County overruling a demurrer to the complaint in an action brought to recover damages for the alleged alienation of the affections of plaintiff's husband from her. *Reversed.*

The facts are stated in the opinion.

Messrs. Theodore Bruener and D. T. Calhoun, for appellant:

The law never has and does not now secure to wives power to bring this kind of action.

Doe v. Roe, 8 L. R. A. 833, 82 Me. 508; *Duffles v. Duffles*, 8 L. R. A. 420, 76 Wis. 374.

Mr. Geo. H. Reynolds, for respondent:

Under section 1, chapter 207, of the General Laws of Minnesota for 1887, the wife "shall receive the same protection of all her rights as a woman which her husband does as a man, and for any injury sustained to her reputation, person, property, or any natural right, she shall have the same right to appeal in her own name alone to a court of law or equity for redress or protection that her husband has to appear in his name alone."

A married woman can maintain an action for the alienation of her husband's affection.

Warren v. Warren, 14 L. R. A. 545, 89 Mich. 123; *Foot v. Card*, 6 L. R. A. 839, 58 Conn. 1; *Seaver v. Adams*, 66 N. H. —; *Westlake v. Westlake*, 84 Ohio St. 633, 32 Am. Rep. 397; *Bennett v. Bennett*, 6 L. R. A. 553, 116 N. Y. 584; *Jaynes v. Jaynes*, 39 Hun. 40; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; Bigelow, *Torts*, 3d ed. 153; *Haynes v. Nowlin*, 14 L. R. A. 787, 129 Ind. 581; *Cooley, Torts*, 2d ed. 267, note 2, *p. 223; *Holmes v. Holmes*, 133 Ind. 886; *Wal-*

dron v. Waldron, 45 Fed. Rep. 815; *Reed v. Reed*, 6 Ind. App. 817.

Collins, J., delivered the opinion of the court:

This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in *crim. con.* A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of her support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought *crim. con.*, and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in *Cooley on Torts*, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what

*Headnote by COLLINS, J.

NOTE.—The above case presents a novel question and makes an important distinction between it and cases of enticing away a husband, such as that of *Hodgkinson v. Hodgkinson* (Neb.) 27 L. R. A. 120, and cases mentioned in footnote thereto. 27 L. R. A.

the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 621, 83 Am. Rep. 897, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan and similar to our own, is *Warren v. Warren*, 89 Mich. 128, 14 L. R. A. 545. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price* (Iowa) 60 N. W. Rep. 202. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 83 Me. 503, 8 L. R. A. 838; *Duffles v. Duffles*, 76 Wis. 374, 8 L. R. A. 420. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert

her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from *crim. con.* It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—*Seaver v. Adams*, 66 N. H. —, and *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787,—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her and one similar to *crim. con.* We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of *crim. con.* Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with little hope of redress for themselves." We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. Laws 1887, chap. 207, § 1. We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarboen*, 48 Minn. 18.

Order reversed.

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota

v.

Myron R. KENT, *Pff. in Err.*

(..... N. Dak.)

- *1. When a person on trial for felony presents to the judge of the district in which the indictment is pending his affidavit stating that he cannot have an impartial trial by reason of the bias and prejudice of such judge, it is the absolute duty of such

*Headnotes by CORLISS, J.

NOTE.—The subject of the employment of private counsel to aid the prosecution in a criminal case is treated with unusual fullness in the present case. The same is true also of the subject of indictments against principals who employ agents in the commission of crimes.

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judge to call in another judge to try the case. For him to refuse to do so is error. The word "may" in the Statute (Comp. Laws, § 7312) must be construed as "must" under a familiar rule of construction.

2. It is not error for the trial judge to permit an attorney who is neither a resident nor a member of the bar of his state, but is a non-resident of this state, and who is employed solely by relatives of the person for whose murder the accused is being tried, to assist the prosecuting attorney on the trial, the latter having requested the judge that such counsel be permitted to aid him in the case.

3. Under section 7260, Compiled Laws, it is proper to charge as principal in the homicide one who counsels and directs a murder, and who therefore would have been an accessory before the fact at common law. The information or indictment may aver that he himself fired the

fatal shot which was in fact fired by the one he instigated to commit the crime.

4. **Great latitude should be allowed in the cross-examination of an accomplice.** Hence it was error for the court to refuse to allow counsel for the accused to ask the accomplice who had by his own testimony made out a case of murder against himself whether he expected to be hung.
5. **Held, further, that it was error to refuse to permit counsel for the accused to prove as bearing upon the credibility of the accomplice that no proceedings whatever had been instituted against him for the murder he had confessedly committed, although several months had elapsed since the crime was perpetrated.**
6. **In this state no person can be convicted on the uncorroborated testimony of an accomplice.** Comp. Laws, § 7312. The corroboration must come from some source independent of the accomplice. But it is not necessary that the corroborating evidence should be sufficient in itself to support a conviction. It is enough if it tends to connect the accused with the commission of the offense. It must, however, tend to connect the accused with the commission of the crime. Evidence corroborating the accomplice as to the fact that a crime has been committed or with respect to the fact that the accomplice is guilty thereof will not satisfy the requirements of the statute.
7. **Instructions given by the accused to the accomplice touching the story the latter was to tell in explanation of the killing may be sworn to by the accomplice, and it is not error for the court to receive in evidence a book in which such instructions were written down by the accomplice, when the latter swears he wrote them down as they were given to him by the accused and under his direction.**
8. **Nor was it error for the court to allow the accomplice, who was a Bohemian, to translate into English these written instructions which he himself had written in the book in the Bohemian dialect, he having testified to his ability to make the translation correctly.**

(March 20, 1895.)

ERROR to the District Court for Morton County to review a judgment convicting defendant of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. M. A. Hildreth, J. E. Campbell, and J. G. Ferrault, for plaintiff in error:

The motion for change of judges should have been granted.

State v. Henning, 8 S. Dak. 492; *Goldsbey v. State*, 18 Ind. 147; *Mershon v. State*, 44 Ind. 598; *Manly v. State*, 52 Ind. 215; *Duggins v. State*, 66 Ind. 850; *State v. Neuner*, 49 Conn. 283; *Ticknor v. McClelland*, 84 Ill. 471; *Kane v. Footh*, 70 Ill. 587; *Worcester County v. Schlesinger*, 16 Gray, 168; *Com. v. Smith*, 111 Mass. 407; *Rez v. Barlow*, Carth. 293; *Rez v. Derby*, Skin. 370; *Potter's Dwarrr Stat.* p. 220, and cases cited; *Endlich Interpretation of Statutes*, § 306, p. 416; *State v. Palmer* (S. Dak.) Jan. 13, 1894.

There was no authority for the courts permitting Mr. Frank M. Nye, of the bar of Hennepin county, Minn., and district attorney of that county, to appear in this case.

1 Bishop, *Crim. Proc.* §§ 988, *et seq.*; *Meister v. People*, 81 Mich. 99; *State v. Russell*, 83 Wis. 330.

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A conspiracy having been prima facie established by competent evidence, to commit a wrongful act, conduct of a co-defendant leading up to the commission of the act, is admissible; but subsequent conduct on the part of the co-defendant cannot bind the defendant, and is not admissible.

People v. Blecker, 2 Wheel. *Crim. Cas.* 256; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Moore*, 45 Cal. 19; *Com. v. Crowninshield*, 10 Pick. 497; *Greenl. Ev.* 14th ed. § 111.

Any statement made by Swedensky which was not a part of the criminal enterprise, and made after the homicide was consummated, was inadmissible, and it was error to admit it.

Stone v. People, 18 Hun, 265; 3 Rice, *Crim. Ev.* p. 903, and cases cited.

It did not appear that Swedensky was competent to translate the writing offered in evidence. He was not sworn as an interpreter; he was not shown competent; and he was directly interested.

The defendant's guilt must be established by evidence of his own acts.

People v. Thoms, 3 Park. *Crim. Rep.* 256; *People v. Courtney*, 28 Hun, 589; *Cuyler v. McCartney*, 40 N. Y. 231; *Ormsby v. People*, 53 N. Y. 472; *Stephen's Dig. Crim. Ev.* art. 39; 3 Rice, *Crim. Ev.* §§ 50, 70.

To make the acts and declarations of the alleged confederate competent evidence against Kent, it was necessary to prove prima facie that he, Kent, had conspired with Swedensky to murder the deceased.

1 *Greenl. Ev.* § 8; *People v. Bennett*, 49 N. Y. 144.

It was therefore error to permit him to testify as to the book and to translate it.

Ormsby v. People, *supra*; *McKenzie v. State*, 32 Tex. *Crim. Rep.* 563; *Brown v. United States*, 150 U. S. 93, 37 L. ed. 1010; *State v. Green*, 40 S. C. 323; *State v. Beauchleigh*, 92 Mo. 490; *Willey v. State*, 23 Tex. App. 408; *State v. Melrose*, 98 Mo. 594; *People v. Pavlik*, 3 N. Y. Supp. 232; *People v. Sharp*, 107 N. Y. 425; *Orook v. State*, 27 Tex. App. 198.

A confession by a co-conspirator after the crime is accomplished binds him but not his co-conspirators.

State v. Green, *supra*; *People v. White*, 62 Hun, 114; *Brown v. United States*, 150 U. S. 93, 37 L. ed. 1010.

When the defendant sought to show, by the clerk of the court, that no steps whatever had been taken looking to the prosecution of Swedensky, the court erred in shutting out the testimony and in refusing to allow the defendant to make such proof.

Abbott, Crim. Trial Brief, § 884, and cases cited; *People v. Whipple*, 9 Cow. 708; *People v. Langtree*, 64 Cal. 256.

Messrs. John F. Cowan, Atty-Gen., and H. G. Voss, for defendant in error:

The word "may" in its ordinary and grammatical sense is permissive merely.

State v. Holk County Court Justices, 39 Mo. 521; *Ex parte Banks*, 28 Ala. 28; *Ex parte Simonton*, 9 Port. (Ala.) 395, 33 Am. Dec. 320; *Gaines v. Harvin*, 19 Ala. 492; *Newburgh & C. Turnp. Road v. Miller*, 5 Johns. Ch. 113, 1 L. ed. 1027; *Kane v. Footh*, 70 Ill. 587.

In the case before us we do not perceive that

the public as such have any interest, nor is the duty imposed upon any officer, nor do the rights of the parties demand, that "may" shall be made to mean "shall" in order that the jury may be enabled to render a just verdict. It is discretionary with the court to give this direction to the jury.

Healy v. Dettra (Pa.) 7 Cent. Rep. 168; *Williams v. People*, 24 N. Y. 405; *Malcolm v. Rogers*, 5 Cow. 188, 15 Am. Dec. 464; *Re Bufalo & B. Pl. Road Co's Application v. Lancaster Highway Comm.* 10 How. Pr. 287; *Outler v. Howard*, 9 Wis. 809; *Kelley v. Milwaukee*, 18 Wis. 83; *Market Nat. Bank of New York v. Hogan*, 21 Wis. 818; *Hungerford v. Oushing*, 2 Wis. 897.

The charge of prejudice or bias is too loosely made to merit any consideration.

Burke v. Mayall, 10 Minn. 287; *People v. Williams*, 24 Cal. 81; *Whart. Crim. Pl. & Pr.* §§ 602-605.

The court permitted no error in permitting Mr. Frank M. Nye to appear to assist the state's attorney in the prosecution of this case.

Polin v. State, 14 Neb. 540; *Bradshaw v. State*, 17 Neb. 147; *State v. Crafton* (Iowa) Oct. 7, 1898; *State v. Shreve*, 81 Iowa, 615; *Com. v. Williams*, 2 Cush. 583; 5 Am. & Eng. Encyclop. Law, 718; *Gardner v. State*, 55 N. J. L. 17; *People v. Powell*, 11 L. R. A. 75, 87 Cal. 848.

A person charged in the indictment with the commission of a felony may be convicted upon proof and although absent when the crime was committed that he advised and procured its commission.

People v. Bliven, 112 N. Y. 79; *Campbell v. Com.* 84 Pa. 187; *State v. Hessian*, 58 Iowa, 68; *State v. Phelps* (S. Dak.) June 18, 1894; *People v. Roelle*, 78 Cal. 84; *People v. Outeraras*, 48 Cal. 19; *Yoe v. People*, 49 Ill. 410; *State v. Duncan*, 7 Wash. 386.

Corliss, J., delivered the opinion of the court:

The plaintiff in error was convicted of the crime of murder. The jury, under the statute, decided that he should suffer death. *Comp. Laws*, § 6449. Having been sentenced to be hung he obtained a writ of error and the whole case is now before us for review.

The first point we will consider relates to the information. In it the accused is charged as principal. The information alleges that he himself held and discharged the gun by which the victim was killed. It contains no averment that he counseled and directed any third person to commit the crime. The undisputed fact is that the murdered person, who was Kent's own wife, was shot and killed by another and that Kent's connection with the homicide, if any, was as the instigator of the accomplice. At the time the fatal shot was fired Kent was many miles away. At common law Kent would have been an accessory before the fact. He could not legally have been indicted as principal. Under such an indictment he could not at common law be convicted. This rule, however, was purely technical, and was limited in its scope to felonies. In cases of misdemeanors all the guilty persons were, at common law, principals, as well those who coun-

seled and directed the crime as those who personally committed the offense. 1 Bishop, *Crim. L.* §§ 681, 685, 686. There was a single exception to this rule in felonies in that there were no accessories in cases of high treason. An accessory after the fact could not be convicted in advance of the conviction of the principal and he could not be indicted as a principal. The specific facts showing his subsequent connection with the traitorous project must have been set forth in the indictment. 1 Bishop, *Crim. L.* § 701. In misdemeanors and high treason the pleader was always at liberty to charge the accessory as principal in the indictment. It was however, entirely proper to set forth that the accused had counseled or directed the commission of the crime by another; but this was not necessary. As the law regarded all who were implicated as principals, they might all be proceeded against as principals. 1 Bishop, *Crim. L.* §§ 681, 685. This distinction between misdemeanors and treasons on the one hand and felonies on the other with respect to the allegations of the indictment and the necessity of first trying the actual principal never had any substantial foundation in principle. 1 Bishop, *Crim. L.* § 678. There is therefore no reason why we should hesitate giving to our statute to which we will now refer a construction which will place felonies in the same category with misdemeanors and treason as far as these questions are concerned. The statute provides that, "the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, and no additional facts need be alleged in any indictment against such an accessory that are required in an indictment against his principal." *Comp. Laws*, § 7260. The language of this statute is too explicit to leave room for doubt as to the intent of the law-making power. The purpose it was framed and passed to accomplish was the abrogation of this purely arbitrary distinction between felonies and other offenses, and the placing of all criminal as well as all civil pleading under the same general rule, which, regarding the act of the agent as the act of the principal himself, permits the averment to be made against him that he himself did what in fact was done by his agent for him. See 1 Bishop, *Crim. L.* § 675. The authorities are numerous which hold that under this same or similar statutes the one who would at common law be a mere accessory before the fact may be indicted as principal,—as though he had himself fired the shot, or administered the poison or struck the fatal blow. Some of the statutes which have been so construed are by no means as explicit in their language as section 7260. *Kronck v. People*, 184 Ill. 139, 8 L. R. A. 887; *People v. Bliven*, 112 N. Y. 79; *Baxter v. People*, 8 Ill. 868; *Dempsey v. People*, 47 Ill. 838; *Spies v. Pe-*

ple, 122 Ill. 1; *People v. Outcortas*, 48 Cal. 19; *State v. Heenan*, 58 Iowa, 68; *State v. Duncan*, 7 Wash. 336; *People v. Roselle*, 78 Cal. 84; *Griffith v. State*, 90 Ala. 583. See also *State v. Phelps* (S. Dak.) 59 N. W. Rep. 471.

This section it is urged is unconstitutional. We discover no provision of our constitution which it violates. Our organic law does not require that the accused shall be informed of the nature and cause of the accusation. The Federal Constitution does (article 6 of Amendment to Constitution), but this provision of the Constitution of the United States does not relate to proceedings in the state courts. Cooley, Const. Lim. 5th ed. p. 26. We are referred to sections 7241 and 7242, Compiled Laws, as being repugnant to 7260. If they were repugnant they would to that extent have to yield to the latter section. But we are unable to find in these two sections anything which forbids the indicting of an accessory as if he were principal. Under them it would be proper to charge an accessory before the fact in the case of a misdemeanor as though he were principal had section 7260 never been enacted. This latter section merely places felonies in the same class. Section 7241 declares that the indictment must contain "a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended."

What are the facts constituting the offense? They are the shooting of the deceased with a gun with the premeditated design to effect her death and the killing of her by such instrumentality used with such a motive. Counseling and directing this criminal enterprise is not a part of the crime itself. By proof of such counseling and direction the plaintiff in error is so connected with the criminal act that in contemplation of law he himself performed it. But the crime itself is entirely distinct from his connection with it. The killing of Mrs. Kent would have been murder if Kent had never participated in it at all. He is charged with having himself performed these acts, and this charge can be made good by evidence that he counseled and directed the murder because such conduct on his part makes him in the eye of the law a participant in the physical act of taking the human life, the same as if he had himself fired the fatal shot. The fact that he counsels and directs is an evidential fact whose utmost scope is to establish that the accused was a principal in the crime. It in no manner tends to prove the crime itself. Evidential facts should never be pleaded as a general rule. It is certainly not necessary to plead them. All the pleader need do is to aver the ultimate facts which the evidential fact is proved to establish. That ultimate fact in this case was the connection of the accused with this murder as a principal in the crime. That was pleaded, and could be proved by evidence that he fired the shot or hired an assassin to fire it. Our statute imposes upon the criminal pleader no more onerous duty in framing an indictment than did the common law. And yet

with respect to treason and misdemeanors it has always been regarded as proper pleading to aver that the accessory before the fact committed the crime himself. Such form of pleading has been universally considered as amply protecting the accused from surprise on the trial. Indeed as we have seen there was no reason why felonies should not have been included in the general rule. Our statute merely abrogates a distinction that had no foundation in reason. The argument that the accused will not be fairly apprised of the charge against him has been considered of no force with respect to treason and misdemeanors for centuries; and indeed as is asserted by the court in *People v. Biven*, 112 N. Y. 79, and is satisfactorily established by the reasoning of the court in *State v. Duncan*, 7 Wash. 336, the argument is more "fanciful than real." We therefore hold that it was proper to charge Kent in the information as principal. We now approach a very interesting question. The state's attorney was assisted on the trial by Mr. Nye, a citizen of Minnesota and a member of the bar of that state. He was retained by the brothers of the murdered woman to assist in the prosecution. He stated to the trial judge that, while he had been paid nothing by his clients and had had no talk with them on the subject of fees, he presumed that they would compensate him for his services in the case. He was not employed by the county of Morton in which the crime was committed or by the state's attorney of that county to assist in the prosecution; but the latter stated in open court that he desired to have Mr. Nye assist him for the reason that he, the state's attorney, was unable because of physical ailments to stand the labor and strain of the case without aid. Mr. Nye was allowed, despite the objection of the counsel for the accused, to assist in the trial of the case, taking a very active part therein. Counsel for the accused insists that this was prejudicial error. There are two grounds on which he assails the action of the trial judge in permitting Mr. Nye to participate in the trial,—first that he was employed by private persons and not by the public; second, that he was neither a resident nor a member of the bar of this state. We will discuss these two points in the order in which they are stated. In England criminal prosecutions were generally carried on by individuals interested in the punishment of the accused and not by the public. The private prosecutor employed his own counsel, had the indictment found and the case laid before the grand jury and took charge of the trial before the petit jury. 1 Chitty, Crim. L. 9, 825. This system does not prevail in this state. Here in each court there is a public prosecutor called the state's attorney for that county. It is his duty to prosecute all criminal offenses triable in that county. He is paid a salary for that purpose out of the public funds. He is not allowed to receive any fee or reward from or on behalf of any prosecutor or any individual for services in any prosecution or business to which it is his official duty to attend; nor be concerned as attorney or counsel for either party other than for the

state or the county in any civil action depending on the same state of facts upon which any criminal prosecution commenced but undetermined shall depend. Comp. Laws, §§ 427-433. We do not think that this change in policy indicates a purpose to exclude the counsel for interested persons from all participation in the prosecution. Such counsel cannot initiate the proceedings or conduct them. The control of criminal prosecution has been taken from private hands and transferred to public functionaries, chosen for that express purpose. But there is nothing in the statute to justify the conclusion that counsel employed by interested persons may not assist the public prosecutor in case he and the trial judge deem this course proper. The fact that the state's attorney who controls criminal cases is not allowed to receive any compensation from private prosecutors for the prosecution of a criminal case does not warrant the conclusion that no counsel paid by private persons shall be permitted to assist in the trial of such a case. It is one thing to have the prosecution entirely in the hands of one who may be influenced because of a retainer by the strong desire of his client to secure a conviction, but it is an entirely different thing to allow such an interested counsel to aid in the prosecution one who stands affected by no other motive than that of securing the punishment of guilt, and who has absolute control over the case. The law has removed criminal prosecutions from the control of private interests; but it has not excluded such interests from all participation therein. If no error is committed on the trial we fail to see how an accused can be prejudiced by the fact that those personally interested have employed private counsel to aid the public prosecutor. Certainly he should not be heard to complain of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into errors. The best mode of reaching the truth is by the strenuous contentions of opposing counsel each animated by the conviction that the case that he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side and none be tolerated on the other? The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and jury, there would be an end to the conviction of criminals. Zeal in the prosecution of criminal cases is therefore to be commended and not condemned. It is the zeal of counsel in the court-room alone of which the accused can complain. No decision can be found which questions the right of the prosecuting officer to consult with and receive all manner of aid even during the trial from the counsel for private parties outside of the court-room. And if such zeal in the court-room on the

trial does not result in error what conceivable difference can it make whether such assistance was employed by the public or by private persons? May not cross-examination of witnesses be conducted and arguments to court and jury be made by one who is as much convinced of the guilt of the accused as his counsel is persuaded of his innocence? The manner of conducting the cases in the court-room cannot work legal prejudice to the accused without resulting in error for which the conviction will be set aside. It is therefore of no legal importance what inspires the zeal of the attorney who assists in the trial. Whatever is done to the injury of the prisoner by private counsel for which he can have no redress is done out of court; for instance by concealing or fabricating evidence. At just this point where the zeal of counsel employed by private parties may be deadly to the accused, no kind of safeguard is or can be thrown around him. The prosecuting officer may consult with and be entirely governed by the advice of such private counsel and yet the accused has no remedy if the private counsel does not participate in the trial. If he does so participate his zeal works no more prejudice to the accused than the zeal of any other equally able counsel who may be employed by the public. The cases agree that an assistant hired by the public may engage in the trial without giving the prisoner any legal cause for complaint. Of course the latter may think he is prejudiced because of being compelled to confront an exceptionally able and experienced prosecutor; but this furnishes no legal ground for overthrowing the conviction. The question can be placed in a clear light by the following statement of it. Can a defendant in a criminal case who is obliged to submit to the zeal of an assistant prosecutor employed by the public insist that the zeal of an assistant counsel employed by interested parties shall not be displayed against him although it results in no error on the part of the prosecution in the management of the case? We think there is only one answer to this question and that is against the right of the accused to complain in either case so long as no error has been committed by the assistant on the trial. The rule is different, however, in Michigan and Massachusetts under statutes very similar to ours. *Meister v. People*, 31 Mich. 99; *Sneed v. People*, 88 Mich. 251; *People v. Hurst*, 41 Mich. 338; *People v. Bemis*, 51 Mich. 422; *Com. v. Gibbs*, 4 Gray, 146.

The reasoning of *Judge Campbell* in *Meister v. People*, while very plausible, does not convince us that there should be interpolated into the statute an implied prohibition against counsel employed by interested parties assisting in the prosecution. We are unable to discover in the statute any other policy than that of transferring the control of criminal prosecutions from private to public hands. We think that the control of the public prosecutor over the proceedings is a sufficient guaranty that the accused will not be made the innocent victim of over-zealous prosecution by private persons. While aware that *Judge Campbell* has made out a strong case in support of his view, we cannot discover

in the legislature of this state the evidence of a policy hostile to the quite general practice of allowing the prosecuting officer to be assisted by counsel retained by those having a personal interest in the prosecution distinct from that of the general public. In support of our ruling on this point we cite the following cases: *State v. Helm* (Iowa) 61 N. W. Rep. 846; *Keyes v. State*, 123 Ind. 537; *Polin v. State*, 14 Neb. 540; *State v. Bartlett*, 55 Me. 220; *State v. Fitzgerald*, 49 Iowa, 260, 81 Am. Rep. 148; *State v. Wilson*, 24 Kan. 189; *Burkhard v. State*, 18 Tex. App. 599-618; *Gardner v. State*, 55 N. J. L. 17; *Bennyfield v. Com.* 18 Ky. L. Rep. 446; *People v. Tidwell*, 4 Utah, 506; 1 Bishop, Crim. Proc. § 281; Whart. Crim. Pl. & Pr. § 555. See also *People v. Powell*, 87 Cal. 848, 11 L. R. A. 75; *Jackson v. State*, 81 Wis. 127; *United States v. Hanway*, 2 Wall. Jr. 189. See particularly the reasoning of Judge Elliott in *Keyes v. State*, 123 Ind. 537, and Judge Brewer in *State v. Wilson*, 24 Kan. 189, 86 Am. Rep. 257.

The decision of the Wisconsin supreme court in *Biemel v. State*, 71 Wis. 444, sustaining the Michigan and Massachusetts doctrine, appears to be based upon legislation in that state authorizing the trial judge to appoint an assistant whenever he thinks the public interests require it and providing that such assistant shall be paid out of the public funds. See pages 444 and 445. The case of *Lawrence v. State*, 50 Wis. 507, is distinguished in the *Biemel Case* on the ground that it was decided before the new statute was passed giving the trial judge power to appoint an assistant to be paid out of the public treasury. The *Lawrence Case* is more in harmony with than opposed to our views. We hold that it was not error to assist in the prosecution at the request of the state's attorney because of his having been employed by the brothers of the murdered woman. Does the fact that he was not a member of the bar of this state render him an improper person to participate in criminal prosecution? This precise question was decided in favor of the contention of counsel for the accused in Wisconsin. *State v. Russell*, 88 Wis. 330. But the decision was founded on the wording of the statute of that state authorizing the trial judge to appoint counsel to assist in the prosecution. The court held that the word "counsel" meant a member of the bar of that state. We have no such statute in this state. On the contrary our legislation seems to voice a different policy. The act which regulates the admission of attorneys to practice provides that, "any member of the bar of another state actually engaged in any case or matter pending in any court of this state may be permitted by such court to appear in and conduct such case or matter while retaining his residence in another state without being subject to the foregoing provisions of this act." Laws 1891, chap. 1199, § 7. Our legislature so far from being inimical to the employment of nonresident counsel to assist in criminal prosecutions seems to place them on the same footing in this respect as resident attorneys. The statute in express 27 L. R. A.

terms dispenses with the necessity of the foreign counsel taking any oath. Therefore one of the main arguments against allowing a foreign attorney to assist the prosecution in a criminal trial, put forth by the court in the *Russell Case*, does not have any application in this state with its policy as shaped by legislation, of permitting foreign counsel to try causes without taking any oath. Whether such counsel does or does not take an oath is practically of little moment to the accused. Every attorney of high character is acting under the restraint of a more sacred oath than that which is formally administered to him in court,—the oath which through his whole career he constantly administers to himself in secret before the solemn tribunal of his own conscience. A mere formal, lip-uttered oath will never control the conduct unless it is the echo of an oath taken within. The fact that the foreign attorney is not amenable to the court before which he appears, as is a resident attorney, cannot prejudice the rights of the accused. The trial judge can always at any stage of the prosecution refuse to permit him longer to remain in the case; and if the judge considers that his conduct has been prejudicial to the accused, he can always grant the accused a new trial. It is safe to leave these matters to the sound judgment of an impartial magistrate.

We come now to what we regard as a fatal error. Section 7812 of the Compiled Laws provides as follows: "A criminal action, prosecuted by indictment, may, at any time before trial is begun, on the application of the defendant, be removed from the court in which it is pending, if the offense charged in the indictment be punishable with death, or imprisonment in the territorial prison, whenever it shall appear to the satisfaction of the court by affidavits, or if the court should so order by other testimony, that a fair and impartial trial cannot be had in such county or subdivision, in which case the court may order the person accused to be tried in some near or adjoining county, in any district where a fair and impartial trial can be had; but the party accused shall be entitled to a removal of the action but once, and no more, and if the accused shall make an affidavit that he cannot have an impartial trial, by reason of the bias or prejudice of the presiding judge of the district court where the indictment is pending, the judge of such court may call any other judge of a district court to preside at said trial, and do any other act with reference thereto, as though he was presiding judge of said district court."

On the very threshold of the trial the counsel for the accused presented to the court an affidavit sworn to by the accused stating that he could not have a fair and impartial trial by reason of the bias, prejudice, and partiality of Judge Winchester, who was the judge of the district in which the information was pending; and thereupon counsel for the accused moved under the above-quoted section of the statute that Judge Winchester call in another judge of the district court to preside at the trial. This motion was de-

nied. In so doing the learned trial court erred. The error is fundamental and because of it we are obliged to reverse the conviction. It is true that the statute declares that the trial judge "may" call in another judge. But permissive language is often construed as mandatory. If a comprehensive survey of a statute leads to the conclusion that the legislative purpose was to confer authority on one for the benefit of another, then the donee of such power has no discretion about exercising it. Said *Chief Justice* Dixon in *Outler v. Howard*, 9 Wis. 309, at page 312: "The cases fully establish the doctrine that when public corporations or officers are authorized to perform an act for others which benefits them, then the corporations or officers are bound to perform the act. The power is given to them not for their own but for the benefit of those in whose behalf they are called upon to act; and such is presumed to be the legislative intent. In such cases they have a claim *de jure* to the exercise of the power." Mr. Sutherland in his work on Statutory Construction at page 597 says that permissive words are "peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice or which concerns the public interest or the rights of third persons." In *Rock Island County Supra. v. United States*, 71 U. S. 4 Wall. 435, 18 L. ed. 419, the court says at pages 446 and 447: "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty." In the light of the rule which the foregoing authorities recognize,—a rule thoroughly settled,—we will proceed to construe the statute in question. For whose benefit was it enacted? Obviously for the sole benefit of those accused of crime that they might be protected against even the unconscious leaning of a biased judge in favor of the prosecution. By expressions of countenance, by tone of voice, by gesture—in a multitude of ways, a prejudiced judge may unwittingly suffer his feeling against the prisoner to so express itself in conduct that the bias of the magistrate passes into the minds of the jury thus depriving the accused of a fair trial before an impartial tribunal. When his prejudice exists the law intends that another judge shall try the case. It cannot admit of doubt that the act we are interpreting was passed to give the prisoner the right to insist on a trial before a different judge when the judge of the district in

which the indictment is pending is biased. From this proposition there flows the corollary that on the presentation of an affidavit stating such bias the right of the accused to have another judge called in to try the case is absolute. If not, then the judge who is so attacked for prejudice sits in judgment on the question of his own bias. It is true that no property interests of his own are involved. Neither is his life or his liberty at stake. But the mind that cannot decide that it is biased without at the same time admitting by such decision that it was willing in that condition to enter on the trial of the man against whom the prejudice is entertained without disclosing such bias and that it would have carried on such trial to its close conscious that it was not impartial, a mind placed in a position where a decision against its own freedom from bias will bring it such humiliation, is not that free, calm, disinterested mind with respect to that question which the law requires and the honest administration of justice demands. This consideration renders it impossible for us to impute to the legislature the purpose to permit the judge so assailed to pass upon his own bias. The language of the statute confirms our view that he is not to try this question. This section contains two distinct provisions: one relating to a change of venue on the ground that a fair and impartial trial cannot be had in the county in which the criminal action is pending; and the other referring to a change of judges because of the bias or prejudice of the judge of the court in which the indictment is pending. The question whether a fair and impartial trial cannot be had in the county in which the action is triable must be settled by the judge. It must be made to appear to his satisfaction by affidavit that a fair and impartial trial cannot be had in that county. Having no interest in the question the law very properly leaves it to him for decision. That he may decide the statute provides that affidavits may be used before him to prove or disprove this fact. The judge in his discretion may hear testimony on this subject. But when we come to that branch of the statute which relates to his own bias nothing is said of his being satisfied of it; nor is there any provision made for the use on the application for a change of judges of any other affidavit than that of the accused stating that by reason of the bias and prejudice of the judge he cannot have an impartial trial. Neither does the statute call for or permit the use of any other evidence than such affidavit. These considerations make it clear that the judge is not to try the question of his own bias. The accused need not prove it to the satisfaction of the judge. He is not even allowed to introduce evidence on that point aside from his own affidavit. Although he might have a score of witnesses to whom the judge had stated his prejudice, he, the prisoner, is powerless to use, on this application, the testimony of one of them. These observations lead us inevitably to the following conclusions touching the rights under this statute of a defendant in a criminal action. When the judge of the court in which

the indictment is pending is biased, the defendant may insist that another judge shall be called in to try the case. The judge so attacked cannot try the question of his own bias. Unless therefore the right to a change of judges is absolute on making the statutory affidavit, the protection of this salutary law is lost to the defendant, and its enactment was an idle deed. The nature of the power vested in the trial judge to call in another judge to try the cause; the circumstances under which it is to be exercised; the fact that its exercise is beneficial to one accused of crime; the question that no one shall decide a question in which he is interested; and finally the very language of the statute itself, aside from the word "may,"—these all unite to bring this law within the scope of that established rule which transmutes the permissive word "may" into the imperative word "must." The supreme court of South Dakota has reached the same conclusion under the same statute. *State v. Henning*, 8 S. Dak. 492; *State v. Palmer* (S. Dak.) 57 N. W. Rep. 490. A single sentence in the opinion of the court in *Hungerford v. Cushing*, 2 Wis. 397, will suffice to show that that decision turned on the language of a statute radically different from the one we are construing. Said the court: "It will be seen by a reference to the statute that the prejudice of the judge is classified with the other facts of the existence of some one of which the judge must be satisfied in order to justify him in changing the venue." We might pause here as our conclusion on this point leads us to a reversal. But we deem it our duty to settle certain questions which are sure to arise on another trial and some of which we are of opinion were erroneously decided by the trial court. The murder that was committed was so atrocious in its character that it is to be hoped that the accused, if again found guilty of instigating it, will not be in position to secure a third trial because of errors occurring on a second trial.

On the trial the theory of the prosecution was that the murdered woman was slain in pursuance of a conspiracy in which her husband, the accused, figured as the originator of the criminal scheme and the instigator of the homicide, and a Bohemian named Swedensky played the part of a venal tool. This theory the testimony of the accomplice fully supported. He told the story of this conspiracy from the time that the accused first unfolded it to him, about a month before the murder, to its horrible consummation in the death of the unsuspecting wife. He testified that when Kent first broached the subject, he refused to aid him because of fear; but that Kent was persistent in his importunities constantly dangling before the eyes of the Bohemian the wages he could earn by executing for Kent his fell purpose. The price Swedensky was to be paid for this deed, was, according to his testimony, the sum of \$18,000. Finally about four days before the fatal shot was fired, Swedensky says that he yielded being assured by Kent that there was no danger; that he could claim that the shooting was accidental and that after being in

jail for a few days he would be liberated. To give the semblance of truth to his story that the killing was unintentional he testified in substance that Kent told him what course to pursue. He was to awaken Mrs. Kent in the night and tell her that there was some one outside the house looking in the window; Kent stated to him that the boy (the son of the accused and the murdered woman, about ten years of age) would think that he saw some one around the house; that he would see some one in every window, and that he would be Swedensky's best witness that his story about burglars was true. He further in substance instructed Swedensky that Mrs. Kent in going about the house from room to room endeavoring to see some one outdoors, should get in a certain position he (Swedensky) was to shoot her in the head and be sure to kill her. He was to tell people that there were burglars around the house and that Mrs. Kent had told him to get the gun and shoot through the window; that the gun went off accidentally and in that way he shot her. Swedensky further testified that Kent dictated to him a story to tell before the coroner's jury; that he wrote it down in a book as Kent told him what to write. On the trial this book was offered in evidence by the state and was received in evidence despite the objection of counsel for the accused. In this there was no error. The book contained nothing connecting Kent with the homicide. It was not an unsworn narrative of past events implicating the accused. Behind every word of it was the oath of the accomplice. His testimony was that what he had set down in that book fell from the lips of the prisoner, and that he wrote it there at his dictation. Certainly what Kent said to him he might testify to. Had nothing been written in the book and had Swedensky been able to remember the story Kent told him to tell, his testimony narrating that story would have been competent. It cannot be any the less competent to prove what Kent said to Swedensky by a written memorandum of it so long as the latter swears that the memorandum does in fact set forth the explanation of the killing as dictated to him by Kent. The counsel for the accused treats the book as containing a mere declaration by Swedensky, unsupported by his oath; whereas in fact every word which this book contains has the oath of the witness behind it. He swears that the story written in this book was written there before the homicide and is the very story which Kent dictated to him to write. In allowing this book to be received in evidence in connection with Swedensky's testimony the court merely permitted the state to prove by the latter just what Kent said to him in connection with and in furtherance of the criminal scheme. If the fact that this story was written down by Swedensky before the murder tends to corroborate his testimony it will not be because of his declaration of fact that he is corroborated but for the reason that it is improbable that he could write this story without the aid of Kent. If for instance it contains facts which Swedensky could not have known in advance without receiving informa-

tion of them from Kent, then the fact that he knew such matters before the murder is a very pertinent fact and one that it is entirely competent to prove. One way of proving it is by showing that the witness had written down such facts before the murder.

If, on the other hand, the story is one which Swedensky could have fabricated himself without the aid of Kent, then the mere fact that it was reduced to writing will not prejudice him any more than proving it by the lips of Swedensky without any writing. The jury may regard it as a fabrication of his own and may look upon his evidence that Kent told him to write it, as perjury. If the fact that Swedensky wrote this before the murder lends any support to his testimony touching the alleged conspiracy to kill the woman and Kent's connection therewith, it is not because of any unsworn declaration of the accomplice but because the circumstances of the case make it improbable that he could have known of facts stated therein unless Kent had told him of them. We fully agree with counsel for the accused that the accomplice cannot corroborate himself by his own words or deeds. The corroboration to satisfy the statute must come from some independent source and must tend to connect the accused with the crime. Mere corroboration as to immaterial matters testified to by the accomplice, or as to the fact that a crime had been committed or as to the connection of the accomplice therewith, or as to all these combined, will not suffice. The rule is very accurately stated in *People v. Platt*, 100 N. Y. 590, 58 Am. Rep. 236: "There must be some fact, too, independently altogether to the evidence of the accomplice which taken by itself leads to the inference not only that a crime has been committed but that the prisoner is implicated therein." It is not necessary that such corroborating evidence be sufficient of itself to warrant a conviction. The requirements of the statute making it necessary to corroborate the testimony of an accomplice are met if the evidence tends to connect the prisoner with the commission of the crime. Said the court in *People v. Everhardt*, 104 N. Y. 591: "The law is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime so that the conviction will not rest entirely upon the evidence of the accomplice." See *People v. Cloonan*, 50 Cal. 449; *State v. Van Winkle*, 80 Iowa, 15; *State v. Hicks* (S. Dak.) 60 N. W. Rep. 66, and cases cited; *State v. Russell* (Iowa) 58 N. W. Rep. 890; *State v. Townsend*, 19 Or. 213.

The language of our statute is so plain that no room is left for interpretation. It provides that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense, or the circumstances thereof." Comp. Laws, § 7884. It was objected that the accomplice was allowed to translate the story he had himself written in

Bohemian in this book at the dictation of Kent, as he claims.

His evidence shows him to have been qualified by his knowledge of the English language to make the translation. The translation itself confirms his testimony in this respect. It was originally given to him in English and by him set down in Bohemian. Certainly he is qualified to translate it back into English. The fact that he was an accomplice might affect the weight to be given to his translation but the danger of deception from a false translation of a writing is slight when compared with the danger of deception from allowing an interested person to act as interpreter of words spoken on the witness stand in a foreign tongue which leave behind them no fixed record by which the untruth of the interpreter's rendering of the testimony of the witness can be determined. And yet it has been held not to be error to permit a person sustaining quite close relations with one side of the cause to interpret for a witness who was sworn on the same side of the cause. *Swift v. Applebone*, 23 Mich. 252. See also *Chicago & A. R. Co. v. Sherk*, 181 Ill. 288; *Com. v. Kepper*, 114 Mass. 278. The defense had a right to prove that Swedensky's translation was not correct. Any qualified person might have been called for that purpose.

On the cross-examination of the accomplice Swedensky counsel for the accused asked him whether he expected to be hung for his crime. This question being objected to by counsel for the state the court sustained the objection. In this the court committed error. One who is on trial for his life should be allowed great latitude in the cross-examination of the witness who by his own confession can have no hope of escaping the death punishment save through the indulgence of those who under the law have his life in their hands. An accomplice in such a case in implicating another with him in guilt is under the influence of the most powerful motive that can shape human conduct. For this reason the law looks with such distrust on his testimony that as a general rule it will not suffer another to be convicted on his evidence in the absence of corroboration. True the principle has often been stated that one may be convicted on the uncorroborated testimony of an accomplice. But this principle has been regarded with such disfavor that even in the absence of a statute courts have generally cautioned juries against convicting where the story of the accomplice stood unsupported by other evidence. Sometimes they have advised the jury to acquit; and in some instances they have directed an acquittal. After conviction new trials have been granted because the accomplice was uncorroborated. The practice has not been uniform, but the whole trend of it shows unmistakably that the law regards the testimony of the accomplice with distrust. See 1 Am. & Eng. Encyclop. Law, p. 76, and *note 2*; *note to Com. v. Price*, 71 Am. Dec. 671; *Com. v. Holmes*, 127 Mass. 424, 84 Am. Rep. 891. In many jurisdictions because of statutory enactments the accomplice must be cor-

roborated by evidence that tends to connect the accused with the crime. Testimony coming from such an untrustworthy source should be thoroughly sifted. The rule is to allow great latitude in the cross-examination of the accomplice. Whart. Crim. Ev. § 444; 1 Am. & Eng. Encyclop. Law, p. 78; *Lee v. State*, 21 Ohio St. 151. Certainly he who is on trial for life may inquire of the accomplice who has sworn against him whether the testimony is not given with the hope of escaping death. The only object of proving that the accomplice has or has not been promised total or partial immunity is to strengthen or weaken his credibility by showing that his testimony is given possibly without hope or that in giving it he may be influenced by an expectation of total or partial exemption from punishment as a reward for such testimony. Even if no express promise of immunity is made, the accomplice may be led to believe by something in the conduct or speech or tone of voice of some one connected with the prosecution that nevertheless his testimony involving another in guilt with him will earn him some consideration at the hands of those who control his fate. We are therefore clear that even when all the positive evidence is against the proposition that any express promise has been made, it is competent to ask the accomplice as affecting his credibility whether he expects to have full punishment meted out to him. Even when the accomplice has nothing in the way of word or conduct from any one connected with the prosecution on which to build an assurance he may have some expectation, leading all the way from a faint glimmer of hope to confident belief, that if his testimony results in the conviction of another he himself will reap some reward. One whose life he is swearing away has a right to discover if he can by the admission of the accomplice himself that his testimony is given under a hope of life which he cannot entertain unless he looks for indulgence. The accused has a right to have such fact laid before the jury on the question of the accomplice's credibility. Whether he is justified in cherishing such hope is immaterial. The only evidence in the case that Swedensky had not been promised immunity was his own. Counsel for the accused offered to prove that no complaint had ever been made against him for this murder; that he had had no preliminary examination on such charge and that no information had been filed against him to put him on trial for this offense. This evidence was excluded. In this the court erred. It bore directly on the question whether he was not testifying under hope. Without any express promise he might infer from the fact that no proceedings had been taken against him, but that the whole strength of the prosecution was directed against Kent alone, that he was to be the recipient of some favor. So long a period had elapsed at the time of the trial since Swedensky had confessed, three months, that the failure to proceed against him might cause him to expect indulgence. In ruling out this evidence the trial judge made a state-

ment that must have been prejudicial to the accused. He said: "It is evident from the record in this case that the witness Swedensky is a criminal and it would be the duty of the judge of this court to see that he is prosecuted." Such a remark might well lead a jury to believe that they were to look upon the testimony of Swedensky as the testimony of a man swearing without hope; and therefore not to be distrusted as the evidence of a person who expected to gain some personal advantage by giving it. At the time this remark was made by the court Swedensky had already testified. In weighing his credibility the jury were to consider, not the fact that the court said he would be punished at a time when the remark could have no effect on his testimony, but the actual hope which he himself entertained at the time he gave his testimony. The prejudicial effect of this error must have been augmented by what the trial judge stated to the jury on this subject in his charge. He said: "The witness Swedensky is not on trial and the fact that he is or is not on trial should not influence you in the least degree in passing upon the guilt or innocence of this defendant whom you have in charge." The case of *People v. Hare* (Mich.) 7 Crim. L. Mag. 196, is a direct authority on the point that excluding his evidence was error.

The accused interposed a challenge to the panel of the special jury summoned by the sheriff under a special venire issued by the court after the regular panel had been exhausted. The ground of the challenge was the bias of the sheriff. It was made under Comp. Laws, section 7847, which provides as follows: "When the panel is formed from persons whose names are not drawn as jurors a challenge may be taken to the panel on account of any bias of the officer who summoned them which would be good ground of challenge to a juror." "Such challenge must be made in the same form and determined in the same manner as if made to a juror." The test of the sheriff's qualification to summon such special jury is whether he would be qualified to sit as a juror in the case. It has been so held in California under the same statute. *People v. Coyodo*, 40 Cal. 592; *People v. Welch*, 49 Cal. 174. On his examination under this challenge the sheriff testified that he had expressed to others his opinion that the accused was guilty and it is apparent that this opinion was very strong. It would seem that it was derived from statements made to him by the accomplice Swedensky. If so, it is very doubtful whether the sheriff would have been competent as a juror in the case, notwithstanding the fact that he testified that if summoned as a juror he would give the accused a fair and impartial trial according to the law and the evidence. *Greenfield v. People*, 74 N. Y. 277; *Jackson v. Com.* 23 Gratt. 919; *Armistead v. Com.* 11 Leigh, 657, 37 Am. Dec. 638; *Black v. State*, 42 Tex. 377; *Goodwin v. Blachley*, 4 Ind. 488; *Frazier v. State*, 23 Ohio St. 551; *Woods v. State*, 134 Ind. 85; *People v. Wells*, 100 Cal. 227; *Walker v. State*, 102 Ind. 502; Comp. Laws, § 7861.

It is, however, unnecessary for us to settle this question as the person who was sheriff at the time this case was tried is no longer sheriff of Morton county.

The judgment and order are reversed, and a new trial is ordered.

All concur.

Messena B. ERSKINE, *Appt.*,

o.

NELSON COUNTY, *Resp.*

(.....N. Dak.....)

*To legalize void evidences of municipal indebtedness, the purpose to validate them must be clearly expressed by the legislature, or be deducible from the statute by necessary implication. The statute referred to in the opinion examined, and held to so far validate void county warrants theretofore issued that the plea of *ultra vires* could not thereafter be interposed as a defense thereto.

(Corliss, J., *dissent.*)

(December 2, 1906.)

APPEAL by plaintiff from a judgment of the District Court for Nelson County denying him a portion of the relief demanded in an action brought to enforce payment of certain county warrants. *Modified.*

The facts are stated in the opinion.

*Headnotes by BARTHOLOMEW, CL. J.

NOTE.—*Statutes legalizing invalid municipal contracts.*

The great majority of the cases hold that the legislature has power to validate contracts which a municipal corporation has attempted to make but which are invalid for lack of power or informality in its execution. Most of the cases seem to have dealt with the question of power and few have discussed the question raised in *ERSKINE v. NELSON COUNTY*, how far legalization has been accomplished by the statute which is claimed to have that effect.

General rules.

Where a municipal corporation has done an act beyond its statutory powers but within the powers which it is competent for the legislature to confer upon it, the act may be validated by a curative statute. *Baker v. Seattle*, 3 Wash. 576.

If the legislature possessed power to authorize the act to be done it could by retroactive act cure the evil which existed because the power thus conferred had been irregularly executed. The question with the legislature was one of policy and the determination made by it was conclusive. *Thompson v. Lee County*, 70 U. S. 3 Wall. 327, 18 L. ed. 177.

A healing statute is not bad for unconstitutionality, if it gives validity to an act irregularly done which the legislature could have authorized to be done in the irregular way in the first instance. *Lockhart v. Troy*, 48 Ala. 579.

The legislature may subsequently legalize any contract or agreement of a municipality if it could have authorized the making of it in the first place. *Single v. Marathon County Supra*, 38 Wis. 364. In that case the court says that it may be observed that if ratification of the validating act on behalf of the county is essential for any purpose, such act was ratified in that case by a resolution of the board of supervisors.

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Messrs. Newman, Spalding & Phelps, for appellant:

The bonding act was mandatory in fact, although permissive in form. Its object was to enable the county to pay outstanding warrants for which it had received consideration. The holders of these warrants were to be benefited by the provisions of the law.

Sutherland, Stat. Constr. p. 598; *Rock Island County Supra v. United States*, 71 U. S. 4 Wall. 435, 18 L. ed. 419; *Mason v. Pearson*, 50 U. S. 9 How. 259, 13 L. ed. 130.

The contention that the act covers only valid outstanding warrants is not tenable:

1. Because there were no valid outstanding warrants.

2. All valid outstanding warrants, if any, were necessarily provided for by the tax levy made, as it was the issue of these warrants in excess of the tax levy that rendered them invalid.

3. The words, "outstanding bounty warrants" must be construed according to their common meaning in the community.

Sutherland, Stat. Constr. § 243.

The legislature is presumed to have acted upon evidence and to have had a full knowledge of all facts involved in their action, and not to have done a vain thing.

Sutherland, Stat. Constr. § 331; *Brown v. New York*, 68 N. Y. 239; *Shaver v. Eldred*, 114 N. Y. 243.

The provision for payment of the warrants validates them by implication and is as effectual for that purpose as though the statute expressly declared the warrants valid.

The legislature may dispense with the formalities contained in the charter and give the contractors their equitable right to compensation for services rendered or for materials furnished in good faith for the public benefit. *State v. Jersey City Board of Finance and Taxation*, 38 N. J. L. 205.

A legalizing statute is not a prohibited retroactive law. *Read v. Plattsburgh*, 107 U. S. 593, 27 L. ed. 414.

Where there is no defect of constitutional power such legislation is valid. *Gelpcke v. Dubuque*, 69 U. S. 1 Wall. 173, 17 L. ed. 530; *St. Joseph Twp. Champaign County v. Rogers*, 33 U. S. 16 Wall. 644, 21 L. ed. 323; *Pine Grove Twp. v. Talcott*, 36 U. S. 19 Wall. 666, 23 L. ed. 227; *Ritchie v. Franklin County*, 39 U. S. 23 Wall. 67, 23 L. ed. 325; *Otoe County v. Baldwin*, 111 U. S. 1, 23 L. ed. 331; *Grenada County v. Brown*, 112 U. S. 261, 26 L. ed. 704; *Anderson v. Santa Anna Twp.*, 116 U. S. 353, 29 L. ed. 633; *Bolles v. Brimfield*, 130 U. S. 759, 30 L. ed. 736; *Putnam v. New Albany*, 4 Biss. 305; *Dows v. Elmwood*, 34 Fed. Rep. 114.

But the legislature could not validate an unconstitutional act. *State v. Whitesides*, 3 L. R. A. 777, 30 S. C. 581.

Subsequent ratification by the state of a contract made by one of its own agencies is equivalent to a previous authorization. *State v. Miller*, 66 Mo. 323; *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477, 19 L. ed. 725.

Failure to record a contract is a technical defense which the legislature may remedy. *Com. v. Marshall*, 69 Pa. 383.

There are, however, a few cases which seem to be in conflict with the doctrine held by the majority of the cases, although the exact limits of the rule which they seek to establish have not yet been defined.

In *Cholsser v. People*, 140 Ill. 31, a county under

Sutherland, *Stat. Constr.* § 884; *United States v. Babbitt*, 66 U. S. 1 Black, 55, 17 L. ed. 94; *Beloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 206; *Brown v. New York*, 63 N. Y. 239; *Nelson v. New York*, Id. 585; *Campbell v. Kenosha*, 72 U. S. 5 Wall. 194, 18 L. ed. 610; *Thompson v. Perrine*, 108 U. S. 806, 26 L. ed. 612; *Pompton Twp. v. Cooper Union for Advancement of Science and Art*, 101 U. S. 198, 25 L. ed. 808; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. ed. 881; *Grenada County Supra. v. Brown*, 112 U. S. 261, 28 L. ed. 704; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 688; *Gelpeke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *State v. Jersey City Board of Finance and Taxation*, 88 N. J. L. 265.

Mr. William H. Standish, for respondent:

The powers of the boards of commissioners are subordinate to existing restraints made by the legislature and constitution of the state.

Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; *United States v. Macon County Ct.* 98 U. S. 582, 25 L. ed. 831; *Anthony v. Jasper County*, 101 U. S. 698, 25 L. ed. 1005; *Ogden v. Daviess County*, 102 U. S. 684, 26 L. ed. 268; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 288; *Hopper v. Covington*, 118 U. S. 148, 30 L. ed. 190; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1028; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 860; *Marsh v. Fulton County Supra.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *Lake County Comrs. v. Rollins*, 180 U. S. 662, 32 L. ed. 1060; 1 Dill. Mun. Corp. ed. 1890, § 25, p. 44.

proper authority voted to subscribe to the stock of a railroad company. The county court, however, transformed the proceeding into a donation of county bonds to the railroad. The legislature then passed a curative act and the court held that the only proposition which was, or could lawfully be submitted to the voters, and the only one therefore, to which they gave their assent, was the proposition to subscribe for stock so that the donation of bonds was void. The court then states that the question is, Had the general assembly power to validate a contract which was utterly void and thus impose upon the county an indebtedness to which it had never assented? The court holds that it has never been held to be within the power of the legislature to compel a municipal corporation without its own consent legally expressed to assume obligations of this character.

That conclusion would be inevitable if the only way in which the consent of the county could be given was by vote of the people, but in *Williams v. Roberts*, 88 Ill. 11, the court had held that county boards might be authorized to make contracts for the county, and that their illegal acts might be ratified. Why would not that rule apply in the *Choiseur Case*? In fact the authority relied upon in the *Choiseur Case* was one dealing with township bonds. But in such a case it had been expressly held that there was no one who could be authorized to represent the township in the making of contracts except the voters themselves.

The United States Supreme Court has held that a curative act was not prohibited by the Illinois Constitution of 1848. *Quincy v. Cooke*, 107 U. S. 549, 27 L. ed. 549; *Jonesboro v. Cairo & St. L. R. Co.* 110 U. S. 122, 28 L. ed. 116.

But in *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710, the court followed Illinois decisions holding that a validating act violated the constitution of that state.

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The supreme court of this state in *Capital Bank of St. Paul v. Barnes County School Dist. No. 53*, 1 N. Dak. 479, settles the inability of a county board to indebted a county beyond its taxing powers for the year and its current funds, and silences the claim that a county warrant is a judgment against the county or that any benefits received from warrants issued in excess of power can in any way obligate or estop the county.

Capital Bank of St. Paul v. Barnes County School Dist. No. 53, *supra*; *Goose River Bank v. Willow Lake School Twp.* 1 N. Dak. 26; 1 Dill. Mun. Corp. § 457, p. 528; *Wall v. Monroe County*, 108 U. S. 74, 26 L. ed. 430; *Nashville v. Ray*, 86 U. S. 19 Wall. 468, 22 L. ed. 164.

Where there is no power given in the statute to the commissioners to issue county warrants they are null and not the obligations of the county, and they remain void in the hands of all purchasers regardless of what statements the county commissioners or other county officers may make as to the validity in the sale of them to innocent purchasers.

Ouachita County v. Wolcott, 109 U. S. 559, 26 L. ed. 505; *People v. Eldorado County Supra.* 11 Cal. 170; *Goodnow v. Ramsey County Comrs.* 11 Minn. 31; *Gould v. Sterling*, 23 N. Y. 463; *Bissell v. Michigan, S. & N. I. R. Cos.* 22 N. Y. 280; *Bard v. Chamberlain*, 3 Sandf. Ch. 82, 7 L. ed. 759; *Perrine v. Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172, 18 L. ed. 92; *McCullough v. Moss*, 5 Denio, 567; *Williams v. Lash*, 8 Minn. 496; *Brady v. New York*, 20 N. Y. 312; *Wright County School Dist. No. 7 v. Thompson*, 5 Minn. 280; *Clark v. Des*

So in a Wisconsin case the court asked: "Can the legislature by recognizing the existence of a previously void contract and authorizing its discharge by the city or in any other way coerce the city against its will into a performance of it; or does the law require the assent of the city as well as of the legislature in order to make the obligation binding and efficacious?"—and it answered, the latter act as well as the former is necessary for that purpose and without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract and to admit that the legislature of its own choice and against the wishes of either or both of the contracting parties can give it life and vigor is to admit that it is within the scope of the legislative authority to divest settled rights to property, and take the property of one individual or corporation and transfer it to another. *Hasbrouck v. Milwaukee*, 18 Wis. 37, 80 Am. Dec. 718.

And that case was recognized as correctly decided in the subsequent case of *Mills v. Charleston*, 29 Wis. 400, 9 Am. Rep. 573, which was an attempt to validate an invalid tax assessment.

So in *Horton v. Thompson*, 71 N. Y. 513, commissioners who were not town officers and had no authority to act for the town, but who had been appointed to issue bonds in accordance with the vote of the people, failed to act in accordance with such vote, and that court held that the bonds issued by them were void and could not be validated by the legislature, since validation would be imposing a liability on the town without its assent.

But the Supreme Court of the United States refused to follow the doctrine of that case in *Thompson v. Perrine*, 108 U. S. 539, 27 L. ed. 268.

Bonds.

The most numerous class of contracts which have been before the courts are bonds irregularly is-

Moines, 19 Iowa, 190; *Field*, *Ultra Vires*, 449.

A municipal corporation is not estopped after a warrant upon its treasury has been issued to set up the defense of *ultra vires*, fraud, or failure or want of consideration.

Hodges v. Buffalo, 2 Denio, 110; *Halstead v. New York*, 8 N. Y. 480; *Anihony v. Adams*, 1 Met. 286; *People v. Eldorado County Supra*, *supra*; *Sturtevant v. Liberty*, 46 Me. 457; *Smith v. Cheshire*, 18 Gray, 818; *Dalrymple v. Whittingham*, 26 Vt. 845; *Taft v. Pittsford*, 28 Vt. 286; *People v. Gray*, 23 Cal. 125; *Hubbard v. Lyndon*, 28 Wis. 674.

County warrants are a valid investment only when the board of commissioners had legal authority to issue them or contract the obligations under which they are founded, and are not binding when issued in violation of law or in fulfillment of a contract with the board which they are prohibited from making.

Sault Ste. Marie Highway Comrs. v. Van Dusen, 40 Mich. 429; *Nash v. St. Paul*, 11 Minn. 174; *People v. Flagg*, 17 N. Y. 589; *Brady v. New York*, 20 N. Y. 812; *Hess v. Pegg*, 17 Nev. 23.

The special purpose named in the bill claimed as a validating act was to authorize bonding to fund a debt, and there was nothing disclosed to the legislature, so far as the bill shows, that the commissioners of Nelson county in 1883 and 1884 had issued over \$21,000 of warrants in excess of statutory power, which were void and therefore not a debt; that it was desired that the legislature should validate them; nor did the legislature give any

authority to the commissioners to ratify them.

The fact of ratification must be shown by evidence as clear as would be required to show an original authority in the agent to take the conveyance in his own name and execute a mortgage.

Wisconsin Bank v. Morley, 19 Wis. 72; *Rochester v. Alfred Bank*, 18 Wis. 433, 80 Am. Dec. 746; *Dodge v. McDonnell*, 14 Wis. 553; *Savage v. Davis*, 18 Wis. 606; *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Pa. 428; *Owings v. Hull*, 84 U. S. 9 Pet. 607, 9 L. ed. 246; 1 Parsons, Cont. 6th ed. § 52, p. 54; *Gillis v. Bailey*, 17 N. H. 18; *Dickinson v. Conway*, 12 Allen, 487; *Hazleton v. Bachelder*, 44 N. H. 40; *Holderness v. Baker*, Id. 414; *Brass v. Worth*, 40 Barb. 648; *Johnson v. Craig*, 21 Ark. 539.

Did the legislature pass this funding bill for the express purpose of validating void claims against Nelson county, or only to enable its commissioners to issue bonds to pay off the actual and legal indebtedness of the county? If the latter, then the commissioners could not validate a dollar of warrants issued in excess of power if they sought to.

Dill. Mun. Corp. 4th ed. § 544, p. 637; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81.

No recovery can be had, even when the county or municipality obtained an equitable benefit from the issue and delivery of void warrants and void bonds.

Capital Bank of St. Paul v. Barnes County School Dist. No. 53, 1 N. Dak. 479; *Litchfield*

sued, and the courts have for the most part applied the principles announced above.

General power to validate.

The legislature may legalize a defective execution of power given a municipality to issue bonds. *Belo v. Forsythe County Comrs.* 76 N. C. 499.

Where bonds issued by a county are invalid merely for want of legislative authority to issue them they can be made valid by a subsequent act. *Nolan County v. State*, 33 Tex. 123.

The legislature may confirm the issuance of the bonds. *State v. Charleston*, 10 Rich. L. 491.

If the consent of the legislature was wanting when the bonds were issued merely because the act giving it had not then been published the legislature can with the consent of the municipal authorities legalize the bonds. *Knapp v. Grant*, 37 Wis. 147.

If the legislature has power to authorize the bonds in the first instance the act to legalize them will give validity to them notwithstanding any informality or illegality in their issue. *Rogers v. Keokuk*, 18 L. ed. 74.

In *Jefferson City Gas-Light Co. v. Clark*, 95 U. S. 444, 24 L. ed. 521, the question is stated as follows, whether it was competent for the legislature to legalize the issue of the bonds if for any cause they were originally invalid; or more properly to compel their payment by the city,—and it was held that there was power to compel such payment.

The congress of the United States may legalize bonds of a territorial county issued in aid of a railroad company. *First Nat. Bank of Brunswick v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

In *Thompson v. Perrine*, 103 U. S. 306, 26 L. ed. 612, it was held that the legislature could ratify and confirm an exchange of town bonds for railroad stock which was illegal so as to make the bonds 37 L. R. A.

binding obligations on the town in favor of all who then held them or thereafter acquired them in good faith, or for a valuable consideration; and the court expressly refused to follow the doctrine of *Horton v. Thompson*, 71 N. Y. 512, and the decision of the supreme court was adhered to upon a subsequent appeal in *Thompson v. Perrine*, 106 U. S. 589, 27 L. ed. 293.

In *Cooper v. Thompson*, 13 Blatchf. 494, it is said the power of the legislature to validate such bonds is established by repeated adjudication and is not contested here.

Municipal bonds issued without authority of law and therefore void may be validated by an act of the legislature passed for that purpose, if the legislature of the state could authorize the issuing of similar bonds. *Deyo v. Otoe County*, 37 Fed. Rep. 246.

Bonds bearing semi-annual interest issued under authority of an act granting permission to issue bonds bearing annual interest may be ratified by the legislature. *Outler v. Madison County Supra*, 56 Miss. 115.

Making bonds payable in a manner not authorized by the legislature may be remedied by subsequent legislation. *Brownell v. Greenwich*, 4 L. R. A. 685, 114 N. Y. 512, affirming 44 Hun, 611.

The legislature may cure defects in the exercise of power previously given to issue bonds. *McMillen v. Boyles*, 6 Iowa, 204; *McMillen v. Lee County Judge & Treasurer*, Id. 893.

The legislature may authorize the issuing of valid bonds for the void ones which were issued without authority. *Steines v. Franklin County*, 46 Mo. 167, 8 Am. Rep. 87; *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294.

The issuance of bonds at a discount may be ratified. *Atcholson v. Butcher*, 3 Kan. 104.

But if the bonds have not been issued in accord-

v. *Ballow*, 114 U. S. 190, 29 L. ed. 193; *Richardson v. Grant County*, 27 Fed. Rep. 495.

A board of county commissioners in Dakota while it was a territory did not possess judicial power, and their orders and findings and warrants issued have no conclusive effect either for or against the county except that until it is shown the board had exceeded its authority prior to the issuing of the warrant, the warrant furnishes prima facie evidence of liability.

Spencer v. Sully County, 4 Dak. 474; *Rupert v. Alturas County Comrs.* 2 Idaho, 31; *Hedges v. Lewis & Clarke County Comrs.* 4 Mont. 280; *Ferris v. Higley*, 87 U. S. 20 Wall. 875, 23 L. ed. 383.

The act did not direct the board to issue any bonds, nor use the words "may, must or shall," or the words "are directed," nor did any part of the act say any warrants "are hereby legalized," as had been done in all theretofore Dakota legalizing acts.

Quincy v. Cooke, 107 U. S. 549, 27 L. ed. 549.

The person who undertakes to ratify must do so with a knowledge of all material circumstances or with an intent to take all liability without such knowledge.

1 Am. & Eng. Encyclop. Law, p. 432, *note 8*.

Bartholomew, Oh. J., delivered the opinion of the court:

The plaintiff sought to hold the defendant liable upon certain county warrants. These warrants were regular in form, and purported to be issued for debts incurred by the county; but it is uncontroverted that, in so far as the

trial court refused to give judgment upon these warrants against the defendant, the warrants were originally illegal and void. The debts which they represented were obligations which the board of county commissioners had no authority to create, because the expenditures at the time were in excess of the amount which could be provided for by the current revenue of the county from the tax levy of the year. It is unnecessary to refer to the statute or other authority which renders void these warrants representing such expenditures. The counsel for plaintiff makes no contention against their original invalidity, but strenuously urges here that they have been transmuted into legal obligations of the county by an act of the legislature passed March 13, 1885, which provides as follows: "An act to authorize the county commissioners of Nelson county, Dakota, to fund the outstanding indebtedness thereof.

"Be it enacted by the legislative assembly of the territory of Dakota:

"Section 1. That the board of county commissioners of the county of Nelson, in the territory of Dakota, be empowered, and are hereby authorized, to issue bonds for not less than five hundred (500) dollars each, the total amount of such issue not to exceed thirty thousand (30,000) dollars; said bonds to draw interest at a rate not to exceed eight (8) per cent per annum, payable annually at the county treasurer's office of said Nelson county. Said bonds shall specify on their face the date, amount, for what purpose issued, the time and place of payment and rate of

ance with the consent given by the tax-payers it is not lawful for the legislature to validate them since a liability cannot be imposed upon the tax-payers by the legislature without their consent. *Horton v. Thompson*, 71 N. Y. 512.

Validating elections.

If the legislature could permit the issuance of bonds without requiring the consent of the tax-payers it can validate an issuance which has been made without procuring such consent. *Hardenbergh v. Van Keuren*, 4 Abb. N. C. 43.

Irregular elections for issuance of bonds may be legalized. *Gardner v. Haney*, 86 Ind. 17.

In *Gibbons v. Mobile & C. R. Co.*, 36 Ala. 410, before the bonds were issued an act was passed providing that the vote that had been taken should be sufficient to authorize the issuance of the bonds, and the court held that under the provisions of that act the bonds were valid although the vote had not been taken in accordance with the statute which first authorized the aid to the railroad.

A defect in the notice as to the election under which bonds are to be issued may be cured by a subsequent statute recognizing the validity of the bonds. *Cumberland County Suprs. v. Randolph*, 60 Va. 614.

In *Duanesburgh v. Jenkins*, 57 N. Y. 177, the court says that the legislature may dispense with the requirement of the consent of taxpayers to the issuance of bonds and make the validity of their issuance depend upon the consent of the town commissioners. In that case the case of *People v. Batchellor*, 53 N. Y. 123, 13 Am. Rep. 480, which held that a town could not be compelled to take stock against its will, was limited and it was held that the consent of the tax-payers was not necessary, but that the consent of the representative of the town was sufficient, and that his assent might be ratified

although it was not sufficient when given. And the authority of that case was recognized in *Williams v. Duanesburgh*, 66 N. Y. 129.

Authorizing bonds for past debt.

The legislature may authorize the issuance of bonds to pay for bridges theretofore contracted for and built. *Bradley v. Franklin County*, 65 Mo. 638.

Form of statute.

Bonds cannot be validly issued under a law which has been passed but not published, and it seems that the subsequent publication of the law will have no effect to render the bonds valid. *Rocheester v. Alfred Bank*, 13 Wis. 433, 30 Am. Dec. 746.

A statute directing bonds to be paid is in all respects equivalent to original authority and cures all defects of power and all irregularities in its execution. *Beloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 206.

Where a second act was passed to modify the terms fixed by the first act, it was contended that the bonds were invalid because they purported to have been issued under the first act alone and hence could not be sustained by a resort to the provisions of the second act, but the court held that there was no necessity that the bonds should in terms refer to either act, that the important question was whether or not the authority existed, not whether it was properly stated in the bonds. *Gould v. Sterling*, 23 N. Y. 466.

Constitutional provisions.

The legislature cannot validate bonds issued in violation of constitutional provisions. *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660.

In *Sykes v. Columbus*, 55 Miss. 119, it was held that after the adoption of a constitution forbidding the legislature to authorize the issuance of bonds by a town without the authority of a cer-

interest. Said bonds and coupons thereto attached shall be severally signed by the chairman of the board of county commissioners of said Nelson county, and attested by the clerk or auditor of said Nelson county, said bonds to be payable at the office of the county treasurer of Nelson county, or such other place as the board of county commissioners may designate.

"Sec. 2. Said bonds shall be dated the first day of July, A. D. 1885, and shall be payable in twenty (20) years, with the privilege of calling in said bonds at any time after ten (10) years.

"Sec. 3. The board of county commissioners of said Nelson county is hereby authorized, and it is made their duty to levy a sufficient tax for each year, besides the ordinary tax authorized by law, to be levied for the purpose of paying the interest of said bonds; provided further, that seven (7) years after the time of issue of said bonds, it is made the duty of said board of county commissioners to levy a sinking fund for the purpose of paying off and redeeming said bonds, said tax not to exceed two (2) mills on the dollar of the valuation of said county in any one year.

"Sec. 4. It is hereby made the duty of the county treasurer of Nelson county to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold, and he, said county treasurer, shall be allowed two (2) per cent commission as his fees, and no more, for negotiating said bonds, and paying out said money; provided

further, said bonds shall not be sold for less than par.

"Sec. 5. That after issuing the bonds mentioned in section 1 of this Act, no warrants shall be issued by the county board unless at the time of issuing the same there is money enough in the county treasury of Nelson county to pay the warrants so issued.

"Sec. 6. This act shall take effect and be in force from and after its passage and approval.

"Approved March 18th, 1885."

Respondent's counsel contends that there was no intent or purpose on the part of the legislature, in the enactment of this statute, to validate any invalid warrants. His position may be thus stated in brief: To legalize void evidences of municipal indebtedness, the purpose to validate them must be clearly expressed by the legislature, or be deducible from the statute by necessary implication, and that in the statute in question there is neither a clearly expressed nor necessarily implied intention to validate any invalid warrants of Nelson county. The legal proposition involved in this position is sound, both upon principle and authority. Dill. Mun. Corp. § 544; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 91; *Beloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 205; *Brown v. New York*, 68 N. Y. 289. But we encounter here the ever-recurring difficulty of applying recognized legal principles to the facts of a given case. It might greatly lessen the labor of courts if the legislative intent were always expressed in clear and unequivocal

terms. The portion of the tax-payers, the legislature could not ratify bonds issued before the adoption of the constitution without such authority.

The Illinois doctrine.

In *Keithsburg v. Frick*, 34 Ill. 408, the question of the power of the legislature to confirm the issuance by a municipality of bonds was raised, but the court says that it was foreign to the case.

In *Marshall v. Sullivan*, 61 Ill. 218, where the election under which the bonds were voted was void, the court held that an act which attempted to validate it and which imposed a debt upon the town without its consent was void, directly under the Constitution of 1870, and by construction of the clause of the Constitution of 1848, which provides that the corporate authorities of municipalities may be vested with the power to assess and collect taxes for corporate purposes. It being held that this implied a limitation upon the power of the legislature to directly impose a debt upon the corporation.

And that ruling was followed in *Wiley v. Sullivan*, 62 Ill. 170; *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 506; *Barnes v. Lacon*, 84 Ill. 461.

But in *Williams v. Roberts*, 88 Ill. 11, it was held that county boards and the municipal authorities of incorporate cities, towns, and villages may, when empowered so to do by proper legislation, subscribe for the corporate stock of railroad companies without first submitting the question to the electors of the municipality, hence it has been held where a vote of the electors has been required as a condition precedent to the making of a subscription for stock and the law prescribing the mode of calling and holding the election has not been observed inasmuch as the legislature might have empowered the municipal authorities to make the subscription without first submitting the question 27 L. R. A.

to the electors, it may by a subsequent enactment declare the noncompliance with the law in the holding of the election of no consequence and validate the election. But under the Illinois system of township organization there is no officer or board representing the corporate authority of the town, the electors only represent it and they in doing so must necessarily act through town meetings or town elections.

In *Cholmer v. People*, 140 Ill. 21, where a subscription to stock was authorized and a donation of bonds made, the court held that the only proposition which had been submitted to a vote of the people was that of making a subscription, and when the county officers made the donation they did an act to which the people had not and could not give their assent. It is not within the power of the legislature to compel a municipal corporation without its own consent legally expressed to enter into or assume obligations of subscription to a railroad company. Declaring the void contract to be valid and binding, and providing that it shall be carried into effect in good faith, was an attempt to impose upon the county an obligation in aid of a railroad without its own consent expressed in any lawful form. And it was further held that a constitutional prohibition against making subscriptions will prevent the legislature from ratifying a donation.

The legislature cannot validate bonds without the consent of the proper municipal authorities. *Gaddis v. Richland County*, 98 Ill. 119.

And one federal court followed that rule.

Where a county with power to subscribe to the stock of a railroad makes a donation of its bonds, the act being void the legislature cannot afterwards validate it by a curative act since that would be an imposition upon the county of an obligation without its own assent expressed in any lawful

vocal language. It might benefit the taxpayers and the state if validating acts were always couched in express and unmistakable terms. But it is not the province of a court to dictate the language that shall clothe legislative enactments. Courts may say in certain cases, as they do in this, that they will accept no doubtful construction, but, when that which it is clearly provided shall be done cannot be done without accomplishing a certain result, it must be presumed that it was the legislative purpose to accomplish such result, and courts cannot excuse their failure to give effect to this legislative purpose by saying that the legislature might have used more apt terms in which to declare it. It must then be our sole purpose, in this case, to ascertain whether the legislature, by the enactment in question, clearly and necessarily evinced the legislative intent and purpose to validate the invalid warrants of Nelson county.

At the time of the passage of said act, certain facts existed,—some of them notorious, and others of them of record, and brought to our attention by the abstract in this case—of which we must not lose sight, if we would correctly measure the legislative purpose. The defendant county was organized in June, 1883, without funds in its treasury, and the act in question was passed at the first session of the legislature thereafter. The total assessed valuation of the county for the year 1883 was \$280,830, and the total levy for all county purposes and for roads and bridges was 10 mills on the dollar, making the total

revenue for that year \$2,808. The assessed valuation of said county for the year 1884 was \$771,823. There was no levy whatever for that year, and consequently no authorized revenue for that year. The statute was passed prior to the time fixed by law for the assessment and levy in 1885, and hence dealt with the fiscal affairs of the county as they were left by the tax proceedings for the years 1883 and 1884. Under the law of the then territory of Dakota, the county commissioners of the defendant county were without power to issue warrants in excess of the amount that could be raised from the tax levy of the current year. All warrants in excess of that amount were *ultra vires* and void. As we have seen, that amount for the year 1883 was \$2,808, and for 1884 it was nothing. Prior to March 18, 1885,—the date of the approval of said act,—the defendant county had executed and delivered its warrants to the full amount of \$32,789.16. Of this sum, warrants to the amount of \$30,436.16 were in excess of the limit fixed by law, and hence invalid. But the county had actually paid upon its warrants the sum of \$4,411.53. This the county had been able to do, because, although the trial court found that there was no levy in 1884, yet there was a pretended levy; and the sums voluntarily paid as taxes under such pretended levy, added to the amount realized from the levy for 1883, enabled the county to make such payments. And, as the amount thus paid exceeded the authorized revenue for the two years, it follows that all unpaid warrants were in excess of the limit, and

form. *Post v. Pulaaki County*, 9 U. S. App. 1, 49 Fed. Rep. 623.

Although another one held that a donation of bonds to a railroad under legislative power to subscribe for stock may be ratified by an act authorizing a tax to pay interest on the bonds and provide a sinking fund for the ultimate redemption of the principal. *Denison v. Columbus*, 62 Fed. Rep. 775.

So in Kansas it was held that where a county board having power to issue warrants for the payment of the contract price of buildings which they undertook to erect, without power issued bonds at high interest for the amount, the legislature has no right to attempt to validate such bonds so as to make them binding on the county. *Shawnee County Comrs. v. Carter*, 2 Kan. 115.

Subscriptions to internal improvements.

The legislature may ratify a subscription to stock of a railroad company. *Winn v. Macon*, 21 Ga. 275. Such an act is not unconstitutional as being retroactive. *Bass v. Columbus*, 30 Ga. 845.

The legislature may legalize stock subscriptions by counties to railroad companies. *Bartholomew County Comrs. v. Bright*, 18 Ind. 93.

The legislature may validate subscriptions to stock of corporations. *First Municipality of New Orleans v. Orleans Theatre Co.* 2 Rob. (La.) 209.

In *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 412, it was held that if the municipality had regularly voted to subscribe to the stock of a railroad company without power from the legislature to do so, the legislature might subsequently authorize such subscription and the bonds might then be issued under such vote, by reason of a special schedule annexed to the constitution providing for the issuance of the particular bonds in question in that case.

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Where a city voted aid to a railroad without statutory authority and then the legislature confirmed the act and such confirmation was accepted by the city, the court held that the legislature had power to make the confirmation and that the act was not void as a retroactive statute. *Bridgeport v. Housatonic R. Co.* 15 Conn. 475.

And that is true although the property of individual members of the municipality is rendered subject to execution for payment of judgments recovered upon the bonds. *Beardley v. Smith*, 16 Conn. 368, 41 Am. Dec. 143.

Where a legislature has power to authorize a municipality to take stock in a railroad company it can by retroactive legislation cure the evils arising from an irregular execution of such power. *People v. Mitchell*, 35 N. Y. 551.

Where after a city had subscribed for stock of a railroad company under the belief that it had authority to do so under the laws of the state, the supreme court held that it had no such authority and the legislature then passed a statute to enable cities which had subscribed for stock in the companies incorporated to construct works of public utility to ratify such subscriptions, the court held that such statute was valid, saying that "such laws when they do not impair any contract or injuriously affect the rights of third persons are generally regarded as unobjectionable and certainly are within the competency of the legislative authority. *Bissell v. Jeffersonville*, 65 U. S. 24 How. 237, 16 L. ed. 664.

Defective subscriptions may in all cases be ratified where the legislature could have originally conferred the power. *Reid v. Henry County Supra*, 31 Grant. 696; *Cumberland County Supra*, v. *Randolph*, 90 Va. 614.

A subscription authorized by an election held without legislative authority, when the constitu-

void. But the outstanding warrants, all of which were unauthorized, with the accumulated interest thereon, amounted, at the date of the passage of said act, to the sum of \$29,955. The act authorized funding bonds to the amount of \$30,000, barely sufficient to cover all outstanding warrants. If, as has been suggested, the act, in speaking of county warrants, meant valid warrants, and no others, then it is clear that there were no warrants whatever upon which the act could take effect. No single step could be taken under the act, and it becomes a useless blot upon the statute book. If, on the other hand, by the use of the terms "county warrants," the legislature meant all instruments that were such in form, which had been put forth by the county, purporting on their face to be valid obligations of the county, and if it was the purpose to validate all such instruments, and provide for their payment, then every sentence of the act becomes instinct with life and purpose and usefulness.

The claim is made, however, that there were some valid outstanding warrants; that it is almost universal that there are some delinquent, uncollectible taxes; and that, to the extent of such delinquency, the outstanding warrants would be valid. It seems a sufficient answer to say that there is no claim in the record that there was any delinquency in 1888. But granting the usual percentage of delinquency upon a total tax but little in excess of \$2,000, the amount thereof, when compared with the amount of bonds au-

thorized by the act, is too insignificant to affect the rule of construction.

It is urged upon us that these facts which we have been considering were not known to the legislature; that a bill was presented to that body entitled "An act to authorize the county commissioners of Nelson county, Dakota, to fund the outstanding indebtedness thereof," and that such bill was passed without investigation by the legislature as to whether or not Nelson county had any indebtedness, and, if any, how much; that such matters were left entirely to the discretion of the county commissioners. We are not allowed to cast upon the popular branch of government this imputation of ignorance and negligence. On the contrary, we are bound to presume that it performed its duty intelligently and faithfully; and, unless the contrary appear from its own records, we think such presumption ought to be conclusive here. At section 881, Sutherland, Stat. Constr., it is said: "It is not to be presumed that the legislature have assumed the existence of a fact upon which an act of legislation is based, without evidence. On the contrary, courts are bound to presume that they act upon good and sufficient evidence, and that presumption is conclusive on the question of the validity of the act. It was so held on an objection to the validity of an act organizing a new county,—that it did not contain the population required by the constitution. It is presumed, as well on the ground of good faith as on the ground

tion required such authority, will not be validated by a subsequent statute validating subscriptions, which were not made in violation of the constitution of the state. *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81.

An invalid subscription cannot be validated without the consent of two thirds of the voters under a constitutional provision that the legislature shall not authorize any county, city, or town to become a stockholder or loan its credit to any company, association, or corporation unless two thirds of the qualified voters of such county, city, or town has at a special election or regular election to be held therein assented thereto. *Katzengerger v. Aberdeen*, 121 U. S. 172, 30 L. ed. 911.

If the legislature has no constitutional power to authorize the subscription it cannot validate it by subsequently recognizing it as valid. *Folsom v. Township of Ninety-Six*, 69 Fed. Rep. 67.

Contracts to pay bounties.

The legislature may confirm a resolution of a municipality to pay a bounty to men who were drafted for military service. *Bartholomew v. Harwinton*, 38 Conn. 408; *Potter v. Canaan*, 37 Conn. 224; *Stuart v. Warren*, Id. 225.

And the legislature may authorize the town to confirm a vote of money to pay drafted men. *Booth v. Woodbury*, 32 Conn. 126.

Where after the passage of an act authorizing the levying of a tax to pay bounties to persons volunteering to enter the military service of the United States persons advanced the money on the faith of the act, the legislature could subsequently require the town to levy the tax to refund the loan. *Johnson v. Campbell*, 49 Ill. 316; *State v. Sullivan*, 43 Ill. 412.

The legislature may validate a loan to obtain bounties to pay persons enlisting in the military service. *Weister v. Hade*, 53 Pa. 474.
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The legislature may validate bonds issued by towns without authority for the payment of bounties to soldiers. *Kunkle v. Town of Franklin*, Wright County, 13 Minn. 127, 97 Am. Dec. 226; *Comer v. Folsom*, 13 Minn. 219.

But a contract by a town to pay the fees paid by drafted men for substitutes is a contract to donate money to individuals in which the public has no interest and it is beyond the power of the legislature to validate it. *Thompson v. Pittston*, 50 Me. 545; *Freeland v. Hastings*, 10 Allen, 570.

Land grants.

The legislature may validate void grants of swamp lands belonging to the county. *Barton County v. Walser*, 47 Mo. 180.

The legislature had authority to validate acts of the city of San Francisco disposing of pueblo lands. *Payne v. Treadwell*, 16 Cal. 220; *Hart v. Burnett*, 15 Cal. 580.

But if a vote of the people is required to donate the property of a county to a corporation for public improvements, the donation cannot be validated by the legislature if made by the county authorities without such vote. *Palmer v. Howard County*, 45 Iowa, 61.

So where property has been conveyed to a city for its purposes and it is authorized to convey it by an ordinance which did not receive the required vote to pass it, the legislature cannot validate the attempt because since the property belonged to the city, and it had never consented to part with it, it was not within the power of the legislature to divest the city of its property without its consent which the validating statute in effect amounts to. *Grogan v. San Francisco*, 18 Cal. 580.

Other contracts.

The legislature may validate a street improvement contract which was not made according to the mode pointed out by the legislature. *San*

that the legislature would not do a vain thing, that it intends its acts, and every part of them, to be valid, and capable of being carried into effect." In *Plint & F. Pl. Road Co. v. Woodhull*, 25 Mich. 99, 13 Am. Rep. 233, Judge Cooley says: "The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but, from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And, if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority." Again, in *De Camp v. Ereland*, 19 Barb. 81, it is said: "It is not to be presumed that the legislature have assumed the existence of a fact upon which an act of legislature is based without evidence. On the contrary, courts are bound to presume that they acted upon good and sufficient evidence, and this presumption is conclusive." See also *Lusher v. Scites*, 4 W. Va. 11; *Humboldt County v. Churchill County Comrs.* 6 Nev. 80; *Farmers Loan & T. Co. v. Chicago, P. & S. R. Co.* 39 Fed. Rep. 143. Under these authorities, we are bound to say that, when the legislature authorized the issuance of the bonds of Nelson county to the extent of \$30,000 for the purpose of funding out-

standing indebtedness, it did so with full knowledge of the financial condition of Nelson county. And, knowing that the outstanding warrants amounted to nearly or quite the full amount of bonds authorized, it also knew that such warrants were beyond any limit allowed by law, and were necessarily invalid. We say the legislature knew this, because it knew that Nelson county was but just organized, and its resources were limited. Its assessed valuations for the years 1883 and 1884 were of record in the territorial auditor's office, and the total tax that could have been realized on such valuations under the highest levy permissible to the county would not have equaled, in both of said years, one third of the amount of the bonds authorized, and the ordinary percentage of delinquency would not have equaled one-tenth of such amount. Hence, we say that the legislature knew that Nelson county had outstanding warrants amounting to nearly \$30,000, and knew that all such warrants were beyond the limit allowed by law, and consequently void. Yet the legislature, after authorizing the issuance of bonds to the amount of \$30,000, in express terms declared: "It is hereby made the duty of the county treasurer of Nelson county to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold." But it was not possible that the treasurer should perform this duty thus unequivocally thrust upon him without paying warrants issued in excess of au-

Francisco City and County v. Certain Real Estate, 42 Cal. 517.

In *People v. Livingston County Supra.*, 68 N. Y. 114, an unauthorized contract by road commissioners for the building of a bridge was ratified and the ratification held to be valid.

A statute permitting a contract for water to be made upon vote of a majority of the persons voting at an election held for that purpose is not modified by a subsequent emergency statute permitting the borrowing of money for the purpose of building a bridge, constructing a sewer, or carrying out some other proper village object, so that a contract for the water will be valid without a prior vote of the tax-payers. *Squire v. Preston*, 32 Hun, 88.

The legislative sanction of a contract which a city had no power to make granting the exclusive right to furnish the city with water will render the contract valid and binding. *Citizens' Water Co. of Bridgeport v. Bridgeport Hydraulic Co.* 55 Conn. 1.

A contract to gutter, curb, and flag a street made under authority to grade it may be ratified by a subsequent statute, and the fact that it was not let to the lowest bidder after advertisement may be dispensed with. *Brown v. New York*, 68 N. Y. 239.

A contract for materials which contrary to the law exceeds in amount the sum appropriated to cover the cost of the work may be ratified by subsequent legislation so that the contractor may recover the amount due him. *Nelson v. New York*, 68 N. Y. 535.

A street paving contract entered into and the work performed thereon, pursuant to a legislative act subsequently declared unconstitutional, is legalized by a subsequent remedial statute authorizing the assessment of frontage property to pay the amount remaining unpaid on the contract. *Dunbar v. Williamsport*, 9 Pa. Co. Ct. Rep. 451.

The legislature may validate an attempted con-

tract granting power to collect tolls on a canal. *Morris v. State*, 62 Tex. 723.

In *Nolan County v. State*, 33 Tex. 182, it is said if at the time of the attempted creation of a contract the legislature could not have authorized it, it may be doubted whether the legislature can make it valid, although in the mean time by a change in the constitution the restriction upon its own power may have been removed.

In *Campbell v. Kenosha*, 72 U. S. 5 Wall. 194, 18 L. ed. 610, it is said the act is not in terms a curative act but it has that effect by fair implication. It is not doubted that the legislature could by a direct act of confirmation legalize the issue of this scrip, notwithstanding the submission of the question to the vote of the people was under a wrong law. If by a direct act so equally in any other way, if the intention of the legislature to legalize clearly appears.

Excessive Indebtedness.

The legislature cannot give effect to indebtedness contracted in excess of the constitutional limit. *Mosher v. Ackley Independent School Dist.* 44 Iowa, 122.

Where a city in a territory exceeded the limit of indebtedness fixed by act of congress and subsequently the territory became a state, the state legislature could validate the indebtedness although it could not have authorized it at the time it was constructed, since it has succeeded to all the power of congress in the premises. *McBryde v. Montemano*, 7 Wash. 69.

For the purpose of determining whether or not the indebtedness incurred by the subscription of aid to a railroad exceeds the constitutional limit, such subscription being invalid at the time made, but subsequently validated by the act of the legislature, the time of the passage of the act and not

thority. Hence, the intention of the legislature that such warrants should be paid is unmistakable and unavoidable.

Thus far in this discussion, we have not stopped to inquire whether section 1 of the Act was mandatory upon the county commissioners, or directory-only, for the reason that, before the warrants upon which this action was brought were last presented for payment, the commissioners had in fact issued bonds under the act to the full amount of \$30,000, and said bonds had been negotiated, and the proceeds thereof were in the treasury of the defendant county. But, upon a ground not heretofore mentioned, the learned counsel for respondent claims that there were certain legal warrants outstanding upon which the act could take effect. It is urged that, although not appealed from, yet the finding of the court that there was no levy in 1884, should be disregarded, as a matter not in issue, and contrary to the admissions in the pleadings. Let this be conceded *pro arguendo*, and it will but strengthen our conviction. If the levy for 1884 was as high as the law permitted, the county revenue arising therefrom would be \$7,718. To this add the sum of \$2,303,—the revenue for 1883,—and we have a total for the two years of \$10,021. As heretofore stated, the county had paid during said time \$4,411.53, leaving a possible balance of \$5,609.47 in valid, outstanding warrants. Under the authorities already cited, the presumption is conclusive here that the legislature knew that the outstanding warrants of Nelson county, valid and invalid, amounted to nearly \$30,000. Did it authorize bonds in that sum for the purpose of paying less than one fifth of the amount? To so hold compels us to say that the legislature did an unadvised, useless, and utterly incomprehensible thing. This the authorities sternly forbid. We are then forced to say that the legislature intended to provide for the payment of all outstanding warrants, or it intended to cloth the county commissioners with power to say what warrants should be paid and what should not. But the power to validate invalid evidences of municipal indebtedness is a purely legislative power, and cannot be delegated. If the act sought to throw such power into the hands of the county commissioners, it is unconstitutional and void. But, as between a construction that upholds and one that de-

feats the statute, the canons of construction leave us no choice. We must uphold the law. Further, how can we say that the legislative mandate to the treasurer to call in "all outstanding warrants" means "all such warrants as the county commissioners may direct?" The interpolation is wholly inadmissible. Let it be granted that certain outstanding warrants were valid. As to such warrants the first section of the act, while in form permissive, was in fact mandatory upon the board of county commissioners. *Sutherland, Stat. Constr. § 598; Rock Island County Suprs. v. United States*, 71 U.S. 4 Wall. 435, 18 L. ed. 419; *People v. Niagara County Suprs.* 49 Hun. 82; *People v. Otsego County Suprs.* 51 N. Y. 401; *People v. Livingston County Suprs.* 68 N. Y. 114. But there is no discrimination in the act itself. All outstanding warrants are treated in the same manner, unless, indeed, it was the purpose to clothe the commissioners with power to declare outstanding evidences of municipal indebtedness invalid. But that power is purely judicial, as the power to validate when invalid is purely legislative, and neither power can be exercised by a board of county commissioners. It would seem to follow that the act was entirely mandatory or entirely directory, and in our judgment it was mandatory. Had the act in terms validated all outstanding warrants, its mandatory character would not be questioned; but, if the warrants were validated by necessary implication, they were none the less valid, and the act not less mandatory. Viewing the action of the legislature in the light of the existing facts and circumstances conclusively presumed to have been known to the legislature, and the legislative purpose to validate and provide for the payment of all outstanding warrants cannot be doubted or evaded. Nor did that purpose work any injustice to the taxpayers of the defendant county. The county officials had incurred indebtedness for services, and in constructing roads, bridges, and improvements, far in excess of their legal powers. The county commissioners (the fiscal agents of the county) examined the bills and accounts, and declared them meritorious, and issued their warrants in payment therefor. The county had the benefit of the services and improvements. The moral obligation to pay was complete. The legislature added the legal obligation, but, instead of imposing the

that of the subscription is to be regarded. *Massachusetts & S. Constr. Co. v. Cane Creek Twp.* 45 Fed. Rep. 336.

Construction of statutes.

In *Atchison, T. & S. F. R. Co. v. Jefferson County Comrs.*, 17 Kan. 29, the act in question was construed as not intended to legalize illegal votes, but merely to cure irregularities in proceedings.

Legislative authority to a municipality to fund its floating debt will validate the debt, if it was contracted without authority. *Smith v. Stephan*, 66 Md. 381.

In *Roberts v. Bolles*, 101 U.S. 119, 25 L. ed. 890, the bonds were held valid without the aid of the curative act.

A statute authorizing and directing a city to provide the means of paying the interest on its debt will not have the effect of ratifying or legitimizing 37 L. R. A.

bonds which were illegally issued since it can and will be applied to legal debts and will not be extended by mere construction. *Memphis v. Bethel* (Tenn.) Dec. 4, 1875.

A statute giving the county authorities permission to exchange invalid conditional bonds which they had issued to a railroad for coupon bonds is such a recognition of the bonds as to validate them. *Bell v. Farmville & P. R. Co.* (Va.) Feb. 7, 1886.

A legislative direction that scrip issued by a city under a statute which was unconstitutional because it had not fixed the limit of the amount of such scrip which could be issued, be paid will not validate the scrip. *Fisk v. Kenosha*, 28 Wis. 33.

A mistake in referring to the date of an ordinance which the legislature is attempting to validate will not defeat the validation, if there is sufficient in the act and its preamble to identify the ordinance. *Com. v. Marshall*, 80 Pa. 236. E. P. F.

burden of payment on the infant county, it was extended through a long series of years, until, presumably, the financial condition of the county would be such that payment could be accomplished without hardship. Certainly, no fair-minded tax-payer could object to such a course.

The learned trial court, as appears by its findings of fact and conclusions of law, decided this case exclusively upon the ground that the warrants upon which the action is based were void because issued in excess of the amounts of the current revenues of the years in which they were issued. We hold, upon grounds heretofore fully stated, that the Act of March 13, 1885, cured that defect, and deprived the county of the defense of *ultra vires*. The legislature had power to authorize the issue of warrants to the amount issued before they were issued, and hence it likewise possessed the power to subsequently ratify and validate those actually issued. If the county had any defense to the warrants on the merits,—such as a want of consideration to support them, or fraud in their issuance,—and such facts had been established at the trial, and found by the court, a very different question would have been presented to this court for determination. In the supposed case it would have devolved upon this court to decide whether the legislature could constitutionally legalize warrants issued fraudulently or without consideration, in whole or in part. There are no such findings in the record, and the legal presumptions are that the warrants were issued upon sufficient consideration, and without fraud. The sole ground upon which respondent endeavors, in this court, to uphold the action of the trial court, is that the warrants sued upon, and which appellant admits were originally *ultra vires*, were not validated by the subsequent legislative enactment. This ground failing, it follows that plaintiff is entitled to judgment for the full amount of such warrants. The trial court is directed to so modify its judgment as to award judgment in plaintiff's favor for the amounts prayed in the complaint. Appellant will recover costs in this court.

Modified and affirmed.

Corliss, J., dissenting:

The plaintiff sought to hold the defendant liable upon certain alleged county warrants. These instruments were county warrants in form, and it appears to be in the main undisputed, so far as this record is concerned, that these warrants were issued for debts incurred by the county. It is also uncontroverted that, in so far as the trial court refused to give judgment upon those warrants against the defendant, the warrants were originally illegal and void. The debts which they represented were obligations which the board of county commissioners had no authority to create, because the expenditures at the time were in excess of the amount which could be provided for by the current revenue of the county from the tax levy of the year. It is unnecessary to refer to the statute or other authority which renders void these warrants representing such expenditures.

The counsel for the plaintiff makes no contention against their original invalidity, but strenuously urges here that they have been transmuted into legal obligations of the county by an act of the legislature passed March 13, 1885, which provides as follows:

"An act to authorize the county commissioners of Nelson county, Dakota, to fund the outstanding indebtedness thereof.

"Be it enacted by the legislative assembly of the territory of Dakota:

"Section 1. That the board of county commissioners of the county of Nelson, in the territory of Dakota, be empowered, and are hereby authorized, to issue bonds for not less than five hundred (500) dollars each, the total amount of such issue not to exceed thirty thousand (30,000) dollars; said bonds to draw interest at a rate not to exceed eight (8) per cent per annum, payable annually at the county treasurer's office of said Nelson county. Said bonds shall specify on their face the date, amount, for what purpose issued, the time and place of payment and rate of interest. Said bonds and coupons thereto attached shall be severally signed by the chairman of the board of county commissioners of said Nelson county, and attested by the clerk or auditor of said Nelson county; said bonds to be payable at the office of the county treasurer of Nelson county, or at such other place as the board of county commissioners may designate.

"Sec. 2. Said bonds shall be dated on the first day of July, A. D. 1885, and shall be payable in twenty (20) years, with the privilege of calling in said bonds at any time after ten (10) years.

"Sec. 3. The board of county commissioners of said Nelson county is hereby authorized, and it is made their duty to levy a sufficient tax for each year, besides the ordinary tax authorized by law, to be levied for the purpose of paying the interest of said bonds; provided, further, that seven (7) years after the time of issue of said bonds, it is made the duty of said board of county commissioners to levy a sinking fund for the purpose of paying off and redeeming said bonds, said tax not to exceed two (2) mills on the dollar of the valuation of said county in any one year.

"Sec. 4. It is hereby made the duty of the county treasurer of said Nelson county to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold, and he, said county treasurer, shall be allowed two (2) per cent commission as his fees, and no more, for negotiating said bonds, and paying out said money; provided, further, said bonds shall not be sold for less than par.

"Sec. 5. That after issuing the bonds mentioned in section 1 of this act, no warrants shall be issued by the county board unless at the time of issuing the same there is money enough in the county treasury of Nelson county to pay the warrants so issued.

"Sec. 6. This act shall take effect and be in force from and after its passage and approval.

"Approved March 13th, 1885."

At the outset we are informed by the title to

the act, not that its purpose is to validate void county warrants, but to fund "the outstanding indebtedness" of the county. It is true that the title of a statute is not necessarily controlling; but something very convincing in the body of the act to the contrary of this avowed object of the law must be found, to overthrow this clearly expressed purpose merely to provide means for paying the outstanding indebtedness of the county. I find nothing to warrant me in construing this as a statute to validate void warrants, in that portion of the statute which makes it the duty of the county treasurer to sell the bonds, and call in all the "outstanding warrants." These words, "outstanding warrants," are more naturally applicable to valid warrants than to void warrants. When we find them employed in a statute whose sole purpose, as disclosed by its title, is to fund the "outstanding indebtedness" of the county, is there any escape from the conclusion that they relate only to such warrants as represent county indebtedness? In no proper sense is a paper in the form of a county warrant, but issued without authority, and against the commands of a statute, an indebtedness of the county. It is urged, however, that if only valid warrants were to be provided for there was no occasion for the enactment of the statute, as all such warrants would be paid out of the annual revenue. But it is well known that, while in theory the revenue from taxation should equal the total tax levied, yet in practice it often falls short of it, because of the failure to collect all taxes due. Sales of property to enforce collection will not bring cash to the treasury when no purchasers can be found. Because of inability to obtain cash for taxes, it might well happen that it would be necessary to provide another mode of payment for valid county warrants. In some of the counties (and Nelson county was not more fortunate than other counties), many farmers found themselves unable, through repeated crop failures, to pay their taxes. Nor does it necessarily follow that, because all legal warrants would be paid out of current revenues if the affairs of the county were lawfully managed, the legislature was bound to assume that all of them had been so paid. It might easily happen that the county treasurer would pay the warrants in their numerical order, and in this way the illegal warrants of one year might be paid out of the revenue of the next year; completely exhausting such revenue, and leaving the valid warrants of that year entirely unprovided for. It is not utterly impossible for it to have been a fact that very few of the legal warrants of either year had been paid at the time the act in question was passed. The revenues of these years might have been improperly spent. Valid warrants to the amount of over \$10,000 could have been issued during these two years. It seems to me an extraordinary doctrine that the legislature inquired whether a strictly legal levy had been made during the year 1884 before passing this law. Nor is it important whether they made such inquiry or not. It is not controverted that there were some steps taken towards a legal levy. If the power of a

county to incur debts depends upon there being in fact a valid tax levy for the county,—if the validity of tax proceedings are indispensable,—then very few valid warrants, in such cases, have been issued. The county may contract an indebtedness equal to the amount of taxes it can collect during the year, on the theory that the taxes are legal. Whether the taxes are legal or not is entirely immaterial, provided there are some steps taken towards the levy of a tax.

The prevailing opinion in this case, in assuming that there were no valid warrants outstanding at the time of the passage of this act, assumes a fact which I am unable to find in this record. I know it was possible for there to have been valid warrants outstanding at that time, for the reasons already stated, and it appears from this record that such was the fact. The court expressly finds that at the time the act was passed only \$4,411.53 of over \$32,000 of warrants had been paid. As valid warrants to the amount of over \$10,000 might have been issued during the years 1883 and 1884, how can it be said that the legislature was bound to know that all of these unpaid warrants were void, when over \$5,000 of them might have been valid? But what I regard as a conclusive argument against this reasoning is that it embodies still another unwarranted assumption. It assumes that the legislature was as fully in possession of all the facts regarding the illegality of these warrants as this court, after careful judicial investigation. This assumption is unreasonable, because it nowhere appears upon the face of the bill that the question whether these warrants were illegal was called to the attention of the legislature, or was in their minds, when the act in question was passed. This act does not pretend to legalize illegal warrants, or to deal with them in any way. On the contrary, its provisions relate to such warrants as constitute indebtedness of the county, *i. e.* valid warrants. When the legislature was asked to pass a law to fund the outstanding indebtedness of the county, and was informed that there were warrants outstanding to about the amount of \$30,000, there was nothing in the circumstances of the case, or in the nature of the legislation asked at their hands, to call their attention to the question whether these warrants were illegal, or to lead to an investigation of the matter. They were merely asked to give the county authority to fund such of them as constituted indebtedness of the county, not exceeding \$30,000. They did not give power to fund 30,000 of warrants and pretended warrants. It is only on the theory that they are presumed to have made a careful investigation of this question, which was not before them, so far as this act shows, that it can be said that they intended to legalize void warrants on the ground stated in the prevailing opinion, that it was only for void warrants that such funding measure was necessary. If they did not make such investigation, they knew nothing of the validity or invalidity of the warrants. To support the contention that the legislature investigated the question of their legality, it is necessary to assume, in the first instance.

that the act relates to illegal as well as valid warrants. This is the very question to be determined. It is hardly logical to assume it in order to prove it. It is a rational assumption that they took it for granted that these alleged warrants which were outstanding were valid warrants, there being nothing in the statute to raise the question of invalidity, and the act being limited to valid warrants. The absence of all language showing a purpose to legalize the warrants is to my mind conclusive that the question of their illegality was not before them, and had not occurred to them. It would have been easy to have expressed such a purpose, had such been the legislative will. Whenever the legislature has wished to legalize county warrants, they have not found it difficult to express this purpose in unmistakable language. In one instance we find the contrast sharply presented between the funding of outstanding indebtedness and the legalizing of county warrants. The title of an act passed in 1881 is "An act authorizing the board of commissioners of Hutchinson county to fund certain outstanding indebtedness and legalizing warrants issued by the commissioners of Armstrong county." The act declares "that the board of commissioners of Hutchinson county are hereby authorized to fund such indebtedness of said county as may exist on the first day of March, 1881, and also to fund the outstanding warrants issued by authority of the commissioners of Armstrong county prior to the date of the delivery of the books of said Armstrong county to the officers of said Hutchinson county, which warrants issued in the regular order of business of said acting commissioners of Armstrong county are hereby legalized." Laws 1881, chap. 16. The act in question in this case embraces only the funding feature. It does not also "legalize" the warrants. Power to incur indebtedness binding upon a municipal corporation must be clearly conferred. No doubtful implication will suffice. Shall the act which is to ratify an illegal exercise of authority be less explicit?

I regard it as a dangerous doctrine that after extravagance has issued pretended obligations of municipality in excess of authority, and in the very face of statutory prohibition, cunning can outwit the wise and salutary restrictions upon municipal expenditures, by concealing, in artfully framed statutes, its purpose to legalize the void obligations, and then secure from the courts a construction of the law which the language of the act not only did not reveal, but studiously buried from sight. When a bill is introduced to legalize void indebtedness, it must disclose its purpose upon its face, to the end that every legislator may act intelligently, — may meet that issue upon its merits. A court which, after a measure, whose real purpose to legalize is concealed by its author from the legislature, has skulked through the legislative halls in disguise of ambiguous and doubtful language, aids in throwing off the cloak of deception, will find that it has encouraged like practices in the future. I do not say that deception was in the mind of the one who framed this statute.

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But I venture the prediction that practically every member who voted for it will be dumfounded at finding such radical consequences wrapped up in this simple funding law. Whatever rule may elsewhere obtain, in my judgment, we should lay it down as a rule to be rigidly enforced that the purpose to validate a void obligation must be expressly declared, or be deduced from the law by the clearest necessary implication. The case of *Brown v. New York*, 63 N. Y. 239, is one in which the purpose to validate was necessarily embraced in the act. In that case the commissioner of public works had entered into a contract with plaintiff "for regulating, grading and setting curb and gutter stone in Tenth avenue from Manhattan to 155th street, and flagging the sidewalks thereof." The contract was held void because it was not founded upon sealed proposals, and was not let to the lowest bidder after advertisement, as required by the statute. The court, however, held that the contract had been validated by a subsequent act of the legislature, which provided as follows: "The board of the assessors of the city of New York are hereby authorized and directed to assess upon the property intended to be benefited, in the manner provided by law for making assessments for local improvements, the expense which has been, or shall be actually incurred by the mayor, aldermen, and commonalty of the city of New York for regulating, grading, and setting curb and gutter stones and flagging the sidewalks in the Eighth avenue, from Fifty-Ninth street to One Hundred and Twenty-Second street, in said city; also in the Tenth avenue, from Manhattan street to One Hundred and Fifty-Fifth street in said city." "The law required all expense connected with this particular work, whether incurred or to be incurred, to be assessed upon the property benefited by the improvement. Here was a legislative declaration that the amount of expenses already incurred and to be incurred under any contract relating to the improvement to these parts of streets should be raised by assessments upon the property benefited. The money so raised was clearly intended to be used in paying these expenses, and this would involve payment of the expenses under the void contract. I do not wish to be regarded as expressing my approval of this case. I think the doctrine that a void claim against a municipality can be legalized by anything short of a very clear manifestation of such purpose is fraught with danger, — is repugnant to sound policy. Let it once be understood that the courts demand an unequivocal expression of the purpose to validate the void obligation, and there will be found no difficulty in so framing statutes as to express this purpose in unmistakable language. Let the contrary rule prevail, and funding statutes will become the stalking horses to cover the secret wish of interested parties to secure the legitimization of void debts, when it would not be safe to reveal such purpose to the legislature; and to the surprise of legislators, the innocent funding bill for which they voted will be found to be a wide-reaching and radical measure, to create, and not merely to fund, legal obligations.

The case of *Beloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 205, which is relied upon by plaintiff's counsel, is, in my judgment, distinguishable from the case at bar. The town of Beloit having issued certain bonds in payment for railroad stock, which were void, the legislature created out of a portion of the territory embraced within the limits of such town the city of Beloit. No other bonds had at that time been issued for railroad stock by the town of Beloit, except those already referred to. Under these circumstances the legislature declared that "all principal and interest upon all bonds which have heretofore been issued by the town of Beloit for railroad stock or other purposes, when the same, or any portion thereof shall fall due, shall be paid by the town and city of Beloit in the same proportions as if said town and city were not dissolved." The court laid stress on the fact that the act could have no effect, as to bonds issued for railroad stock, unless it was held to apply to those void bonds, as they were the only bonds which had been issued for that purpose by the town, and that the act declared that such bonds should be paid. Said the court: "No bonds were issued in payment for railroad stock, but those to a part of which this controversy relates. The language used by the legislature is clear and explicit. No gloss can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated, that the bonds shall be paid." The more recent decision of the Federal Supreme Court fully sustains my conclusion. *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81. The facts of that case are as follows: The constitution of Mississippi declared that the legislature should not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, should assent thereto. A city in that state subscribed for stock in the Selma, Marion & Memphis Railroad Company, after an election held to vote on that question, but neither the election nor the subscription was authorized by the legislature. There being a vote of more than two thirds in favor of the proposition to subscribe for the stock, the subscription was made, and bonds to pay for the stock were issued. They were, of course, void. But subsequently the legislature passed an act which declared that "all subscriptions to the capital stock of the said Selma, Marion & Memphis Railroad Company, made by any county, city, or town of this state, which were not made in violation of the constitution of this state, are hereby legalized, ratified, and confirmed." Laws 1872, chap. 75, p. 313. This act more strongly indicates a purpose to validate the void subscription and bond than does the act relied on in this case indicate a purpose to legalize void warrants; and yet the court was clearly of the opinion that it had no such effect, and there was no dissent in the case. Counsel for plaintiff seeks to distinguish this case on the ground that the legalizing statute was not applicable to the subscriptions and

bonds in question, for the reason that it validated only such subscriptions as were not made in violation of the constitution. This reasoning of the counsel assumes that the subscription in question did violate the constitution. But it did not. The subscription was not void because the constitution prohibited it, but because there was no statute authorizing it. The case was one of a want of power, and not of the violation of the fundamental law. The subscription was such a one as the constitution permitted the legislature to authorize. The only trouble with it was that the legislature had failed to authorize it. The case was in no manner different from what it would have been, had the constitution been silent on the subject, and there had been no statute authorizing the subscription; and yet, in such a case, it would not be pretended that the subscription would have been in violation of the constitution. The constitution merely restricted the legislature in the exercise of its power to authorize such subscriptions, and it is only with reference to such subscriptions as the legislature were prohibited from authorizing that it could be said that the subscription would be in violation of the constitution. But the subscription made was one which the legislature might have authorized. The following language of the court in that case embodies my conception of the true doctrine: "The intention of the legislature to confirm and ratify the subscription in question cannot be ascertained with certainty from the language of the act, which is too vague to form the basis of so important an authority as that sought to be deduced from it. As is said in *South Carolina v. Stoll*, 84 U. S. 17 Wall. 425, 486, 21 L. ed. 655, if the legislature intended to do what is claimed, 'it was bound to do it openly, intelligently, and in the language not to be misunderstood;' and, 'as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed.'"

The argument that the legislature should not be presumed to have passed an idle act has but little weight, under the circumstances of this case. There might have been several thousand dollars of valid warrants outstanding when the act was passed. I believe that there were. If so, the act would have force when construed as a mere funding law. The legislature does not declare that the county shall bond to the amount of \$30,000. It says that this shall be the limit. Whatever amount, under this sum, shall be needed to pay warrants, may be raised by the issue of bonds. Suppose that the legislature had said in terms that only valid warrants should be paid. Would it be argued that illegal warrants must be paid because to hold otherwise would render the act of no effect? Had the statute in terms spoken of valid warrants, it would not have been clearer. We have seen that the legislature knew what language to employ when they desired to legalize void warrants. They used explicit language in such a case, but in this act they refrain from the use of such language, and expressly limit the law to valid warrants by describing it as a law to fund the indebtedness of the county. It seems to me that the

fallacy of the reasoning that the legislature must be presumed to have known all the facts is twofold: Their attention was not called by the prepared bill to any matters connected with the validity of these warrants, and we have no means of knowing that they had evidence that all of these warrants were void. We do not know it ourselves. There is nothing in the language of the cases cited in the prevailing opinion warranting the rule that this court must assume that the legislature had investigated a mass of facts which were entirely foreign to the measure they were about to pass,—a measure to provide for the funding of the county indebtedness by the issue of bonds to the necessary amount, not exceeding \$30,000. I know of no decision which holds that the legislature must be presumed to have investigated acts not suggested by a bill before them, for the purpose of forcing into the act, by a strained construction, a meaning not apparent on the face of the act itself,—a meaning directly opposed to the terms of the statute; a meaning which finds no support, except upon the theory that the legislature, without any hint as to their relevancy from the act itself, have examined into these facts. What right have we to say that such an investigation, even if made, convinced the legislature that there were nothing but void warrants to be funded? It is said that the provision requiring the treasurer to call in all outstanding warrants, etc., is conclusive that void warrants were intended to be legalized. But the treasurer is not directed to call in pretended warrants. He has no power or right to do so. The instruments he is to call in are warrants, and warrants are instruments which represent the indebtedness of some municipality; and he is distinctly informed that it is only warrants of that kind—only real warrants, and not pseudo warrants—that he is to pay, by the very title of the act, which speaks of the funding of the indebtedness as being the sole purpose of the statute. It cannot be said that to hold that the county commissioners were to pay only valid warrants out of the proceeds of the bonds sold would vest them with judicial power. Not at all. They were not to determine this question finally. Should they refuse to pay a valid warrant, they could be compelled to pay it. Should they undertake to pay a void warrant, they could be restrained from doing so. They would merely determine, as the officers of any other corporation would determine, what were valid claims against the corporation. No one ever dreamed that the decision of such a question as the basis of business action was the exercise of judicial power. It is a decision that is being made thousands of times every day by business men, when asked to pay some claim or some pretended obligation. They do not decide it finally. They merely decide it for the purpose of governing their conduct in paying or refusing to pay the claim presented. So with reference to these outstanding warrants. The county commissioners could not finally determine which were to be paid and which were not to be paid. They could only decide the matter as other business men decide similar questions in de-

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termining whether they will pay a claim or contest it in the courts.

The statute, upon its face, is simply a funding law. Nothing else can be made of it, unless extrinsic circumstances are to be considered. Now, there is no rule better settled than that which forbids an examination of extrinsic facts,—which prohibits an inquiry as to consequences when the act, upon its face, is unambiguous. Courts look to consequences, and investigate circumstances, not to introduce doubt and uncertainty into an act, the meaning of which is plain upon its face, but to aid in solving doubts which the very terms of the act itself create. When the legislature has passed a statute which in terms is clearly a mere funding law, what right have we to construe it as a legalizing statute because investigation may lead us to the conclusion that the outstanding legal warrants against the county were less in amount than the sum for which the county might issue its bonds to fund its indebtedness? What right have we, at all, to look beyond the language of the act itself? For my part, I believe we have no right to fix the judicial eye upon anything but the words of the plain statute itself. The rule which I invoke is ancient, and it is universally recognized. "If the meaning of statutes is doubtful, the consequences are to be considered in the construction of them; but, if the meaning is plain, no consequences are to be regarded, for that would be assuming legislative authority." 4 Bacon, Abr. 652. See *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559. The court said: "It is only when the words of the statute are obscure or doubtful that we have any discretionary power in giving them a construction, or can take into consideration the consequences of any particular interpretation." In *Salling v. McKinney*, 1 Leigh, 42, 19 Am. Dec. 722, the court said: "In the construction of statutes, we are told, from high authority, that, when the words are doubtful and uncertain, it is proper to inquire what was the intent of the legislature, but, where they have expressed themselves in plain and clear words, it is very dangerous for judges to launch out too far, in searching into their intent." In *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, it is held that "in construing a statute, if the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction, but, if the meaning of the language of the statute is plain, there can be no such reason." In *United States v. The Sadie*, 41 Fed. Rep. 896, the court said (quoting with approval the language of the court in *United States v. Church of Holy Trinity*, 86 Fed. Rep. 304): "Where the terms of the statute are plain, unambiguous, and explicit, the courts are not at liberty to go outside of the language, to search for a meaning which it does not reasonably bear, in the effort to ascertain and give effect to what may be imagined to have been the intention of congress." Mr. Sutherland says, in his work on Statutory Construction: "And, if the legislature has expressed its intention in the law itself, it is not admissible to depart from that intention on any

extraneous consideration or theory of construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself, which the legislature has used to express it, if a knowledge of it can be so derived." Section 236, p. 812. He says further, in section 287, on page 812: "It is, beyond question, the duty of courts, in construing statutes, to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but . . . first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition, and, if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail, without resorting to

other means in aiding in the construction." Again, on page 313, he says: "The legislative intent being plainly expressed, so that the act, read by itself, or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only simple and obvious duty to enforce the law according to its terms." In *Alexander v. Worthington*, 5 Md. 485, the court said: "The language of a statute is its most rational exposition, and, where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations."

In conclusion, I wish to express my pleasure that the majority of this court are able to reach a conclusion contrary to this opinion, and hold the county liable on these warrants. To a new state, its financial honor is of the highest importance. To develop its resources, capital is indispensable, and everything that savors of repudiation, in any form, tends to frighten capital from its borders.

Petition for rehearing overruled March 5, 1894.

NEW YORK COURT OF APPEALS.

HEALTH DEPARTMENT OF THE CITY OF NEW YORK, *Appt.*,

v.

RECTOR, etc., OF TRINITY CHURCH, *Respts.*

(145 N. Y. 32.)

1. A statute requiring water to be furnished on each floor of every tenement house is a valid exercise of police power with respect to health, and also with respect to public safety regarding fires and their extinguishment.
2. Compelling expense to improve property by the exercise of police power does not deprive the owner of his property without due process of law, if the exaction is not unreasonable either with reference to the nature or cost.
3. Due process of law does not require notice to the owner of premises before the board of health under statutory authority can order him to furnish water in tenement houses, where he is entitled to a trial in any attempt to enforce a penalty or punishment for non-compliance.
4. One place of water supply on each floor of a tenement house fairly accessible to all occupants of the floor is all that can usually or reasonably be required for health and fire protection, and therefore all that the board of health has power to order under New York Act 1887, amending section 663 of the New York City Consolidation Act.

(Bartlett, J., *dissent.*)

NOTE.—The above case seems to be one of first impression, and is clearly of great importance.

For constitutionality of laws charging expense of police regulations on business to be regulated, see *Pittsburgh, C. & St. L. R. Co. v. State* (Ohio) 18 L. R. A. 330, and *note*; and for similar question as to cost of abolishing grade crossings, see *Kelly v. Minneapolis* (Minn.) 26 L. R. A. 92, and *note*.

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See also 29 L. R. A. 573.

(February 23, 1895.)

APPEAL by plaintiff from an order of a General Term of the Court of Common Pleas for the city of New York reversing a judgment of a Trial Term in favor of plaintiff in an action brought to recover the statutory penalty for refusing to comply with an order of the board of health to place water facilities in certain tenement houses. *Reversed.*

Statement by Peckham, J.:

This is an appeal from an order of the general term of the court of common pleas for the city of New York, which reversed a judgment on a verdict directed for the plaintiff, and granted a new trial. The action was brought by the plaintiff, by virtue of several acts of the legislature giving it power, in certain cases, to commence an action in its own name, for the purpose of recovering the amount of \$200, being the penalty for twenty days' violation by the defendant of the act hereinafter mentioned, relative to the supply of water in several tenement houses owned by the defendant. The defendant denied some of the allegations of the complaint, and set up, also, as one of the defenses to the action, that the statute upon which the complaint is founded is unconstitutional. Each party moved, after the evidence was in, that a verdict be directed in its favor. The motion on the part of the plaintiff was granted, and that on the part of the defendant was denied. The defendant excepted to these decisions of the court, and, judgment having been entered, it appealed to the general term of the court of common pleas. There the judgment was reversed, and from the order of reversal the plaintiff appeals here.

The cause of action is founded upon section 663 of the Consolidation Act, relating to the city of New York, as such section was amended by chapter 84 of the Laws of 1887. After making various provisions in prior sections for the proper construction and ventilation of tenement houses in the city of New York, the legislature, by the amendment of 1887, enacted as follows: "Sec. 663. Every such house erected after May 14th, 1867, or converted, . . . shall have Croton or other water furnished in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families; and all tenement houses shall be furnished with a like supply of water by the owners thereof whenever they shall be directed so to do by the board of health. But a failure in the general supply of water by the city authorities shall not be construed to be a failure on the part of the owner, provided that proper and suitable appliances to receive and distribute such water are placed in said house. Provided, that the board of health shall see to it that all tenement houses are so supplied before January first, eighteen hundred and eighty-nine." The rest of the section is not material. It appeared upon the trial that the defendant was the owner of certain houses in the city of New York, known as "Numbers 59, 77, 84, and 86 Charlton Street," and on the 20th of March, 1891, the plaintiff caused to be served on the agent of the defendant a notice requiring the defendant, in conformity with the provisions of the Sanitary Code, to alter, repair, cleanse, and improve the premises above mentioned, and directing that suitable "appliances to receive and distribute a supply of water for domestic use be provided on the top floor of No. 59; the basement, first and second floors of No. 77; the basement, first, second, and third floors of No. 84; and the basement and attic of No. 86." And the defendant was required to comply with the requirements within five days from the receipt of the notice, and it was also stated in the notice that any application for a necessary extension of time, or for the suspension of any part of the requirements contained in the written notice, should be made to the health department, at the time and place designated in the notice. This action was brought against defendant as owner of houses Nos. 77 and 84 Charlton street. The defendant claims that the houses in question were not "tenement" houses, as that word is popularly used; that they were houses constructed many years ago as dwelling houses, and they have never been altered, with reference to their internal arrangement, so as to convert them into what would popularly be called "tenement houses." They were old-fashioned dwelling houses,—two-story, attic, and basement. There were hydrants in the back yards, accessible to all tenants of the houses. But the proof in the case shows that at No. 77 Charlton street there were three families, and in No. 84 there were six families; and the houses came clearly and distinctly under the definition of "tenement houses," as enacted by section 666 of the Consolidation Act, as amended by the Laws of 1887, chap. 84, p. 100. It is

claimed on the part of the defendant that the buildings are in a transition neighborhood, which will be shortly required for business structures; that they are not in a neighborhood where all or many of the large buildings, which are known as "tenement houses," in the popular meaning of the word, are situated; and that these houses are not really within the reason of the statute. The defendant offered on the trial to give testimony as to the necessary cost of complying with the order of the board of health, which was excluded, and the defendant excepted. Defendant also offered to prove that the introduction of appliances to furnish water on each floor, and the required sinks and waste pipes to connect with the sewer, would cause great danger of injury to the property, through the water in the pipes freezing and the pipes bursting in the winter season; also, that no complaints had been made to the defendant corporation by the occupants of these houses, in reference to the want of water. All this evidence was excluded, under the objection of the plaintiff, and upon the exception of the defendant. The general term of the common pleas granted leave to plaintiff to appeal from its order of reversal and granting a new trial, on the ground that a question of law was involved, which ought to be reviewed by this court.

Mr. Roger Foster, with Mr. Henry Steinert, for appellant:

The statute is a lawful exercise of the police power both for the protection of the health of the community and protection against fire.

Com. v. Roberts, 16 L. R. A. 400, 155 Mass. 281; *Com. v. Certain Intoxicating Liquors*, 115 Mass. 153; *Baneroft v. Cambridge*, 126 Mass. 438; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113; *Com. v. Abbott*, 160 Mass. 282; *Prentice, Pol. Powers*, 236, note 2; *Re Paul*, 94 N. Y. 497; *Rose v. King*, 15 L. R. A. 160, 49 Ohio St. 213.

The owners of these houses, like the owners of theatres, dedicate them to a quasi public use or a use in which the public have a special interest, which justifies a special regulation regulating their use.

People v. King, 1 L. R. A. 293, 110 N. Y. 418; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1; *Budd v. People*, 148 U. S. 517, 86 L. ed. 247, 4 Inters. Com. Rep. 45.

Tenement-house owners are in a similar position to innkeepers, whose obligations to their guests have always been regulated by law.

People v. Budd, and *Budd v. People*, *supra*; *Hale, De Portibus Maris*, 77.

The protection of the public health is always a justification for the regulation of the use of property under the police power.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Budd*, *supra*; *People v. Hoer*, 25 L. R. A. 794, 141 N. Y. 129; *People v. King*, *supra*; *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375; *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102.

To promote the public safety, the legislature has the power to regulate the construction of buildings in cities by forbidding their erection above a certain height, by compelling the use of fire-proof material and even by forbidding

the repair of wooden buildings put up within the fire limits before the passage of the law.

Fire Department of New York v. Atlas S. S. Co. 106 N. Y. 586; *People v. D'Oench*, 111 N. Y. 859; *Klinger v. Bickel*, 117 Pa. 826; *Ex parte Fiske*, 72 Cal. 125; *Wadleigh v. Gilman*, 12 Me. 408, 28 Am. Dec. 188; *King v. Davenport*, 98 Ill. 806, 38 Am. Rep. 89; *Vanderbilt v. Adams*, 7 Cow. 349; *Allen v. Taunton*, 19 Pick. 485; *Opinion of Justices*, 8 L. R. A. 487, 150 Mass. 592.

An abundant and accessible supply of water is a necessity for the protection of the health of the community and for protection against fire; and is always the subject of police regulations.

State v. Toledo, 48 Ohio St. 112; *Lumbard v. Stearns*, 4 Cush. 60; *Opinion of Justices*, *supra*; *Spring Valley Water Works v. Schottler*, 110 U. S. 847, 28 L. ed. 178.

It is not a taking of property to compel an owner to improve or alter the condition of his property although he is thereby put to some expense.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 87 L. ed. 769; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 88 L. ed. 269; *People v. Boston & A. R. Co.* 70 N. Y. 569; *Charlotte, O & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1; *Goddard, Petitioner*, 16 Pick. 504, 28 Am. Dec. 259; *Carthage v. Frederick*, 10 L. R. A. 178, 122 N. Y. 268.

The state may compel a man to drain his own land at his own expense.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Wurts v. Hoagland*, 114 U. S. 806, 29 L. ed. 229; *Donnelly v. Decker*, 88 Wis. 461, 46 Am. Rep. 687; *Norfleet v. Cromwell*, 70 N. C. 694, 16 Am. Rep. 787; *Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63; *O'Reiley v. Kankakee Valley Draining Co.* 32 Ind. 169; *New Orleans Draining Co.* 11 La. Ann. 838; *Williams v. Detroit*, 2 Mich. 560; *Seestons v. Crunkilton*, 20 Ohio St. 849; *Dingley v. Boston*, 100 Mass. 544; *Bancroft v. Cambridge*, 126 Mass. 438; *Hagar v. Yolo County Supra*, 47 Cal. 222; *French v. Kirkland*, 1 Paige, 117, 2 L. ed. 588; *Philips v. Wickham*, 1 Paige, 590, 2 L. ed. 768; *Woodruff v. Fisher*, 17 Barb. 224.

So, a city can forbid the construction of wooden buildings within its limits.

Vanderbilt v. Adams, 7 Cow. 349; *Wadleigh v. Gilman*, 12 Me. 408, 28 Am. Dec. 188; *Cordes v. Miller*, 89 Mich. 581, 38 Am. Rep. 480; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 826.

The state may require the owner of a lot to fill it up at his own expense when otherwise it would become a nuisance.

Nickerson v. Boston, 181 Mass. 806; *Rochester v. Simpson*, 184 N. Y. 414; *Yonkers Board of Health v. Copcutt*, 23 L. R. A. 485, 140 N. Y. 12.

The legislature may forbid the further use of a brewery for the purpose for which it was constructed.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

Or further interments in a cemetery may be
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forbidden by the ordinance of a city which sold the land for that purpose with a covenant of general enjoyment.

Brick Presby. Church Corp. v. New York, & Cow. 598; *Coates v. New York*, 7 Cow. 535.

So a building law may forbid improvements or repairs without a license.

Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 838. See also *Daniels v. Hilgard*, 77 Ill. 640; *State v. Hoskins* (Minn.) 25 L. R. A. 759; *Rideout v. Knox*, 2 L. R. A. 81, 148 Mass. 368; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625.

The act is not unconstitutional because of its failure to expressly direct that the owner of a tenement shall be given notice and a hearing before he is ordered to connect his buildings with the Croton water pipes.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Spencer v. Merchant*, 100 N. Y. 535, 125 U. S. 845, 31 L. ed. 763; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 8 Inters. Com. Rep. 209; *Chicago & G. T. R. Co. v. Weltman*, 143 U. S. 839, 36 L. ed. 176; *People v. Yonkers Board of Health*, 23 L. R. A. 481, 140 N. Y. 1; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650.

If notice was necessary it will be presumed that it was given.

Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637; *People v. Seneca Falls Board of Health*, 59 Hun, 595.

Mr. S. P. Nash, for respondent:

The acts of the legislature which impose the duty of supplying water on each floor of the houses described cannot be sustained as a proper exercise of police power.

Carthage v. Frederick, 10 L. R. A. 178, 122 N. Y. 268; *People v. Gilson*, 109 N. Y. 389; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Rochester v. Simpson*, 57 Hun, 36.

Judicial proceedings which involve the imposition of penalties or other pecuniary liabilities cannot be taken without notice to the parties to be affected.

People v. Seneca Falls Board of Health, 59 Hun, 595.

Where legislation destroys or impairs the property of the citizen or interferes with his rights it is void, unless it is clearly within the police power of the state; legislation looking to the public good, not merely to individual ease and comfort, or the benefit of one class rather than another.

Forster v. Scott, 18 L. R. A. 543, 136 N. Y. 577.

Peckham, J., delivered the opinion of the court:

The recovery in this case is founded upon that portion of the consolidation act which requires that all houses of a certain description, upon the direction of the board of health, shall be provided with Croton or other water in sufficient quantity at one or more places on each floor, occupied, or intended to be occupied, by one or more families. The defendant, among other things, alleges as a defense that the order of the board of health directing the defendant to furnish the water as provided by the statute

was made without notice to it, and that, as it could not be complied with excepting by the expenditure of a considerable amount of money, the result would be to deprive the defendant of its property without a hearing and an opportunity to show what defense it might have, and that it in fact deprived the defendant of its property without due process of law. There was no arrangement in either of these houses in question for the supplying of the Croton or other water to the occupants of each floor at the time when the order of the board of health was made. Such order could not, therefore, be complied with on the part of the defendant without the expenditure of money for that purpose. That fact must be assumed, and, even upon that assumption, we do not think the act is invalid on the alleged ground that it deprives the defendant, if enforced, of its property without due process of law. The act must be sustained, if at all, as an exercise of the police power of the state. It has frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the federal and state constitutions, and the law passed in the exercise of such power must tend, in a degree that is perceptible and clear, towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided. Such cases have arisen in this state, where the power of the legislature was questioned, and where the exercise of that power was affirmed or denied for the reasons given therein. See *People v. Marz*, 99 N. Y. 877, 52 Am. Rep. 84; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686; *People v. Gillson*, 109 N. Y. 889; *People v. Arensburg*, 105 N. Y. 129, 59 Am. Rep. 483, and many cases cited in these cases. See also, *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 62, 21 L. ed. 894, 404; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 928; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989. The act must tend in some appreciable and clear way, towards the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of the police power. It must not be exercised ostensibly in favor of the promotion of some such object, while really it is an evasion thereof, and for a distinct and totally different purpose; and the courts will not be prevented from looking at the true character of the act, as developed by its provisions, by any statement in the act itself, or in its title, showing that it was ostensibly passed for some object within the police power. The court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof; and it must see that the latter do tend, in some plain and appreciable manner, towards the accomplishment of some of the objects for which the legislature may use this power.

Assuming that this act is a proper exercise

of the power, in its general features, we do not think that it can be regarded as invalid because of the fact that it will cost money to comply with the order of the board, for which the owner is to receive no compensation, or because the board is entitled to make the order, under the provisions of the act, without notice to and a hearing of the defendant. As to the latter objection, it may be said that, in enacting what shall be done by the citizen for the purpose of promoting the public health and safety, it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature. *People v. Yonkers Board of Health*, 140 N. Y. 1, 6, 23 L. R. A. 481. The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If, in such case, the enforcement of the direct command of the legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the state or federal constitution would be violated. The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out.

As to the other objection, no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property, and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would, without doubt, violate the constitutional rights of the individual. The exaction must not alone be reasonable, when compared with the amount of the work or the character of the improvement demanded. The improvement or work must, in itself, be a reasonable, proper, and fair exaction, when considered with reference to the object to be

attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges. We may own our property absolutely, and yet it is subject to the proper exercise of the police power. We have surrendered, to that extent, our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property, and which we must incur, either voluntarily, or else under the direction of the legislature, in order that the general health, safety, or welfare may be conserved. The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants, and of the public through them, may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class, and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction, either with reference to its nature or its cost. Within this reasonable restriction, the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors, or to the public generally. The difference between what is and what is not reasonable frequently constitutes the dividing line between a valid and void enactment by the legislature in the exercise of its police power. In commenting on the difference of degree in any given case which would render an act valid or otherwise, *Mr. Justice Holmes*, in *Rideout v. Knor*, speaking for the supreme court of Massachusetts, said: "It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil. Larger ones could not be, except by the exercise of the right of eminent domain." 148 Mass. 868, 872, 2 L. R. A. 81. See also, *Miller v. Horton*, 152 Mass. 540, 547, 10 L. R. A. 116. The case of *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, is an example of the exercise of the taxing power of the state, and other considerations obtain in such cases.

Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the

owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. 1 Dill. Mun. Corp. 4th ed. § 141, and note 2; *Com. v. Alger*, 7 Cush. 83, 84, 86; *Baker v. Boston*, 12 Pick. 183, 193, 22 Am. Dec. 421; *Clark v. Syracuse*, 18 Barb. 82, 86.

The state, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner; but, so long as the amount exacted is limited as stated, the property of the citizen has not been taken, in any constitutional sense, without due process of law. Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them, and where such expense must be borne by them, without any hearing or compensation, because of the provisions of the law. *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140-152, 62 Am. Dec. 625. One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. Laws 1887, chap. 462. The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories,—all these were required by the legislature from such owner, and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health, as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed. *Coates v. New York*, 7 Cow. 185; *Stuyvesant v. New York*, Id. 604; *Cooley*, Const. Lim. 5th ed. p. 708, chap. 16, etc.

Any one in a crowded city who desires to erect a building is subject at every turn, almost, to the exactions of the law in regard to provisions for health, for safety from fire, and for other purposes. He is not permitted to build of certain materials, within certain districts, because, though the materials may be inexpensive, they are inflammable; and he must build in a certain manner. Theaters and hotels are to be built in accordance with plans to be inspected and approved by the agents of the city; other public buildings, also, and private dwellings within certain districts are subject to the same supervision.

And in carrying out all these various acts the owner is subjected to an expense much greater than would have been necessary to have completed his building, if not compelled to complete it in the manner, of the materials, and under the circumstances prescribed by various acts of the legislature. And yet he has never had a hearing in any one of these cases, nor does he receive any compensation for the increased expense of his building, rendered necessary in order to comply with the police regulations. I do not see that the principle is substantially altered where the case is one of an existing building, and it is to be subjected to certain alterations for the purpose of rendering it either less exposed to the danger from fires, or its occupants more secure from disease. In both cases the object must be within some of the acknowledged purposes of the police power, and such purpose must be possible of accomplishment at some reasonable cost, regard being had to all the surrounding circumstances. There might at first seem to be some difference as to the principle which obtained in enacting conditions, upon complying with which the owner might be permitted to erect a structure within the limits of a city or village, or for certain purposes, and the enactment of provisions which would necessitate the alteration of structures already in existence. In the first case it might be urged that the discretion of the legislature in enacting conditions for building might be more extensive, because the owner would be under no necessity of building; it would be a matter of choice, and not of compulsion; and, in choosing to build, it might be said that he accepted the condition,—while in the second case he would have no choice, and would be compelled to alter or improve the existing building as directed by the law. The difference, however, is, as it seems to me, really not one of principle, but only of circumstances. Although the owner, in the one case, is not compelled to build, yet he is limited in the use to which he may put his property by the provisions of the law. He cannot build as he wishes to, unless upon the condition of a compliance with the law; and he may very probably be so situated, as to location of property, and in other ways, that it is really a necessity for him to use his property in the way proposed, and which he cannot do without expending considerable sums above what he otherwise would be called upon to do, in order to comply with those provisions. They must therefore be reasonable, as already stated. When one's use of his property is thus circumscribed and limited, what might otherwise be called his rights are plainly interfered with, and the justification therefor can only be found in this police power. So, when the owner of an existing structure is called upon to make such alterations, while the necessity may seem to be more plainly present, still it may exist in both cases, and the only justification in either is the same. Under the police power, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort and health of the public.

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The citizen cannot, under this act, be punished in any way, nor can any penalty be recovered from him for an alleged noncompliance with any of its provisions, or with any order of the board of health, without a trial. The punishment or penalties provided for in section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge; to show, in other words, that he did not violate the statute, or the order of the board. He might show that the house in question was not a tenement house, within the provision of the act, or that there was a supply of water as provided for by the act, or any other fact which would show that he had not been guilty of an offense with regard to the act. *Salem v. Eastern R. Co.* 98 Mass. 481, 447. The mere fact, however, that the law cannot be enforced without causing expense to the citizen who comes within its provisions, furnishes no constitutional obstacle to such enforcement, even without previous notice to and a hearing of the citizen. What is the propriety of a hearing, and what would be its purpose? His property is not taken without due process of law, within any constitutional sense, when the enforced compliance with certain provisions of the statute may result in some reasonable expense to himself. Any defense which he may have is available upon any attempt to punish him, or to enforce the provisions of the law.

An act of the legislature of Massachusetts which provided that every building in Boston used as a dwelling house, situated on a street in which there was a public sewer, should have sufficient water closets connected therewith, was held valid as to existing houses, and applied, in its penalties, to their owners, if such houses continued without the closets after its passage. *Com. v. Roberts*, 155 Mass. 281, 16 L. R. A. 400. And see *Train v. Boston Disinfecting Co.* 114 Mass. 529, 59 Am. Rep. 113. No notice or hearing was provided for, in the above statute as to water closets, before the act could be enforced; and yet to enforce it would, of course, cost the owner of the building some money. The same may be said as to the disinfecting of the rags, in above case in 144 Mass. If the citizen be charged with any violation of such a statute, and any penalty or punishment is sought or attempted, then is the time for a hearing, and then is the time he can make defense, if any he may have. But to assert that he must be heard before the authorities assume or endeavor to act under and to enforce the law, as against him, is to say, in substance, that each citizen is to be heard upon the general question whether it is right to enforce the law in his particular case. This is not to be permitted. *Com. v. Alger*, 7 Cush. 53, 104; *Salem v. Eastern R. Co. supra*. Everything that the individual could urge upon the hearing, if given prior to the attempted enforcement of the act by the making of the order in question, can be said by him when he is sued, or when the attempt is made to punish him for the alleged violation of the law. Upon the prior

hearing, if granted, it would be no defense to him if he showed that the law could not be complied with, unless at some reasonable expense to himself. That would have been matter to urge upon the legislature prior to the enactment of the statute, as a question of reasonable cost and of public policy. *Boston & M. R. Co. v. York County Comrs.* 79 Ma. 386, 393; *State v. Wabash, St. L. & P. R. Co.* 83 Mo. 144-149; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 149, 156, note, 62 Am. Dec. 625. We do not think that the cost of making the improvements called for by this act exceeds the limits which have been defined, assuming the amount thereof which the defendant offered to prove.

This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him, nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without a hearing) that the thing condemned was a nuisance. Nor is it the case of the destruction of property which is in fact a nuisance, without compensation. Where property of an individual is to be condemned and abated as a nuisance, it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity, when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance. *People v. Yonkers Board of Health*, 140 N. Y. 1, 23 L. R. A. 481; *Yonkers Board of Health v. Copeutt*, 140 N. Y. 12, 23 L. R. A. 485; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 208. We are therefore of the opinion that the act, if otherwise valid, is not open to the objection that it violates either the federal or state constitution, in the way of depriving the defendant of its property without due process of law.

We think the act is valid as an exercise of the police power with respect to the public health, and also with respect to the public safety regarding fires and their extinguishment. We cannot say, as a legal proposition, that it tends only to the convenience of the tenants in regard to their use of water. We cannot say that it has no fair and plain and direct tendency towards the promotion of the public health, or towards the more speedy extinguishment of fires, in crowded tenement houses. That the free use of water, especially during the summer months, tends towards the healthful condition of the body, by reason of the increased cleanliness occasioned by such use, there can be no reasonable doubt. The supply of water to the general public in a city has become not only a luxury, but an absolute necessity for the maintenance of the public health and safety. The city of New York itself has spent millions upon millions of dollars for the purpose of securing this great boon for the inhabitants thereof. The right of eminent domain in the

taking of land around the sources of the water supply has been granted to and exercised by that city to a very large extent, so that all sources of supply of this vital necessity of life should be rendered as free from contamination and danger to health and life as it possibly could be. This use of the water is not confined, so far as the necessities of the case are concerned, to the public hydrants. The water is brought into the city so that it may be used in every house and building within its limits; and although we may, and indeed must, admit that no health law could practically be enforced which should provide that every individual inhabitant of the tenement houses should use the water, yet we think it is perfectly clear that facilities for the use of the water will almost necessarily be followed by its actual use in larger quantities and more frequently than would be the case without such facilities, and to the great benefit of the health of the occupants of such houses. Those occupants require it more even than their more favored brethren, living in airy, larger, more spacious, and luxurious apartments. Their health is matter of grave public concern. The legislature cannot, in practice, enforce a law so as to make a man wash himself; but, when it provides facilities therefor, it has taken a long step towards the accomplishment of that object. That dirt, filth, nastiness in general, are great promoters of disease; that they breed pestilence and contagion, sickness and death,—cannot be successfully denied. There is scarcely a dissent from the general belief on the part of all who have studied the disease that cholera is essentially a filth disease. The so-called "ship fever" or "jail fever" arises from filth. Most diseases are aggravated by it. That opportunities—conveniences—for the use of water in these tenement houses will unquestionably tend towards, and be followed by, more cleanly living on the part of the occupants of those houses, cannot, it seems to me, admit of any rational doubt; and, if so, then the law which provides, at a reasonable cost, for the furnishing of such facilities, is plainly and honestly a health law.

The learned counsel for the defendant asks where this kind of legislation is to stop. Would it be contended that the owners of such houses could be compelled to furnish each room with a bath tub, and all the appliances that are to be found in a modern and well-appointed hotel? Is there to be a bath room and water closet to each room, and every closet to be a model of the very latest improvement? To which I should answer, certainly not. That would be so clearly unreasonable that no court, in my belief, could be found which would uphold such legislation, and it seems to me equally clear that no legislature could be found that would enact it. The tenement house in New York is a subject of very great thought and anxiety to the residents of that city. The number of people that live in such houses; their size; their ventilation; their cleanliness; their liability to fires; the exposure of their occupants to contagious diseases, and the consequent spread of the contagion through the

city and the country; the tendencies to immorality and crime where there is very close packing of human beings of the lower order of intelligence and morals,—all these are subjects which must arouse the attention of the legislature, and which it behooves him to see to, in order that such laws are enacted as shall directly tend to the improvement of the health, safety, and morals of those men and women that are to be found in such houses. Some legislation upon this subject can only be carried out at the public expense, while some may be properly enforced at the expense of the owner. We feel that we ought to inspect with very great care any law in regard to tenement houses in New York, and to hesitate before declaring any such law invalid, so long as it seems to tend plainly in the direction we have spoken of, and to be reasonable in its provisions. If we can see that the object of this law is without doubt the promotion or the protection of the health of the inmates of these houses, or the preservation of the houses themselves, and consequently much other property, from loss or destruction by fire, and if the act can be enforced at a reasonable cost to the owner, then, in our opinion, it ought to be sustained. We believe this statute fulfills these conditions. We think that in this case it is not a mere matter of convenience of the tenants as to where they shall obtain their supply of water. Simple convenience, we admit, would not authorize the passage of this kind of legislation. But where it is obvious that, without the convenience of an appliance for the supply of water on the various floors of these tenement houses, there will be scarcely any but the most limited and scanty use of the water itself, which must be carried from the yards below, and when we must admit that the free use of water tends directly and immediately towards the sustaining of the health of the individual, and the prevention of disease arising from filth either of the person or in the surrounding habitation, then we must conclude that it is more than a mere matter of convenience in the use of water which is involved in the decision of this case. The absence of the water tends directly towards the breeding of disease, and its presence is healthful and humanizing.

Looked at in the light of a fire law, and the act is also valid. The section of the consolidation act in question belongs to title 7, which treats of tenement and lodging houses; and various provisions are made in the preceding sections looking towards the prevention and the prompt extinguishment of fires, as well as towards the protection and promotion of the health of the occupants of such houses. And it seems to me that the facility for the extinguishment of fires, which would result from the presence of a supply of water on each floor of these houses, is plain, and the act must be looked upon as a means for securing such an important result. We are inclined therefore, to the belief that the act may be upheld under both branches alike, as a health law, and as one calculated to prevent destruction of property from fires which might otherwise take place.

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The act is somewhat vague as to what shall be regarded as a sufficient quantity of water on each floor, but it must have in this respect, as in others, a reasonable construction; and when an appliance for its supply is placed on a floor where it might be open and common to all those on that floor, and easy of access, and the supply sufficient in amount for general domestic purposes, then and in such case there would be a full compliance with the provisions of the act.

Some criticism is made in regard to the wording of the order of the board of health. The order directed that suitable appliances to receive and distribute a supply of water for domestic use should be provided at these various houses; and it is claimed that there is no language in the act which requires appliances for the distribution of water, nor that the water shall be furnished for domestic use. The act provides that the water shall be furnished in sufficient quantity at one or more places on each floor occupied, or intended to be occupied, by one or more families. This necessarily requires some appliance for that purpose. The statute must also mean that the water is to be provided for the use of the one or more families that are to be occupants of the floor, and that must include a sufficient quantity of water for domestic purposes. The provision in the law that the water shall be furnished in sufficient quantities at one or more places on each floor cannot be so construed as to leave the number of places of supply entirely to the discretion of the board of health. As the water is to be supplied in sufficient quantity for domestic and not for manufacturing purposes, when that point is reached the law is satisfied. Looking at the purpose of the supply, it is, as I have said, reasonably apparent that one such place on each floor, fairly accessible to all the occupants of the floor, would be all that could usually and reasonably be required, and anything further would be unreasonable, and therefore beyond the power of the board to order. The facilities thus given would at the same time furnish the means necessary for obtaining water to extinguish such fires as might accidentally break out, and before they had obtained such headway as to render necessary the aid of the fire department. This is clearly a most important safeguard.

The question alluded to in the brief of the respondent's counsel, whether the penalties might not be said to have commenced running immediately after the passage of the amended Act of 1887, because of the provision requiring all tenement houses to be supplied with suitable appliances before January 1, 1889, and so have amounted to a confiscation of property, is not before us, as the proceeding herein was to recover only those incurred since the order was made by the board. If such a case arises where penalties so enormous in amount are claimed, there will probably be not much difficulty in refusing enforcement, under the circumstances of that case. Upon the whole, we think the order of the General Term of the Court of Common Pleas should be reversed, and the judgment of the Trial Court affirmed, with costs.

Bartlett, J., dissenting:

I am unable to discover the limit of legislative power, if this act is to stand. Upon the face of the proceeding, it is not an exercise of the police power to promote the safety of property by the prevention of fire. The order of the health department, served upon the defendant, directs that suitable appliances "to receive and distribute a supply of water for domestic use be provided" on certain floors in the houses named. The act provided that tenement houses "shall have Croton or other water furnished in sufficient quantities at one or more places on each floor," etc. The order undertakes to construe the act, and requires the landlord to distribute a supply of water for domestic use on each floor. The board of health is not confined to compelling one place on each floor at which water may be obtained, but the act reads, "one or more places on each floor." So that it is left with the board of health to determine how many water faucets upon each floor shall be provided by the landlord for the use and convenience of his tenants. In other words, the legislature seeks to vest in one of the departments of the city government the power to decide the extent of the plumbing in tenement houses for Croton water purposes. It must, of course, be admitted that water is essential to the public health, and more particularly in crowded tenement districts. It would undoubtedly be a legitimate exercise of the police power to compel the introduction of water into tenement houses at some convenient point where all the tenants could obtain an adequate supply; and it may be that the legislature could go so far as to require a faucet upon each floor of the large tenement houses, in the public hall, in order to encourage the free use of water, by enabling the tenants to procure it without too great exertion, but certainly it cannot be possible that the legislature may leave the number and location of faucets on each floor for the domestic use of water to be determined by the board of health. There is no limitation as to whether the faucets shall be in the public hall, or in the room of the tenant. To my mind, such an exercise of the police power is spoliation and confiscation under the forms of law. It deprives the landlord of the control of his property, and leaves it to a stranger to decide in what manner the house shall be plumbed. It is a direct interference with the right of the landlord to regulate the rental value of his property. It is a matter of common knowledge that in rented apartments in the city of New York the convenience and volume of the water supply is regulated by the rental value of the premises, and that in the cheap tenement districts the convenience of the tenants is not and cannot be consulted to the same extent as in first-class localities. The vice of the act we are considering lies in the fact, already pointed out, that it is too general in its terms, and clothes the health department with unlimited and undefined powers. If it be the legislative intent to compel the introduction of a more abundant supply of water into tenement houses either to promote

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the public health, or to provide for the timely extinguishment of fires, I think this very proper exercise of the police power should be manifested in an act containing details and limitations, so that capitalists may understand the burdens imposed upon tenement property, and decide, with a full knowledge of the facts, whether they care to embark their money in that class of buildings. This court has held *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636, that the limit of police power "cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it." Each case must be decided very largely on its own facts. A sound public policy certainly dictates that at this time, when the rights of property and the liberty of the citizen are sought to be invaded by every form of subtle and dangerous legislation, the courts should see to it that those benign principles of the common-law which are the shield of personal liberty and private property suffer no impairment. I think the judgment should be affirmed, with costs.

All concur with **Peckham, J.**, for reversal except **Bartlett, J.**, who reads for affirmance.

PEOPLE of the State of New York, *ex rel.*
Peter NECHAMCUS, *Appt.*,

v.

WARDEN OF THE CITY PRISON, *Respnt.*

(144 N. Y. 520.)

1. A statute making it unlawful to do business as an employing or master plumber without a certificate of competency obtained from an examining board, and registration with the board of health, and requiring compliance with the regulations of both boards, but having no application to plumbers who do not employ others, is a constitutional exercise of the police power to protect health.
2. Unfair or oppressive action of the board of examiners authorized to grant the required certificates of competency to master plumbers, will not render unconstitutional a statute which, as framed, provides for an impartial board.

(January 20, 1905.)

APPEAL by relator from an order of the General Term of the Supreme Court, First Department, affirming an order of a Special Term for New York County dismissing a writ of habeas corpus which had been sued out to

NOTE.—On the question of equal privileges or protection as affecting the constitutionality of a statute restricting business, see *Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 679.

For other questions as to statutes restricting business, see *note to State v. Loomis* (Mo.) 21 L. R. A. 789; *Braceville Coal Co. v. People* (Ill.) 22 L. R. A. 340; *Leep v. St. Louis, I. M. & S. R. Co.* (Ark.) 23 L. R. A. 264.

For statutes compelling safety of employes, see *State v. Haskins* (Minn.) 25 L. R. A. 759, and *note*.

obtain the release of petitioner from the custody of defendant to which he had been committed for exercising the business of master plumber without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. Roger Foster, for appellant:

The act is void as a deprivation of the relator's liberty and property without due process of law by forbidding him to exercise his lawful calling; as a denial to him of the equal protection of the laws of the state of New York; and as a discrimination against him on account of his race.

U. S. Const. 14th Amend.; New York Const. art. 1, § 6; *People v. Gillson*, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Mara*, 99 N. Y. 377, 53 Am. Rep. 84; *Live Stock Dealers & Butchers Assn. v. Orcauent L. S. L. & S. H. Co.* 1 Abb. (U. S.) 888.

It has been held in Illinois unconstitutional to provide by statute for the weighing of coal taken out of mines on scales to be furnished by the mine owner, and that the weight thus ascertained shall be the basis for computing the miner's wages.

Millet v. People, 117 Ill. 294, 57 Am. Rep. 869; *Ramsey v. People*, 17 L. R. A. 853, 142 Ill. 380. See also *Godcharles v. Wigeman*, 118 Pa. 481; *Prorer v. People*, 16 L. R. A. 492, 141 Ill. 171; *State v. Loomis*, 21 L. R. A. 789, 115 Mo. 807.

The supreme court of Massachusetts has held that the legislature has no power to enact a law forbidding an employer to impose a fine upon a laborer, or withhold any part of his wages on account of imperfections in his work.

Com. v. Perry, 14 L. R. A. 325, 155 Mass. 117; *Com. v. Potomaka Mill Corp.* 155 Mass. 122, *note*.

In Nebraska, an eight-hour law has been held unconstitutional.

Low v. Rees Printing Co. 24 L. R. A. 702, 41 Neb. 127. See also *Re Kubach, Petitioner*, 9 L. R. A. 493, 85 Cal. 274; *State v. Scougal* (S. Dak.) 15 L. R. A. 477.

In former times legislation of this character was usual. No one was allowed to practice a trade unless he first joined and served the regular terms of apprenticeship and examinations in the guild or trade union, which had control of the same.

Madox Firma Burgl, p. 286; *Brentano's History and Development of Guilds and the Origin of Trade Unions*, in *Toulmin's English Guilds*, p. cxx, 886.

It has been said of this "that it was a monstrous law, and that, according to the opinion of historians, it represented the triumph of the craft guilds, that is, the mediæval trade unions."

People v. Budd, 5 L. R. A. 559, 117 N. Y. 1. Similar attacks upon the "sacred right of labor" were authorized by law in France down to the time of the French Revolution, of which they were amongst the chief causes.

Dunoyer, De la Liberté du Travail, 358; *Carrey's Essays on Rate of Wages*, 195, 196; *Mill, Political Economy*, vol. II. 525, 536.

Of statutes like these, different in kind but only in degree from that under which *Nechamcus* was sent to jail, this court has spoken its opinion in no uncertain language.

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People v. Gillson, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The fact that this act purports to be designed to protect the public health will not prevent the court from invalidating it upon the ground that this is a pretense to cover the design of creating a monopoly.

Ex parte Whitwell, 19 L. R. A. 727, 98 Cal. 73; *Re Jacobs*, *supra*; *People v. Ewer*, 25 L. R. A. 794, 141 N. Y. 129; *Singer v. State*, 8 L. R. A. 551, 72 Md. 464.

The legislature has no power to compel a man to submit to an examination to obtain a certificate of competency before continuing the exercise of his handicraft as a plumber.

In determining the constitutionality of the act the court may examine its effect as proved by the uncontradicted affidavit of the relator.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 289.

Messrs. John R. Fellows, and John D. Lindsay, for respondent:

The legislature may pass laws, the effect of which is to impair or even to destroy the right of property. Private interest must yield to public advantage. All property is held subject to the power of the state to regulate or control its use, to secure the general safety and the public welfare.

Phelps v. Racey, 60 N. Y. 14, 19 Am. Rep. 140; *Bertholf v. O'Reilly*, 74 N. Y. 521, 30 Am. Rep. 823.

All regulations of trade, with a view to the public interests, may more or less impair the value of property, but they do not come within the constitutional inhibition, unless they virtually take away and destroy those rights in which property consists.

Wynhamer v. People, 18 N. Y. 391.

The object of the statute under consideration is obvious, and its measures are clearly calculated, intended, convenient, and appropriate to accomplish that object. Therefore the discretion of the legislature in its enactment is not the subject of judicial review.

People v. Gillson, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Mara*, 99 N. Y. 377, 53 Am. Rep. 84.

That there is a fair, just, and reasonable connection between the statute and the purpose it was designed to serve is apparent upon a perusal of the enactment, and such relation being manifest, the enactment must be upheld as a valid exercise of the police power.

People v. Ewer, 25 L. R. A. 794, 141 N. Y. 129; *People v. King*, 1 L. R. A. 293, 110 N. Y. 418; *People v. Budd*, 5 L. R. A. 539, 117 N. Y. 1.

A statute of Maryland requiring all plumbers, whether masters or journeymen, to take out a license, has been declared constitutional.

Singer v. State, 8 L. R. A. 551, 72 Md. 464.

Every intendment is in favor of the validity of statutes, and no motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the face and to be gathered from the terms of the law itself. *People v. Albertain*, 55 N. Y. 54; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145.

Gray, J., delivered the opinion of the court:

The act, for the violation of the provisions of which the relator was arrested and convicted (Laws 1892, chap. 602), created a board for the examination of plumbers, which, in the cities of New York, Brooklyn, and Albany, was to be known as the "examining board of plumbers," and in other cities of the state as "the examining and supervising board of plumbers and plumbing." The members of the board were to be appointed by the mayor, and were to consist of five persons, two of whom were to be master plumbers, of not less than ten years' experience in the business of plumbing, and one was to be a journeyman plumber of like experience. The two other members of the board were to be the chief inspector of plumbing and drainage of the board of health and the chief engineer having charge of the sewers. The fourth section of the act empowered the several boards of examiners to examine all persons intending to engage in the business of plumbing "as employing plumbers," with the power to examine all persons applying for certificates of competency as "employing or master plumbers," or inspectors of plumbing; to determine their fitness and qualifications for conducting such business; and to issue certificates of competency to all such persons as, upon a satisfactory examination, were determined by the board to be qualified for conducting the business as "employing or master plumbers," or inspectors of plumbing. The fifth section requires any person intending to conduct the "trade, business, or calling of a plumber, or of plumbing . . . as employing or master plumber," to submit to examination before the board, as to his experience and qualifications in such trade, business, or calling; and declares that, after September 1, 1893, it shall not be lawful in any city of this state for any person to conduct such "trade, business, or calling" unless he shall have first obtained a certificate of competency from the board of the city. The sixth section provides that on and before September 1, 1893, every "employing or master plumber," carrying on his "trade, business, or calling" in any city of this state, shall register his name and address at the office of the board of health of the city, and that he shall thereupon be entitled to receive a certificate of such registration; provided that, at the time of his application for registration, he hold a certificate of competency from the examining board. A further provision of the section makes it unlawful for any person to engage in the trade, business, or calling" of an "employing or master plumber" without such registration. The thirteenth section provides that any person violating any of the provisions of the act, or any regulation of the board of health, or of the board of examiners, shall be deemed guilty of a misdemeanor, etc.

The relator was a master plumber, who had practiced his trade for some years past in the city of New York. He does not allege that he had applied for examination, or had been refused a certificate of competency from the examining board of plumbers of the city

of New York; but he alleged in his petition his trade, his religion, and Russian nationality, and then set forth various refusals of the board in that city to grant certificates to other persons because discriminating against race and religion, and because of their not belonging to an association of master plumbers. He says that the act is void, as a deprivation of his liberty and property without due process of law, inasmuch as it grants to the individual members of the examining board of plumbers an exclusive privilege, immunity, and franchise. He says that it is a denial to him of the equal protection of the laws of this state, and that it is a discrimination against him on account of his race. In specification of his objections, he says: First, that the object of the act is to create a monopoly, because, if intended to secure good plumbing work, it would apply to journeyman plumbers and independent plumbers who work alone, or with the aid of apprentices, and do not employ other plumbers; and second, that even if the act applied to all plumbers, journeyman as well as master, it will still be unconstitutional.

As a preliminary observation, I may say that the first ground partakes more of criticism upon the extent to which the legislature has gone. Every person may follow the trade of a plumber, if he chooses, and the restriction is upon their employing men to work for them in their business, unless they hold a certificate of competency based on experience and qualifications. Another observation is that the act does not suggest, as the appellant says of it, any "discrimination against him on account of his race." That is pure supposition, based upon the way he claims to have seen the board perform its duties, and not upon the language of the act, or any possible inference therefrom. A final observation is that it is not made to appear by the petition for the writ that the relator has suffered anything at the hands of the board of examiners. In the absence of any allegations that he applied for examination, that he passed the examination satisfactorily, and that the board, unjustly or otherwise, refused him the certificate, we must assume, under his allegations of his competency and skill as a plumber, or master plumber, that he could have successfully applied for the certificate, which the board was authorized to grant. It seems to me that the constitutionality of this act is to be tested by its effect upon the citizen's right to pursue a lawful employment. If it imposes an arbitrary restriction, and if it has no reference to the welfare and health of the people, it must be condemned. I am not unwilling to concede that the act skirts pretty closely that border line beyond which legislation ceases to be within the powers conferred by the people of the state, through the constitution, upon its legislative body. When the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity, and to nullify the legislative attempt to invade the citizen's rights. The court should never hesitate to interpose the barrier of its judgment against the operation

of laws which distinctly contravene constitutional rights. There has been much discussion upon the subject of what is a valid exercise of the police power of the state through legislative enactment, and there is little to be added to what this and other courts have said. The police power extends to the protection of persons and of property within the state. In order to secure that protection, they may be subjected to restraints and burdens by legislative acts. If the act is a valid and reasonable exercise of the police power of the state, then it must be submitted to, as a measure designed for the protection of the public to secure it against some danger, real or anticipated, from a state of things which modifications in our social or commercial life have brought about. The natural right to life, liberty, and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the welfare, health, or prosperity of the state. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited. That is a fundamental condition of the state, and which, in the end, accomplishes by reaction a general good, from which the individual must also benefit. The restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated. *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794. The legislature, however, is not authorized to enact measures which, under the mere guise of a protection to the citizen, restrains him in the free pursuit of a lawful occupation, and such legislation this court has had occasion, within recent years, to condemn. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389. In the *Gillson* case it was observed by Judge Peckham that if legislation is calculated, intended, convenient, or appropriate to accomplish the good of protecting the public health, and of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial review, but those measures must have some relation to those ends. To this unassailable proposition I will add the remark that the courts should always assume that the legislature intended by its enactment to promote those ends, and, if the act admits of two constructions, that should be given to it which sustains it and makes it applicable in furtherance of the public interests. What is, then, the construction which this act should receive from the court? In the first place, the intentment is warranted that the drainage and sewerage, whether of public works and buildings, or of private tenements, shall be as skillfully planned and carried out as the modern standard of the science admits. Whatever the individual doubts as to the benefits or success, in a sanitary sense, of the work of plumbing as now practiced, it is generally recognized to be essential to comfort and health; and that it should be the subject of some supervision by the authorities ought not to be put in

question. The very doubt should make us hesitate to place any obstacle in the way which the legislature, in its discretion, adopts, in order to accomplish something by which large communities shall benefit in their health and comfort. Is this statute not a regulation of a trade, which is in the public interest? The trade very closely concerns the inhabitants of cities, and it should require no argument to show that the more skillful and the more competent the plumber who is employed to do some large work upon the drainage and sewerage system of a city, or of a public or private building, the greater the security to those inhabitants.

This act does not restrain individuals from working as plumbers. It restrains persons from engaging in the business of master or employing plumbers, unless, from experience and qualifications, they are shown to be, themselves, of competent skill. We know that important plumbing work calls for plans and designs and requires skilled supervision. It is some guaranty of these requirements being met that the plumber, employed upon the particular work and who must employ plumbers and assistants in carrying out the work engaged upon, is competently certified, and therefore held out to be skilled and capable in his business. The layman in his ignorance is obliged to put some trust in the plumber he engages; for the plumber's work is not only one calling for the exercise of skill, but it is done in places which are dark, or more or less inaccessible. The legislature, in creating a system by which the qualifications of plumbers, who propose to have work performed by others under their direction, shall be determined, as it seems to me, aids the citizen in an important degree in placing his confidence and furnishes some safeguard against the performance of bad and unsafe work. That the men employed by the master plumber may prove untrustworthy in practice, or may neglect the work committed to them, certainly can furnish no ground for attacking the purpose of this statute; for the presumption and the natural probability are the other way, that a master plumber, who has been certified by the board, will exercise care in the selection of his employes, and he will be competent to see and correct their faults and omissions. Every reason, in my opinion, which bears upon the citizen's comfort and health, demands that we sustain this statute as a step in the right direction.

Nor is the act vicious for affecting the general individual, or as operating as some restraint upon other business occupations, in connection with which the work of plumbing may be undertaken; as, for instance, in the case of a contract for the erection of a building which may include the doing of the plumbing work. As I have previously observed, it does not operate to prevent the individual from following the trade of a plumber. It, merely and only, requires of those who propose to do business as master plumbers to submit to an examination as to their general competency. The application of the statute is to persons following the trade of a practical plumber. The terms "trade, business, or calling," employed in

the statute, are synonymous, and have relation to the mechanical employment. One's trade is that business which he has learned and fitted himself to follow, and when the legislature speaks of a "person intending to conduct the trade, business, or calling of a plumber" it has used the words as they would naturally and ordinarily be understood by all, and, particularly, by that class of the people to whom they were intended to apply. So regarded, there can be no reasonable doubt that the application of the statutory provision is to the person whose actual and real occupation is that of the practical plumber. It cannot have a more extended application, nor comprehend those persons whose business is not that of the plumber, as it is understood to be. Kindred occupations would not be affected. Whenever a person holds himself out to the public as a plumber, undertaking to do work as such, he must, if he employs assistants to perform the work, comply with the law and procure his certificate.

Nor is it a ground of objection that, as the statute was intended to apply only to master or employing plumbers, the inference follows that a monopoly in the business is created or sanctioned. It may or may not have been wiser that the legislature should require examinations by and certificates from the examining boards in the case of every person engaged in the business of plumbing; but, if the act is a step in the direction of something which will insure to the public health and comfort, that it does not go as far as it might is not a reason for invalidating it. I am able to see how this act may limit the number of master plumbers, and with great wisdom; but I am not able to see how any monopoly will necessarily follow. The purpose of the act is in the direction of limiting the business to those persons who will perform the work, presumably, with some regard to the public health and comfort, and it would be a misuse of language to speak of such provisions as creating, or even tending to create, a monopoly. As well might it be said that to compel physicians or druggists to take out licenses is a provision giving a monopoly of the particular business to those who become licensed. If the measure is not so obvious a precaution in the case of plumbers as in that of physicians or of druggists, is that a reason for condemning it, if it may reasonably be considered as some precaution? I think not, and I think the measure, as one relating to the general health of cities, is evident, and intended to be so, from the provisions of the act, which require the board of examiners to contain the chief examiner of the city sewers and the chief inspector of plumbing of the board of health; which require not only registration with the board of health, but that the business shall be conducted under rules and regulations prescribed by that board; and which authorize that body to cancel registrations for violations of rules and regulations for the plumbing and drainage of the city. Nor is the constitutionality of an act to be determined by the manner in which its provisions may be carried out by those upon whom devolves the duty of acting as examiners. If they act un-

fairly or oppressively, as alleged by the relator in his petition, that is conduct which may call for a remedy against the persons who compose the board; but it does not furnish ground for assailing the validity of the statute. As the act was framed, it provided for an impartial board, made up of persons to whom, in human intentment, such duties as were imposed could safely be entrusted for performance. I deem it unnecessary to refer to the other objections to this act. They were sufficiently answered at the general term. It is my opinion that it would be unfortunate for the public interests if this statute should be condemned. It is a step in a direction which would be encouraged, for it does distinctly relate to the public health and welfare.

The order appealed from should be affirmed

Peckham, J., dissenting:

I dissent from the judgment of the majority of the court in this case. It is unnecessary to enlarge upon the subject, but I desire to record my grounds of dissent as clearly as I can. The act does not state that it is passed in order to preserve the public health. It is sought to be upheld on that ground and as an exercise of that branch of the police power of the state which pertains to the public health. It seems plain to me that the statute has no legitimate tendency to preserve, protect, or defend the public health. Any plumber, however ignorant of his trade he may be, can, under this act, be employed to do any kind of plumbing work, and without having his work subjected to any kind of supervision or inspection. He is absolutely free, and so is his work. The statute only prohibits him from employing others to work for him,—from being, in other words, a master plumber. In order to become a master plumber, he must obtain this certificate. The chance to obtain it lies through an examination into his capacity and his knowledge of his trade, to be certified to by the board of examiners, of which a proportion of master plumbers is to form a part. Thus his right to work in his trade is circumscribed and limited by force of this statute, and he is compelled to pay a certain amount before he is permitted to pass the examination. It is said this is proper and right, in order that the public may have some assurance that the master or employing plumber is not alone capable of following his trade as such, but that he has sufficient knowledge of the laws of health, as applicable to plumbing, to enable him scientifically to follow that trade as a master plumber. It is to be observed that the examination does not necessarily call for any such knowledge. The act can be complied with, so far as this examination is concerned, if the applicant has but the most ordinary knowledge of the laws of his trade and the proper way to follow it practically. It is true the board may demand much more than that, and much more than was ever necessary to practically pursue the trade. If such additional knowledge were exacted, it would be in fact adding, to the known and ordinary qualifications necessary to carry on the well-recognized trade

of a plumber, those other and entirely different and much superior qualifications necessary in one who intended to conduct the professional business of a sanitary expert with regard to systems and general plans of plumbing. The legislature has no power to impose such a condition upon one desiring to exercise such a trade. It has, as I believe, no power to prescribe that an individual who desires to follow the trade of a plumber shall be possessed of qualifications which do not naturally pertain to such a calling, and which are only possessed by persons qualified for the pursuit of a very different occupation, involving learning and skill of an uncommon order. The legislature might probably provide for a sanitary inspection of plumbing work, and thus secure a kind of work, as to its system and sufficiency, which might fairly be said to tend towards the protection of the health of the general public. But the trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of "sanitation," nor is any such knowledge expected of him, and this act, when practically enforced, may or may not exact it of him. This board has the very greatest and an entirely arbitrary discretion as to what qualifications it will exact from the applicant. It may make an examination which none but an expert in sanitary knowledge could pass, or it may make the examination entirely perfunctory. Judging from the other features of the act, it will depend upon considerations which are foreign to any question of health as to what kind of examination will be made. If the broader and more severe examination is held, or the greater qualification is insisted on, the imposition of such a condition in the case of a workman upon his natural right to work at his ordinary trade renders the act under which a condition can be imposed unconstitutional. Whether in all cases the condition would be insisted on is immaterial. It is the power to insist upon it under the law which makes the law itself void. And yet, if the more severe examination is not made, and the superior qualification exacted, the act is absolutely worthless as a health measure. If it is intended as an act simply to secure the ordinary capacity necessary for the prosecution of the trade of a plumber, it is useless and vexatious, and not a health regulation in any form. If exact more, it is an improper addition to the qualifications of a simple tradesman. This act permits the greater exaction to be made. It seems to me very absurd to treat this statute as one which in any possible manner affects, or which was really intended to affect, the public health. And when it is seen that the work of the master plumber may be performed by journeymen who have been subjected to no official examination, and whose work need not be examined by any one, not even by the master plumber himself, the radical failure

of the act to really protect the public health is quite apparent. Sewer gas is dangerous, but exactly how to treat the matter of plumbing in order to run the least danger therefrom is a subject for professional learning and skill, except as to the narrow part of the tradesman plumber, which is to see to it that his pipes do not leak, and that they do not permit the escape of gas. This part is mechanical and easily understood, and is the part which the tradesman performs, and the system, the proper arrangement thereof, and such kindred questions, are for the determination of a more scientific and a more learned body of men. The examination provided for by this act, if conducted for the sole purpose of discovering the qualifications of an applicant in regard to those matters which pertain and are germane to the real and practical trade of a plumber, will not have the slightest tendency to discover whether he has also the requisite knowledge to enable him to act as a sanitary expert. Taking the act as a whole, it would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites of which are not stated, and where his success or defeat is to be determined by a board of which some of their own number are members. In order to be at liberty to exercise his trade as a master plumber, he must pass this examination and become a member of this favored body. It is difficult for me to see the least resemblance to a health regulation in all this. I think the act is vicious in its purpose, and that it tends directly to the creation and fostering of a monopoly. It seems to me most unfortunate that this court should, by a strained construction of the act as a health law, give its sanction to this kind of pernicious legislation. We shut our eyes to the evident purpose of the statute, and by means of maxims well enough in their way, but sadly out of place here, impute a purpose to the legislature which it plainly did not have, and which, if it did have, it has failed to carry out, even conceding that the purpose could be legitimately effected by other means. This measure detracts from the liberty of the citizen, acting as a tradesman, in his efforts to support himself and his family by the honest practice of a useful trade, and I think no court ought to sanction such legislation, unless it tends much more plainly than does this act towards the preservation of the health and comfort of the public. I think the orders of the courts below were wrong, and should be reversed, and the prisoner discharged.

Andrews, Ch. J., and Finch and Haight, JJ., concur with **Gray, J.,** for affirmance. **O'Brien and Bartlett, JJ.,** concur with **Peckham, J.,** for reversal.

James WALSH, by Guardian ad Litem,
Resp't.
 v.
 FITCHBURG R. CO., *App't.*

(445 N. Y. 301.)

1. Active vigilance is not required to see that a mere licensee on one's premises is not injured.
2. A turntable on railroad lands, properly made and used, is not, even as to children of tender years, such a dangerous and enticing machine that the railroad company will be liable for injury to a child playing with it merely because it is in an unfenced lot near footpaths which the public are permitted to use.

(March 12, 1896.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Rensselaer County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligently leaving a turntable unguarded in an exposed position. *Reversed.*

The facts are stated in the opinion.

Mr. T. F. Hamilton, for appellant:

The courts of this state absolutely decline to concur in the doctrines expressed in *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745.

McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; *Larmore v. Crown Point Iron Co.* 101 N. Y. 891, 54 Am. Rep. 718; *Cusick v. Adams*, 115 N. Y. 55.

Even if the public passed over a foot path near this turntable with the knowledge of the railroad company, and pedestrians passed along this pathway as mere licensees, the railroad owed such passers only the duty to do them no intentional harm and no burden of active vigilance was cast upon the defendant.

Nicholson v. Erie R. Co. 41 N. Y. 531; *Sutton v. New York Cent. & H. R. R. Co.* 66 N. Y. 243.

Other states have refused to follow the *Stout Case* some of them in express terms.

Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; *Frost v. Eastern Railroad*, 64 N. H. 230; *Clark v. Manchester*, 62 N. H. 577; *Bates v. Nashville, O. & St. L. R. Co.* 90 Tenn. 86; *Daniels v. New York & N. E. R. Co.* 13 L. R. A. 248, 154 Mass. 349; *Merryman v. Chicago, R. I. & P. R. Co.* 85 Iowa, 634; *Gay v. Essex Electric Street R. Co.* 21 L. R. A. 448, 159 Mass. 238; *Klier v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164; *Maginnis v. Brooklyn*, 7 N. Y. Supp. 194; *Breckenridge v. Bennett*, 7 Kulp, 95; *Greene v. Linton*, 7 Misc. 272; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 865.

Messrs. Henry T. Nason and William J. Roche, for respondent:

If the turntable in question was a dangerous

piece of machinery, attractive to children, who with the knowledge and permission of the officers and servants of the railroad company were in the habit of frequenting these premises, and of being on and about this turntable, then it was the duty of the defendant either to warn or forbid these children from going on the turntable, or else to take some precaution in their management of the turntable to prevent the occurrence of such an injury as the one complained of here.

Townsend v. Wathen, 9 East, 277; 1 Thomp. Neg. pp. 304, 305; *Bird v. Holbrook*, 4 Bing. 628; *Whirley v. Whiteman*, 1 Head, 610; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 806.

The question was squarely decided in *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745.

The same doctrine has been laid down in *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421; *Bridger v. Asheville & S. R. Co.* 27 S. C. 456; *Ferguson v. Columbus & R. Railway*, 77 Ga. 102; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; *Early v. Lake Shore & M. S. R. Co.* 66 Mich. 349; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289; *Iluaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Barrett v. Southern Pac. Co.* 91 Cal. 296, 44 Alb. L. J. 886. See also *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 696, 31 Am. Rep. 203; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 484.

The reasoning on which the above decisions rest is in accordance with the reasoning of our own courts in negligence cases.

Mullaney v. Spence, 15 Abb. Pr. N. S. 319; *Schmidt v. Cook*, 80 Abb. N. C. 285; *Kuns v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508.

The plaintiff in this case does not stand before the court in the light of a trespasser, but as a person who has come upon the defendant's premises at its express invitation, and the degree of care required of the defendant must be measured accordingly.

Beach, Contrib. Neg. § 206; *Lynch v. Nardin*, 1 Q. B. 29; *Ulark v. Chambers*, L. R. 3 Q. B. Div. 327; *Beck v. Carter*, 69 N. Y. 283, 23 Am. Rep. 175; *Corby v. Hill*, 4 C. B. N. S. 556; *Nicholson v. Erie R. Co.* 41 N. Y. 526; *Sutton v. New York Cent. & H. R. R. Co.* 66 N. Y. 243; *Larmore v. Crown Point Iron Co.* 101 N. Y. 891, 54 Am. Rep. 718; *Mangam v. Brooklyn R. Co.* 38 N. Y. 455, 98 Am. Dec. 66; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326; *Barry v. New York Cent. & H. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Bransom v. Labrot*, 81 Ky. 644, 50 Am. Rep. 193; *Murphy v. Brooklyn*, 113 N. Y. 575; *Cusick v. Adams*, 115 N. Y. 55; *Splitstorf v. State*, 108 N. Y. 205.

No negligence can be imputed to the plaintiff, he being *non sui juris*.

Kuns v. Troy, *supra*; *Ihl v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510; *Mangam v. Brooklyn R. Co. supra*.

NOTE.—The above New York decision adopts for that state the rule approved in New Hampshire and Massachusetts disapproving the majority of the cases on the subject as shown by the note. *Fort Worth & D. C. R. Co. v. Robertson (Tex.)* 14 L. R. A. 781.

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See also 32 L. R. A. 825; 34 L. R. A. 459; 39 L. R. A. 112; 41 L. R. A. 831; 44 L. R. A. 655; 46 L. R. A. 829.

Peckham, J., delivered the opinion of the court:

The defendant owned a plot of ground in the northern portion of the city of Troy, bounded by four different streets. Quite a large portion of its land was unfenced, and the public had for a number of years been accustomed to walk across this plot for the purpose of shortening the distance, instead of going around by the public streets. The land was approached from the north on the same grade as the public street, and the defendant laid its tracks through the street, and onto the plot, for the purpose of using it in the ordinary transaction of its business. It was not used for the purpose of a depot, and the land itself was rough, uneven, overgrown with weeds and grass, and not fit for use by horses and wagons, and was not so used. The public were not invited upon the land in any sense further than that the defendant had not taken occasion to prevent the public from using a portion of it as a footpath for the purpose already stated. The footpath thus marked out by use ran within 15 or 20 feet of the turntable of the defendant, which was used by it in the ordinary course of its business. The surface of the table was in some places about 3 feet above the grade of the plot, and at others it was 8 or 9 feet above grade. The only way to approach it on the level was by the use of the tracks of the defendant, which led onto the table, and it was used for the purpose of taking the defendant's engines, and turning them around. The turntable was built in the usual manner, and was in perfect repair. The main tracks of the defendant ran through the eastern portion of the plot. The turntable was west of the main tracks. On the 31st of August, 1888, the plaintiff, who was at that time a child of the age of five years and nine months, had come upon the defendant's premises, and, in company with several other and older boys, was playing on the turntable; and, in the course of turning the table around, the plaintiff had his leg caught between the rail on the table and the rail on the adjoining earth, and he was severely injured. This action has been brought for the purpose of recovering damages for those injuries, and a recovery has been had, which has been sustained by the general term.

Plaintiff bases his right to maintain this action upon the allegation that the defendant, by permitting the public to go upon its land in the manner stated, had in effect invited such entrance, and was bound on that account to use greater care to prevent an accident of this nature. A further ground is stated that, in using the turntable, even upon its own property, under circumstances which rendered it probable that children would come upon the land and play upon the turntable, it was bound to the exercise of greater care than it had observed; that it was bound to guard the table in such a way that children could not come upon it, or to station a man there to prevent their entrance, or else the defendant should have used some kind of a device which would or might prevent the turning of the table while it was not in use by defendant. The defendant contends that

the plaintiff had not been invited to come upon its ground, either expressly or by any implication arising from its conduct in simply permitting the public to cross a portion of its grounds as a short cut between two streets; and that it was not bound to any active vigilance in the matter, and was only bound to such reasonable care and caution as any one ought to take to prevent injury to another; and that, guided by that rule, it had not, as matter of law, been guilty of any negligence.

As to the assumed invitation held out to the public, there is nothing in the facts found in this record which justifies any such assumption. The plaintiff was not on the land by invitation of the defendant, nor in its business, but for his own purposes, totally disconnected with the defendant's business. He was not a trespasser in the sense of his being unlawfully upon the premises, because the defendant, by its course of conduct, had impliedly granted a license to the public to use the land for the purpose above mentioned. This license, of course, could at any time have been revoked, and then any one going upon the land would have been a trespasser. But, under the circumstances, treating the plaintiff as an adult, and simply upon the question of the invitation held out to him, he was there by sufferance only. The defendant had no right intentionally to injure him, and it would be liable if it heedlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or by failing to exercise reasonable care, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission for his own convenience. *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Byrne v. New York Cent. & H. R. R. Co.* 104 N. Y. 868, 58 Am. Rep. 512. *Splittorf v. State*, 108 N. Y. 205; *Orwick v. Adams*, 115 N. Y. 55. We think there is no proof whatever that the defendant, so far as its duty to plaintiff is concerned, failed to exercise reasonable care in the conduct of its business with regard to this machine.

We are of the opinion that the defendant has not been shown guilty of a violation of its duty, nor has a question been made for the jury in that respect by proof that it used the turntable in the manner it did. It is true that some means might have been adopted which possibly might have prevented the happening of this accident. The proof is that turntables are not generally constructed with bolts for the purpose of keeping them steady. Such bolts do not come with the table from the factory. Nothing of that kind is essential to the machine or for its legitimate and proper use. The table might have been kept so fastened or locked when not in use that people could not turn it without unfastening or unlocking it, and the defendant might even have built a wall around it so high and guarded it so closely as to prevent any access to it by children at any time. But was defendant bound to do so? Did it owe any such duty to the public or to this plaintiff? The turntable was on its own land. It was used by the defendant for the

sole purpose of properly conducting its own business. It was a fit and proper machine for that purpose. It was not of the nature of a trap for the unwary. It was not built in any improper or negligent way with reference to the transaction of the business of the defendant. What further duty did it owe to those who had no business upon its land, who came there unasked, and whose presence was simply tolerated?

Upon the question of alluring plaintiff, we do not think it can be correctly said defendant either enticed or allured him to come upon its land. The whole case in this aspect rests upon the doctrine that the turntable was, as to children of tender years, a dangerous, and at the same time an enticing, machine, one which, when seen, would inevitably and infallibly allure children to come upon it for the purpose of playing upon it, and that the natural and probable result of such play would be the injury of the child. Under such circumstances, it is claimed that a person owning such a machine, although it be used on his own land, is bound to exercise extra vigilance for the purpose of preventing injury to children who come upon the defendant's land allured by the machine and ignorant of its dangers. We do not think the facts of this case bring it within any such principle. The leading case in this country, and one which undoubtedly sustains the plaintiff's contention that it is a case for the jury, is that of *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745. That case has been followed in many states, — in Missouri (*Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592); in Kansas (*Kansas Cent. R. Co. v. Pittsimmons*, 22 Kan. 686, 31 Am. Rep. 208, reporter's note at page 208); in California (*Barrett v. Southern Pac. Co.* 91 Cal. 296); and in some other states. The contrary principle has been announced and held in *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 18 L. R. A. 248, and *Frost v. Eastern Railroad*, 64 N. H. 220. We think the better rule is laid down in the two cases last cited. We do not assert that the defendant owed no duty to the plaintiff under the circumstances existing, but we think it did not owe the duty of such active vigilance as would be necessary to exist in order to send the case to the jury, and permit it to find the defendant guilty of negligence in this case. The court, in *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555, while distinguishing it from the *Stout Case*, *supra*, expresses doubt of the correctness of the application of the principle in the latter case. We have not had occasion to decide the question up to this time, but, now that it is presented, we not only reiterate the doubt which we expressed in the *McAlpin Case*, *supra*, but we think that the question of the defendant's negligence was erroneously submitted to the jury in the *Stout Case*, and that we ought not to follow it as a precedent. We think it is not a question of fact to be submitted to the jury for its determination whether the defendant has or has not been guilty of negligence under such circumstances as appear in this case. Upon such facts, we hold the defendant has violated no

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duty it owed the plaintiff. It is not contended for a moment that a person on his own land may under all circumstances do anything that he chooses without being held liable to answer in damages for injuries which are direct and probable and natural results of his action. We only say this is no such case. The case of *Bird v. Holbrook*, 4 Bing. 637, is cited as analogous in principle to that which plaintiff urges in this case. We do not think so. The defendant in that case, for the protection of his property, some of which had theretofore been stolen, set a spring gun, without notice, in his walled garden, at a distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the defendant was liable to him in damages. In that case the plea was made that the defendant had the right to protect his own property, and that one who was injured without having been invited upon the land, and who was unlawfully there, could maintain no action. It was held that the action was maintainable, for otherwise it might result in a mere trespass being made a capital offense. Chief Justice Best said that the practice (without giving notice) was inhuman, and the proof showed that the defendant had placed the spring gun on the wall for the express purpose of doing injury, and that he had refused to give notice of its existence, on the ground that if he gave notice he would fail to catch any one. The chief justice said that the defendant intended that the gun should be discharged, and that the contents should be lodged in the body of his victim; and that he who sets spring guns without giving notice is guilty of an inhuman act, and, if injurious consequences ensue, he is liable to yield redress to the sufferer. The difference in the two cases is so plain as to require no discussion.

Cases are also cited where the defendant, for the purpose and with the intention of enticing his neighbor's dogs upon his premises, set traps very near the line of the highway, and then baited them with decaying meat, so that the scent was cast not only in the highway, but upon the private premises of the plaintiff, whose dogs, taking the scent, came upon the defendant's grounds, and were taken in a trap, and thereby killed. One of such is the case of *Townsend v. Wathen*, 9 East, 277. The court held the defendant liable, upon the ground that one who sets traps to catch his neighbor's dogs, although the traps were set on his own ground, was liable for his wrongful intent and act, and it was fit to be left to the jury whether it was not defendant's intention to catch the plaintiff's dogs; and it was held that a man must not set traps of a dangerous description in a situation to invite, and for the particular purpose of inviting, his neighbor's dogs, as it would compel them, by their instinct, to come into the trap. The act of the defendant in that case was not done in the prosecution of his immediate and proper business, but, as the court held, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his property,

and the enticement was effected by the means spoken of.

Quite a discussion upon the subject of the acts of an owner upon his own land, directed to the preservation of game or to the destruction of dogs, etc., is to be found in the case of *Deane v. Clayton*, 7 Taunt. 489. In that case the court was equally divided, and so no judgment was rendered. The distinction is clear between acts of the nature spoken of in this case and those which are performed by an individual in the legitimate and honest conduct of his own business upon his own land. As is said by *Mr. Justice Cowen* in *Loomis v. Terry*, 17 Wend. 497, 81 Am. Dec. 806: "The business of life must go forward and the fruits of industry must be protected. A man's gravel pit is fallen into by trespassing cattle; his corn eaten or his sap drunk, whereby the cattle are killed; his unruly bull gores the intruder, or his trusty watch dog, properly and honestly kept for protection, worries the unseasonable trespasser. Such consequences cannot be absolutely avoided." The case of *Clark v. Chambers*, L. R. 3 Q. B. Div. 827, is also cited as in some degree applicable. In that case the defendant erected a barrier along a way which it was admitted he had no legal right to erect. It was erected for the purpose of keeping people from traveling where they had a right to travel. The barrier which he erected was armed with spikes, and was a dangerous obstacle. Some person, without the defendant's authority, removed a part of the barrier from where the defendant had placed it, and put it into an upright position across a footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which the footpath led, when he came in contact with the spikes in the barrier, and injured one of his eyes. The jury found that the barrier was in the road, and dangerous to the safety of a person using it. It was held that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the injury was the intervening act of a third party in removing the dangerous instrument to the footpath from the carriageway where defendant had placed it. In that case you start out with the admission that the act of the defendant was unlawful, and all that follows thereafter was held by the court to be the natural and probable result of his unlawful act.

In *Lynch v. Nurdin*, 1 Q. B. 29, the plaintiff was a child seven years of age, and the cartman of the defendant went into a house in London, and left his horse and cart standing at the door, without any person to take care of them, for about half an hour. The plaintiff got into the cart during the cartman's absence, and another boy led the horse on, and, as plaintiff was about getting off the shaft, the horse started, and plaintiff fell, and was run over by the wheel, and his leg broken. The trial justice left it to the jury to say—First, whether it was neg-

ligence in the defendant's servant to leave the horse and cart for half an hour; and, secondly, whether that negligence occasioned the accident. There was a verdict for the plaintiff. On the return of an order to show cause why a new trial should not be had, *Lord Denman, Ch. J.*, held that the case was properly submitted to the jury, and the defendant was properly held negligent by the jury; and although the child had no business on the cart, and, if an adult, it would be said that his own negligence contributed to the injury, yet the child merely indulged his natural instinct in amusing himself with the empty cart and the deserted horse, and therefore it could not be said that he was negligent, or that his action contributed to the injury, within the legal sense of that term, and therefore the defendant could not be permitted to avail himself of that fact. In the course of his opinion, the chief justice said there was a clear distinction to be taken between the willful act done by the defendant in the spring gun case, deliberately planting a dangerous weapon in his ground, with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. In the latter case the liability of defendant is simply for negligence. There is a great difference in the facts between the case of *Lynch v. Nurdin* and the present case. Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street, might be held a proper question for the jury to say whether it was or was not negligence; while in the case of a defendant engaged upon his own land in simply doing that which it is necessary to do in order that he may carry on his business properly, and who fails to exercise the highest vigilance in order to protect from possible harm children who may stray upon his land for no other purpose than recreation, we think there is an absence of any fact upon which a jury ought to be permitted to find negligence. The defendant in the one case was not upon his own land, nor was he engaged in the proper transaction of his business thereon; but, on the contrary, he was in a public street, and improperly left his horse and cart therein unattended, and where others, and among them children, had the same right to be that he had. In the case of this defendant, on the other hand, the turntable was on its own land; it was a proper and appropriate machine for the carrying on of its business; it was properly made; and it was properly used by the defendant. To liken such a case to the allurements of dogs by the spreading of tainted meat over traps on defendant's lands, done for the very purpose of injury, is, as it seems to me, to lose sight of the different principles upon which the cases rest. At any rate, we think that the plaintiff failed to show any actionable negligence on the part of the defendant, and a submission to the jury of the question of such negligence was error. All that can be said on either side of the question has been set forth.

in the *Stout Case* and the various other cases cited above, and a continuation of the discussion would be fruitless.

We think the judgment for plaintiff must

be reversed, and a new trial granted; costs to abide the event.
All concur.

MARYLAND COURT OF APPEALS.

Jennie COCHRANE, App't.,

v.

Mayor, etc., of FROSTBURG.

(.....Md.....)

1. Ordinances to prevent stock from running at large in a city are within the grant of power to pass ordinances not contrary to law which may be deemed beneficial and to remove nuisances and obstructions upon streets, lanes, and alleys.
2. The express grant of power in the charters of certain cities to prevent cattle from running at large cannot be taken as an intention by the legislature to prohibit the exercise of such power by other cities.
3. A city may be liable for injuries to a person on a street by a cow running at large, which it could have prevented by ordinary care and diligence, where it has permitted the running at large of such cattle without any attempt to stop it while it had become a common nuisance and source of danger.
4. A city is not liable for injuries com-

mitted by a cow running at large without any fault of the owner.

(March 26, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Allegany County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been inflicted upon plaintiff by a cow which was alleged to have been negligently permitted by defendant to be upon its streets.

Reversed

The facts are stated in the opinion.

Messrs. Robert R. Henderson and Benjamin A. Richmond, for appellant:

A municipal corporation is only liable for the permission of a nuisance by it when it has the power, express or implied, to prevent or abate it.

Wood, Nuisances, 2d ed. § 742; *Flynn v. Canton Co. of Baltimore*, 40 Md. 322, 17 Am. Rep. 608.

A municipal corporation has no control over

NOTE.—*Liability of a municipality for permitting animals in streets.*

The above case seems to have had no predecessor which contained all the elements upon which it is decided. The point of distinction seems to be that the cattle had been permitted to run at large until by reason of their number and continued presence in the street they had become a nuisance.

In *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435, the court held that a city might be liable for injuries caused by an exhibition of wild animals in a public street under its sanction and authorization.

But upon a second appeal of that case, 49 Wis. 605, 35 Am. Rep. 793, the court explains its position and limits its former ruling to some extent and holds that a city is not liable for injuries caused by wild animals, the exhibition of which it has licensed without specifying the place, if the owner exhibits them in a public street.

And in *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 394, a city was held not liable for injuries caused by an animal which was merely passing along the highway for exercise in charge of its owner, although it had licensed an exhibition of the animal in a booth to be erected in one of the public squares of the city.

In *Levy v. New York*, 1 Sandf. 465, plaintiff's infant child was killed by a hog which was running at large in the streets, and he brought suit against the city to recover the damages. The court says "that there is no precedent for the action" and "that the idea that because the city may prohibit a nuisance, therefore it must not only pass a prohibitory law but must also enforce it at the hazard of being subjected to all damages which may ensue from the nuisance, is certainly novel," and the court held that in that case there was no liability. But from the facts which appear in the report of that case, there is nothing to show that the running at large of hogs in the public streets had been so frequent as to endanger the safety of citizens.

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In *Kelley v. Milwaukee*, 18 Wis. 86, damage was caused by a hog which was running at large entering plaintiff's premises and injuring some clothes. The plaintiff contended that the city was liable because it had failed to pass an ordinance prohibiting animals from running at large, but the court said that the power to pass such ordinance was a discretionary one, for failure to exercise which the city could not be held liable.

In *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787, the city indefinitely suspended an ordinance prohibiting animals from running at large in the streets for the purpose of destroying the grass and weeds which were growing there. A cow running at large set upon and gored the plaintiff who brought suit against the city, because of its failure to keep the streets safe, but the court held that the city could not be held liable for injuries resulting from its neglect to exercise its governmental powers.

In *Givens v. Paris*, 5 Tex. Civ. App. 705, a cow which a city officer was attempting to drive to the pound inflicted an injury on plaintiff and the city was held not liable, but the case turned on the question of the liability of the city for the negligence of its officer in executing the ordinance, rather than on the question of the liability of the city for permitting a cow to be in the street.

In *Moulton v. Scarborough*, 71 Me. 287, 36 Am. Rep. 398, a town was held liable for its negligence in permitting a vicious animal which it owned to be at large in a public highway, where it inflicted injury on plaintiff.

But in the case last cited the liability was of course not established for any neglect to exercise governmental powers, but for negligence in the keeping of its property, for the same reason that an individual would be held liable under similar circumstances.

H. P. F.

nuisances except such as is conferred upon it by its charter or general law.

Wood, Nuisances, 2d ed. § 743, p. 821.

Even where express power to abate nuisances is given in the charter, it is admitted that the municipality cannot by ordinance make that a nuisance which is not in fact a nuisance.

Wood, Nuisances, 2d ed. § 744; Dill. Mun. Corp. 4th ed. § 874.

When a corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety, or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it.

Wood Nuisances, 2d ed. § 749; *Baltimore v. Marriott*, 9 Md. 160; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312, 17 Am. Rep. 608; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759.

The municipality of Frostburg had power to abate nuisances. The language of its charter is clear and explicit.

Permitting of animals to run at large under the conditions and in the manner set out in the declaration is a nuisance, and it is such a nuisance as the city had power to abate.

All "wrongs which arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, working an obstruction of or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume consequent damage," are nuisances at common law.

Wood, Nuisances, § 1.

Common law is "a system of elementary principles, and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanical arts, and the exigencies and usages of the country."

Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; *Jacob v. State*, 8 Humph. 495; *Hightower v. Fitzpatrick*, 42 Ala. 597.

The question of what constitutes a nuisance is one of law for the court.

Wood, Nuisances, 2d ed. § 82; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759.

Coasting on the public streets had never been decided to be a nuisance until in *Taylor v. Cumberland*, *supra*, so held.

So of ice on sidewalks.

See also *Com. v. Curtis*, 9 Allen, 266; *Com. v. Patch*, 97 Mass. 221.

Cattle running at large are dangerous to life and limb, being provided with horns and hoofs, which it is their nature to use. They are subject to sudden panics and become uncontrollable. They are easily excited to anger, especially by the color red. They make loud and unseemly noises. They soil the streets and sidewalks and are in the way of persons passing. They frighten women and children. Modern science has shown that cattle are a most prolific source of disease amongst men, and that they assist in spreading diseases from man to man. They are predatory in their

habits, and destroy trees, vegetables, grass and ornamental shrubs. The sound of their bells day and night disturbs rest, and tries the nerves. All these things the court will infer from the well-known nature of the animals, and they are alleged in the declaration.

Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589; *Dickson v. McCoy*, 89 N. Y. 401; *Barnes v. Chapin*, 4 Allen, 444, 81 Am. Dec. 710.

Even in the case of domestic animals not known to be dangerous the owner is liable for damage done to persons or property by such animals, when they are negligently allowed by the owner to go where they have no right to be; for instance upon the public streets.

Goodman v. Gay, *Dickson v. McCoy*, and *Barnes v. Chapin*, *supra*; *Illidge v. Goodwin*, 5 Car. & P. 190; Dill. Mun. Corp. 4th ed. §§ 950, 951; *Kerwhacker v. Cleveland, O. & C. R. Co.* 8 Ohio St. 172, 62 Am. Dec. 246.

Messrs. A. A. Doub and David W. Sloan, for appellee;

Where the power to prevent cattle from running at large is not expressly granted, it presumed that it was intended it should not be exercised.

Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465; 1 Dill. Mun. Corp. 4th ed. § 89, and *notes*; *St Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89.

Any fair and reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 Dill. Mun. Corp. § 89; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9; Cooley, Const. Lim. pp. 228-232; 1 Kent, Com. 505.

A charter which confers upon the common council full power and authority to remove and abate any nuisance injurious to public health or safety, etc., does not confer upon the council the exclusive jurisdiction to determine what constitutes a nuisance, but only authorizes the abatement of that which is in fact a common nuisance.

Hennessy v. St. Paul, 87 Fed. Rep. 565; 1 Dill. Mun. Corp. § 874, and *note*; *Collins v. Hatch*, *supra*; Wood, Nuisances, p. 828; *Arkadelphia v. Clark*, 52 Ark. 23.

Where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, one who is gored by a cow running at large in the streets has no cause of action against the city.

Dill. Mun. Corp. § 950; *Rivers v. Augusta*, 65 Ga. 876, 38 Am. Rep. 787.

The power to remove nuisances from the streets could only apply to animals *feræ naturæ*, and would not apply to horses, oxen, cows, sheep, swine, etc.

Van Leuven v. Lyke, 1 N. Y. 516, 49 Am. Dec. 346; *Twigg v. Ryland*, 62 Md. 386, 50 Am. Rep. 226.

Municipal corporations are not liable for failure to pass ordinances which are discretionary.

Wilson v. New York, 1 Denio, 595, 43 Am. Dec. 719.

Such animals are not *per se* nuisances, but are subject only to such regulation as municipal authorities may determine.

Kelley v. Milwaukee, 18 Wis. 86.

Boyd, J., delivered the opinion of the court:

The appellant sued the appellee for injuries sustained by her by being horned, tossed, thrown down and trampled upon by a cow which attacked her while she was walking along a lane or street of Frostburg. The defendant demurred to the declaration and the demurrer was sustained by the court below and judgment entered for the defendant. From that judgment this appeal was taken and we are therefore to inquire into the legal sufficiency of the declaration, and determine whether the facts therein stated, which are admitted by the demurrer, give the plaintiff a right of action.

It is alleged that the defendant was by its charter vested with control over all the streets, lanes, and alleys of Frostburg, and with full power to provide by the passage and enforcement of ordinance for the comfort, good order, health, and safety of all the inhabitants of said town residing within the limits and passing along and over its streets, lanes, and alleys, and with power to prevent and remove all nuisances in said town, and to shield and protect said inhabitants therefrom; that the said town is laid off into streets and alleys, contains between four and five thousand inhabitants, and is compactly built, so that there is a great deal of travel and walking on said streets and alleys.

It is further averred that large numbers of horses, cows, hogs, and horned cattle were turned loose and permitted to run at large upon the streets unattended during the day and night, by means of which "said stock, and particularly said cows (they being armed with dangerous horns and equipped with annoying bells) became a common nuisance and a source of great annoyance and danger to persons passing along said streets and alleys, and particularly so as to women and children, who were attacked and frightened by said stock, whereby the safety and comfort of the inhabitants and the good order of said town were destroyed, and whereby the same became and (at the time of the grievances hereinafter set out) was a common and notorious nuisance and a constant source of dangerous discomfort to the inhabitants of said town."

It is then charged that by reason of the powers contained in the charter it became the duty of the defendant to pass and enforce ordinances to abate or prevent said nuisance and to prevent said animals from running at large and require their owners to keep them off the streets, unless attended by some person in charge thereof, but that the defendant unmindful of its duty negligently and wrongfully failed and refused to pass any such ordinances for the preventing and abating of said nuisance, and negligently, willfully, and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said streets, and that while said nuisance still continued plaintiff was walking on a street or lane of said city, using due care and caution, and was attacked by one of the said cows and horned cattle, so by the said defendant negligently and wrongfully allowed and permitted to be at large upon

the said streets and was violently horned, tossed, thrown, and trampled upon, etc. The injuries sustained by the plaintiff are then set out in detail showing that both of her arms were broken, her side torn, and that she was otherwise seriously and permanently injured.

If the defendant can be held responsible in any case to one lawfully using its streets for injuries inflicted by a cow running at large, the allegations in this declaration are certainly sufficient to entitle the plaintiff to recover, if she can sustain them by competent proof. In determining whether the defendant is so liable we will consider:

1. Has the mayor and city council of Frostburg power under its charter to prevent stock from running at large within the corporate limits?

2. If it has such power, what are the consequences of its neglect or failure to do so?

Article 1, section 144, of the Code of Public Local Laws authorizes the mayor and city council of Frostburg to pass such ordinances, not contrary to law, as they may deem beneficial to the town; gives the power to remove nuisance and obstructions upon the streets, lanes, and alleys and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town, and of the people and property therein, and authorizes them to impose fines, forfeitures, or imprisonment for the violation of any ordinances of the town.

These powers are in substance the same as those of the charter of the city of Cumberland, which were passed upon in the case of *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759. This court there held that the defendant was authorized and required under its charter to prevent persons from coasting on the streets, if it could do so by ordinary and reasonable care and diligence, and declared such use of the streets to be a nuisance. There was no special authority given in the charter of Cumberland to prevent coasting on the streets, but the power of the city to do so was not only not questioned, but was expressly recognized in that case. If a municipality can without express powers in its charter prohibit the use of its streets for coasting, why should it not have the power to prohibit the use of them by horses, cows, hogs, and horned animals "during both the night and in daytime, and at all times, and on Sundays," at it is alleged in the declaration, especially when the cows are "armed with dangerous horns and equipped with annoying bells? It is difficult to imagine a condition of things more calculated to injuriously affect, if not destroy, "the peace, good order, health, and safety of the town and of the people, and of the property therein," than that described in the declaration.

It is true that the decisions are not uniform as to whether what is called "the general welfare clause," usually contained in charters, authorizes municipal corporations to restrain domestic animals from running at large, but many of them so hold. See 15 Am. & Eng. Encyclop. Law, p. 1188, and note, where a number of them will be found collected together.

There can be no good reason assigned why it should not, unless there be some statute law, or some other provision of the charter inconsistent with such construction. In those cases in which it is held that municipal corporations cannot, without special authority, pass and enforce ordinances of this character, it will generally be found, upon examination of them, that it is by reason of some statute or other special clause that would not apply to the case under consideration. For example, in the case of *Collins v. Hatch*, 18 Ohio, 533, 51 Am. Dec. 465, so much relied on by the learned counsel for the appellee, the court said that an ordinance to restrain horses, cattle, swine, etc., from running at large, could not be adopted under the general welfare clause, as it would be in contravention of the general laws of that state which allowed such animals to run at large. Is it to be said that the owners of horses, cows, and other animals can turn them loose in the public streets of a town such as described in the declaration, and the authorities have no means to prevent it unless the legislature has given them express power.

It is not necessary to determine whether domestic animals can be impounded and forfeited without express authority being given in the charter, but with powers as broad as those in the charter of defendant there would seem to be no valid reason why it could not pass and enforce ordinances prohibiting stock from running at large and imposing penalties for the violation of them. If the owners of cows and horses tied them along the public streets of Frostburg, so as to interfere with the free passage of people having the right to use the streets, it could not be successfully contended that the authorities were without remedy. Why, then, should they be permitted to turn them loose, thereby not only obstructing the free and proper use of the streets, but permitting them to wander over the sidewalks to frighten, and possibly injure, women and children.

It was contended by the appellee that it is customary in this state to grant special powers to such municipal corporations as desired to prevent stock from running at large, and hence when it is omitted from a charter the presumption is that it was not intended by the legislature that such power should be exercised. We do not think that such a conclusion can properly be drawn. Various reasons might be given for such omission. Some of those municipalities may have been so disturbed by animals running at large that they wanted to emphasize that power to restrain them, or they may have thought it safest to include such power to avoid any question.

In the brief for appellee certain towns are named which have the power expressly granted them to prevent cattle from running at large, and it is stated that Hagerstown, Frederick, and others have no such power conferred on them. It would seem to be a most unreasonable construction to place upon the action of the legislature to say that inasmuch as it has granted this express power to some towns of the state, but has omitted it in the charters of Hagerstown and Frederick, there-

fore these two cities, which are among the largest in the state, were intended by the legislature to be prohibited from exercising such powers. There may be no such provision in the charter of Baltimore city, yet it would scarcely be claimed that it could not prohibit stock from running at large under the general powers vested in it.

The object of such a provision as the general welfare clause is to cover those cases not specifically designated. It would be impossible to enumerate in detail in a charter of ordinary length all the powers that a corporation could exercise. The very effort to name them all might exclude some that were omitted but would have been authorized under the general welfare clause if an attempt had not been made to itemize them. We think it clear that the defendant has the power under its charter to pass and enforce ordinances to prevent stock from running at large within its limits and that the condition of affairs described in the declaration is a nuisance of such character as should be abated for the peace, good order and safety of the people and property of the town.

It becomes necessary therefore, to consider the second inquiry above suggested, namely, what are the consequences of the neglect or failure of the defendant to exercise its powers. We have been referred to a number of authorities outside of this state to the effect that a municipality is not liable for the injuries sustained by reason of its failure to abate a nuisance although it has power to do so. But that is no longer an open question in this state. It was said in *Marriott's Case*, 9 Md. 174, that when a statute conferred a power upon a corporation to be exercised for the public good the exercise of the power is not merely discretionary but imperative and the words "power and authority," in such case may be construed "duty and obligation." It was there held that the city of Baltimore was required to pass ordinances sufficient to reach the exigencies of the case and was bound to see that they were enforced.

Mason, J., in delivering the opinion in that case said, "The people of Baltimore in accepting the privileges and advantages conferred by their charter took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of those burdens was the obligation to keep the city free from nuisances. A disregard of the obligations thus imposed would be attended with the same consequences which would result to the individual at common law were he to disregard his obligations to the community in these particulars. As the duty is the same in a corporation as an individual, so are the consequences the same for its disregard." On page 175 the court quotes with approval from the case of *Pittsburgh v. Grier*, 22 Pa. 65, 60 Am. Dec. 65: "It is no matter whether that duty (removing a nuisance) remains unperformed because it had no ordinances on the subject or because having ordinances it neglected to enforce them. The responsibilities of a corporation are the same in either case."

In *Taylor's Case*, *supra*, it was held that the corporation was under an obligation to

exercise for the public good the powers conferred on it by its charter to prevent nuisances and to protect persons and property. So, whatever may be the law elsewhere it is well settled in this state that a corporation having such powers must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damage therefrom, who is not himself in fault. Of course, as was said in *Taylor's Case*, if it use ordinary and reasonable care and diligence to prevent the nuisance, its duty is discharged and it is relieved from responsibility, and a vigorous effort to enforce its ordinance on the subject would fulfill its duty in this respect.

The declaration alleges that defendant "negligently and wrongfully failed and refused to pass any such ordinances for preventing and abating said nuisance, and negligently, willfully and wrongfully refused to take any steps whatever to prevent said stock and troublesome and dangerous animals from running at large on said street." Now, if it be true, as is alleged in the declaration and admitted by the demurrer, that women and children had been attacked and frightened by these animals thus running at large in the streets, it would seem clear it was the duty of the defendant to take some steps to prevent it. It was certainly its duty to prevent such a condition of affairs as is described in the declaration.

But the main difficulty in this case is to determine how far the defendant is responsible for such an injury as that complained of by plaintiff. It is well settled that the owner of a domestic animal is ordinarily not responsible for injuries inflicted by it unless it is of a ferocious or vicious disposition, accustomed to bite or attack mankind, and he knows that it has such disposition or vicious propensity. "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities," and it is incumbent upon the owner to see that no injury is done by it. There is another class of cases in which owners have been held liable, without proving knowledge by them, on the ground that the animals were wrongfully in the places where they did the mischief. It has, for example, been held that the owner of a horse who permits it to go at large in the streets of a populous city is answerable for a personal injury done by it to an individual without proof that he knows the horse is vicious. The owner had no right to turn the horse loose in the streets. *Goodman v. Gay*, 15 Pa. 188, 53 Am. Dec. 589; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99; *Dickson v. McCoy*, 39 N. Y. 401; *Barnes v. Chapin*, 4 Allen, 444, 81 Am. Dec. 710. This last case places the liability on the ground that the owner was in fault in permitting his mare to go at large on the highway without a keeper. See also *Mosier v. Beale*, 48 Fed. Rep. 358, in which it was held that in an action for personal injury caused by defendant's cow it was not necessary to allege *scienter* when it was alleged that the injury was committed while the cow was negligently permitted by defendant to trespass on plaintiff's premises.

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In the case now under consideration, if the owner of the cow negligently or willfully permitted her to go at large on the streets of Frostburg, he was in fault and was liable for injuries done by her to persons lawfully using the streets. Let us, therefore, apply these principles and determine how far the defendant is liable. We have already said that the defendant had the power, and it was its duty, to prevent such a condition of affairs as the declaration alleges existed at the time of the injury. Of course, the ringing of cow bells, frightening women and children, and other things alleged, which were annoying and injurious to the public at large, do not give the plaintiff a right of action, as she can only recover, if at all, for special injuries sustained by her. Those special injuries were not sustained by the ringing of cow bells, etc., but by the attack of this particular cow. These other matters are relevant, however, to our inquiry, because they are of such character as must likely have brought this nuisance to the attention of the authorities, and hence reflects upon their duty to abate the nuisance. In *Taylor's Case* it would not have been contended that if the sled which struck him had been the only one coasting on the streets of Cumberland, the defendant would have been liable.

It was because coasting had been carried on to such an extent that the city authorities were called upon to stop it as a nuisance and something dangerous to those lawfully using the streets. So in this case, if horses, cows, hogs and horned cattle were permitted by the town authorities to run at large as alleged in the declaration, they were called upon to put a stop to it. If, however, this cow that injured the plaintiff was on the street without any fault of the owner, then no blame can attach to the defendant, and it would not be liable, for it would not do to hold a municipal corporation to a stricter liability for injuries done by domestic animals than the owners themselves would be held to. Nor would the defendant be liable unless it could have prevented this cow from running at large by the use of ordinary care and diligence.

If the cow was at such place and for such short time as it could not have been discovered by the defendant's officers by the use of reasonable care and diligence before it attacked plaintiff, then the defendant would not be liable, unless the cow's running at large can be attributed to the failure of defendant to pass and enforce ordinances to prevent stock from running at large.

Of course, if the plaintiff is shown to be in fault, another defense would arise. Whether or not the plaintiff can prove such facts as will entitle her to recover, can only be determined at a trial of the case, but we think the allegations in the declaration are sufficient to require the defendant to plead, and therefore the demurrer should have been overruled. For these reasons we must reverse the judgment.

Judgment reversed and new trial awarded.

IOWA SUPREME COURT.

Thomas SEEVERS

v.

G. GABEL *et al.*, Appts.

(.....Iowa.....)

A hirer of personal property under an agreement to return it at the expiration of the lease in as good condition as when taken, usual wear excepted, is not liable for its loss by fire without his fault.

(April 3, 1895.)

A PPEAL by defendant from a judgment of the District Court for Mahaska County in favor of plaintiff in an action brought to recover the value of certain property which had been rented by plaintiff to defendant and was accidentally destroyed by fire during the period of rental. *Reversed.*

Statement by Given, J.:

Action upon a written contract, as follows: "This indenture, made and entered into this 17th day of January, 1891, witnesseth, that the said first party lease to second party the following described personal property, to wit, one saw rig, complete, from the first day of February, 1891, to the first day of February, 1892, inclusive.

... And the said second party agrees to pay first party, as rent for the same, eight dollars and thirty-three cents (\$8.33) per month, in advance. ... Second party further agrees to keep a competent man to run same, and, at the expiration of the time mentioned in this lease, to give first party peaceable possession of said personal property, by returning the same to Seever's Manufacturing Company's shops, in Oakaloosa, in as good condition as it now is, usual wear excepted. Thomas Seever's. G. Gabel. C. Brown." Plaintiff alleges that defendants have failed to pay any part of the rent, wherefore he asks to recover \$100, with interest. He also alleges that defendants failed to return said property, as required by the contract, wherefore he asks to recover \$400 damages. Defendants answered, admitting the contract, and alleging that in the nighttime, on or about the 30th day of June, 1891, said property was destroyed by fire; that said fire was the result of accident or incendiaryism, and was not on account of any negligence or want of care on defendants' part. Other allegations of the answer are not material to the question to be considered. Plaintiff replied, denying generally the allegations of the answer. The case was tried to a jury, and a verdict and judgment for plaintiff for \$193.83, including \$147.12 damages. No question is made on this appeal as to the rent.

NOTE.—The above case holding in effect that a hirer of property with a general agreement to return it in good order is not an insurer against its destruction, falls within the subject of intervening impossibility to perform as a release from obligation to perform a contract, as to which, see *note to Stewart v. Stone* (N. Y.) 14 L. R. A. 215.
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Messrs. Bolton & McCoy for appellants.
Messrs. Seever's & Seever's, for appellees.

Given, J., delivered the opinion of the court:

1. The record before us shows that no transcript of the reporter's notes of the evidence in this case was filed with the clerk of the district court until after this appeal was taken, and appellee had filed an amended abstract denying appellants' abstract, and alleging and showing that the evidence had not been preserved as required. Appellee contends that, as the evidence is not before this court, we cannot consider the errors assigned by appellants on the giving and refusing of instructions. The instructions given, which are complained of, clearly relate to a matter of law involved in the case, as shown by the pleadings independent of the evidence. It is a question of the construction that should be given to the written contract sued upon and admitted. Other errors assigned cannot be considered, in the absence of the evidence duly preserved and authenticated.

2. The question to be considered is whether the court erred in giving the following instructions: "(8) Evidence has been offered tending to prove that during the term of the lease the property leased by the plaintiff to the defendants was injured by fire. Defendants' contention is that the fire terminated the contract of lease, and released the defendants from all liability, excepting for the rent that had accrued up to the date of the fire. (4) You are instructed that this would be true, but for the terms of the contract itself, which provide that 'the defendants, at the expiration of the time mentioned in the lease, were to return the said property in as good condition as it now is, usual wear excepted,' and this clause imposes upon the defendants the obligation of returning the property notwithstanding the fire. If they have failed to do so, then plaintiff will be entitled to recover damages, measured by the rule hereinafter given." Appellants complain of that part of the instructions that states that the clause of the contract quoted "imposes upon the defendants the obligation of returning the property notwithstanding the fire," or to respond to damages. They cite authorities as to the different kinds of bailments, and the care required of bailees, and contend that under this contract they are not liable for injury to the property occurring without their fault. There is no question of negligence involved in this inquiry. The instructions complained of are grounded upon the assumption that the property was injured without fault on the part of appellants. Appellee concedes, as do the instructions, that appellants would not be liable, in the absence of the express contract with respect to the return of the property. He contends, and correctly so, that the liability which the law would imply in the absence of contract may be enlarged by contract.

His claim is that under this contract the appellants are absolutely bound to return the property, or, in case of its unavoidable loss or injury, to respond in damages. In the absence of a contract the law would imply a promise on the part of appellants to return the property at the expiration of the term in as good condition as when received, ordinary wear and decay excepted. Aside from naming a place to which the property was to be returned, this is just what the parties have expressed in their contract. Surely, appellants' liability is not enlarged by expressing in the contract just what the law would have implied; yet it is not claimed that appellants would be liable under the implications of the law. That a place is named to which the property was to be returned does not enlarge appellants' liability. The sole contention is whether, under that part of the contract quoted in the instructions, appellants are bound to return the property, or to respond in damages, notwithstanding its destruction by fire without fault on their part. It is simply a question as to the proper construction of this contract. Appellee cites the rule that "where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract." Our inquiry is whether the appellants did, by this contract, create the duty or charge upon themselves to return the property, or respond in damages in case of its unavoidable destruction. If they did so, they are liable; otherwise, not. We will be aided in this inquiry by referring to the construction given by the courts to similar contracts. Among the many cases that might be cited, we refer to the following: In *McEvers v. Steamboat Sangamon*, 22 Mo. 168, a barge was hired by the defendant under an agreement that it was "to be delivered in good order, the usual wear and tear excepted." The barge was destroyed by ice, and it was held that the steamboat was not liable, on the contract, for the nondelivery of the barge. In *Young v. Bruce*, 5 Litt. (Ky.) 324, the contract was for the hire of a slave "until said 25th of December, 1819, to be returned, well clothed, at that time." Defendants answered that the slave was drowned by inevitable accident, without fault of theirs, whereby they were prevented from returning him. The court held that it was not the intention of the parties that the defendants should be responsible for the death of the slave without fault on their part, and that the demurrer was properly overruled. In *Harris v. Nicholas*, 5 Munf. 488, the contract was for the hire "of four negro fellows the present year, who are to be returned, well clothed, on or before the 25th of December." Defendant answered that before the expiration of the time one of the negroes, without fault on defendant's part, departed this life. The court held that if the covenant could be considered "as a covenant to return the negro in question, as well as to secure the payment of the money due for his hire, it ought not to be considered as a covenant to insure such

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return in the event which has happened." In *Maggart v. Hanabarger*, 8 Leigh, 532, the plaintiff leased to the defendant certain real estate, upon which there was a gristmill and carding machine, defendant agreeing "to return the said property with all its appurtenances." The mill and carding machine were destroyed by fire accidentally, or by some unknown incendiary. It was held that the contract was distinguishable from those wherein the party covenants to keep in order, and that the tenant was not bound to rebuild. In *Warner v. Hitchins*, 5 Barb. 666, the defendants bound themselves, "at the expiration of the lease, to surrender up possession of the premises in the same condition they were in at the time of making the lease, natural wear and tear excepted." The court, after a thorough and extended consideration of the subject, held that the tenants were not bound to put up new buildings in the places of those destroyed by fire, distinguishing the case from those wherein covenants to repair are made. In *Wainscott v. Silvers*, 18 Ind. 497, it was held that a tenant is not answerable, in the absence of an express agreement, for the destruction by accidental fire of buildings occupied. This case is clearly distinguishable from those wherein there is an agreement to keep leased property in repair. There are many cases holding that under contracts containing such a covenant the tenant was bound to restore the buildings, if they were destroyed by fire. See *David v. Ryan*, 47 Iowa, 642; *Van Wormer v. Crane*, 51 Mich. 368, 47 Am. Rep. 582.

Appellee cites and relies upon the case of *Drake v. White*, 117 Mass. 10, and *Harvey v. Murray*, 136 Mass. 377. In the first case the contract was as follows: "Received of John E. Drake one Morris & Ireland fire-proof safe, which we promise to deliver the same to said Drake, or its equivalent in money, on payment of a certain note signed by said Drake." The property was destroyed without fault of the defendants. The court says: "In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things,—either to return the property specifically, or to pay for it in money." The conclusion is based upon this expressed agreement. In this case we have no agreement to return the property or its equivalent in money. In the other case, defendant rented a piano, and agreed "to return it in as good order as when received, customary wear and tear excepted." The piano was injured by inevitable accident. The court says: "This case falls fully within the decision in *Drake v. White*, *supra*. Indeed, the mention in the contract now before us that customary wear and tear are excepted from the defendant's agreement furnishes an additional reason for holding that injury from inevitable accident is not excepted." In our opinion those cases are clearly distinguishable from each other. In the former the property was delivered as security for the payment of a debt, under an

express agreement that it, or its value in money, should be returned on payment of the debt. That was a contract to be absolutely liable; but not so in the latter case, nor in this one. We have quoted the entire opinion in the latter case, which is grounded solely upon the former, through a misapprehension, we think, of what was decided in the former. While it is identical with this, as to the question involved, we do not think it is entitled to weight as authority, nor do we think that the exception expressed in that or in this contract is any reason for holding the appellants liable for loss from inevitable accident. Inquiring, as we do, for the intention of the parties with respect to the return of this property, we cannot believe that either party understood himself as standing as an insurer to the other. The plaintiff agreed to furnish the property for use for one year, in return for the rent to be paid. It would hardly be claimed that plaintiff is guilty of a breach of this contract by failing to furnish the

property for use, because of its destruction without fault on his part; yet it does not seem that the destruction of the property should be a termination of this contract as to one party more than to the other. Plaintiff's obligation to furnish the property for use is quite as explicit as is defendants' obligation to return it. There was no adequate consideration moving to the defendants, as insurers of the property. The use and the rent were equivalent. Therefore, defendants would have nothing for this extraordinary liability,—a liability that should not, and, we think, would not, be left to doubtful construction, if intended, but would be plainly expressed in the contract. We are of the opinion that the defendants are not liable, under this contract, for the destruction of the property without fault on their part, and therefore that the court erred in giving the instructions complained of.

Reversed.

ARKANSAS SUPREME COURT.

T. I. GREENSTREET, *Appl.*,
v.
Ada THORNTON.

(60 Ark. 369.)

A decree based on a summons against a dead man who is named as the owner of property, the sale of which is sought for an assessment for an improvement, is of no validity whatever, no matter how the summons was posted or published, although such notice in case of unknown owners might be sufficient.

(March 23, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Sebastian County in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed.*

Ada Thornton a minor owned certain property in Ft. Smith. An assessment for street improvement was made against it which was not paid and a suit was brought by the board of improvement to collect the assessment; the assessment and suit were against George Thornton, father of Ada Thornton, who had been dead for several years. The summons was issued, and being returned not found, a copy was affixed to the property and published as required by the statute in cases where defendant is not found. Upon these services a decree was rendered condemning the property to be sold and Greenstreet purchased at the sale. In due course he received a deed for the property and this suit is brought to cancel such deed.

NOTE.—The sufficiency of constructive service of process to sustain jurisdiction for personal judgment is the subject of a note to *Moyer v. Bucks* (Ind.) 16 L. R. A. 231.

For general requisites of jurisdiction, see note to *Shores v. Hooper* (Mass.) 11 L. R. A. 308. 27 L. R. A.

Further facts appear in the opinion.

Mr. Joseph M. Hill, for appellant:

The provision requiring suit to be brought against the owner of the land does not mean that it must, in order to render the judgment valid, be brought against the real owner, but it means that suit must be brought against the person appearing by the registry of deeds to be the owner in the absence of a showing to the contrary.

Vance v. Corrigan, 78 Mo. 94.

If it were necessary to go into questions of actual ownership, the land taxed would indeed be in a precarious condition, since changes of ownership, either real or simulated, would render the collection of a tax difficult, if not impractical.

Merrick v. Hutt, 15 Ark. 331; *Worthen v. Ratcliffe*, 42 Ark. 330.

Authority over the land owner was acquired by the filing of the complaint stating that taxes were due on this particular tract, and by publication of the required notice, which took the place of ordinary process to bring the parties into court.

McCartier v. Neil, 50 Ark. 188.

This suit is collateral attack, and cannot be maintained.

Williamson v. Mimms, 49 Ark. 336; *Boyd v. Roane*, 49 Ark. 397; *Doyle v. Martin*, 55 Ark. 87.

Greenstreet was an innocent purchaser under this decree, and should be protected as such.

Boyd v. Roane, supra.

No valid defense is offered to the original proceedings.

State v. Hill, 50 Ark. 468.

The statute requires that a valid defense be shown before the statutory action will lie for the vacation of the judgment complained of.

Sand. & H. Dig. §§ 4199, 4200; *State v. Hill, supra*; *Chambliss v. Reppy*, 54 Ark. 539; *Boyd v. Roane, supra.*

Mr. T. W. N. Boone, for appellee:

It is essential that jurisdiction should have attached during the defendant's life; and if the action is commenced against one already dead the judgment will be absolutely void for want of jurisdiction.

1 Black, Judgm. § 203; *Crooley v. Hutton*, 98 Mo. 196; *Williams v. Hudson*, 98 Mo. 524; *Bollinger v. Chouteau*, 20 Mo. 89; *Stafford v. Flier*, 82 Mo. 898; *Harness v. Cravens* (Mo.) Dec. 22, 1894; *Loring v. Folger*, 7 Gray, 505.

Where property is taken under statutory authority in derogation of common law every requisite of the statute having a semblance of benefit to the owner must be complied with or the proceedings will be ineffectual.

Cooley, Const. Lim. 5th ed. p. 646.

A void judgment is subject to a collateral impeachment.

Grimmett v. Askew, 48 Ark. 151; *Graham v. Spencer*, 14 Fed. Rep. 603; *Downs v. Allen*, 22 Fed. Rep. 805; *Citizens Bank v. Brock*, 23 Fed. Rep. 21.

Riddick, J., delivered the opinion of the court:

The question before us is whether the decree for the sale of the lot of Ada Thornton was of any validity. The proceedings were regular, except that instead of Ada Thornton, the owner of the lot, being made a party, George Thornton, a dead man, was named as defendant. It is contended by counsel for appellant that this is a proceeding *in rem*, that by virtue of the same the court obtained jurisdiction over the lot in question, and that its decree is not void, and not subject to collateral attack. Mr. Black, in his work on Tax Titles, speaks of suits to collect delinquent taxes as "proceedings *quasi in rem*." Black, Tax Titles, § 167. Judge Smith in *McCarter v. Neil*, 50 Ark. 188, says that such proceedings are substantially actions *in rem*. But the fact that an action of this kind partakes of the nature of an action *in rem* does not dispense with the necessity of notice. Cooley, Const. Lim. 6th ed. 496. Discussing this question, Judge Work, in his book "Courts and Their Jurisdiction" (page 50), says: "The proceedings may be purely against the thing, in which case it is sometimes said that the proceeding is against all the world, and the notice must necessarily be general. Under such a notice, any and all persons who claim any interest in the property are called upon to assert such claims; and, if they do not, their interests are cut off or made subservient to the decree rendered." A general notice of this kind was required by what is known as the "Overdue Tax Law," and it was of such a notice that Judge Smith was speaking in the case of *McCarter v. Neil*, *supra*, cited by counsel, when he said that in such proceedings "all persons are presumed to be parties." It would not do to suppose that he used this language in reference to any other than those actions in

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which all parties having or claiming an interest are notified to come forward and defend the same, "for the extent of a decree's effect is measured by the notice." "If the notice is limited to certain persons, made parties to the action, the decree is binding upon the rights of such parties only." Waples, Proc. in Rem. § 628; Work, Courts, 50; Cooley, Const. Lim. § 496.

There is only one contingency in which a general notice is authorized by the statute in proceedings of this kind, and that is when the owner of the property is unknown. That fact must be alleged in the complaint, and the suit proceeds, so says the statute, "as an action *in rem* against the property." Summons issues against the unknown owner of the particular property, and service is had by affixing a copy of the same to the property and by publication. In such a case, the notice is general to the unknown owner, whoever he may be, and, if the summons is served in the manner required, all parties must take notice, for it includes all who have an interest in the property. But, as before stated, this general notice is only allowed where the owner of the property is unknown, and that fact alleged in the complaint. Sand. & H. Dig. §§ 5844-5846. Where it is not alleged that the owner is unknown, and the proceedings are against a certain person named as defendant and alleged to be the owner of the property, then, whether there be actual service upon him, or only constructive service in the manner designated by the statute, it is a notice to him only, and the decree affects only his interest in the land, whatever it may be, and no one else is bound by it. The defendant named in this proceeding was dead, and the decree based on a summons against him, it matters not how it was posted or published, was of no validity whatever. *Crooley v. Hutton*, 98 Mo. 196; *Williams v. Hudson*, 98 Mo. 524. The contention of appellant that the decree in question cannot be made the subject of a collateral attack is not well taken, for the decree is void. "A void judgment or decree is a mere nullity, and has no force, either as evidence or by way of estoppel." Black, Judgm. § 535; Freem. Judgm. § 117; *Paul v. Willis*, 69 Tex. 269; *Cain v. Goda*, 84 Ind. 209; *Chicago & A. R. Co. v. Summers*, 113 Ind. 10; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 743.

But we need not discuss that question here, for judgments are only binding on the parties and privies to the litigation. The appellee, Ada Thornton, was not a party to the proceeding to sell this lot, and neither she nor any one else is bound by this decree, rendered in a proceeding begun and prosecuted against a dead man.

We think that the decree of the chancellor was right, and it is affirmed.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* John K. RICHARDS, *Atty-Gen.*,

v.

City of CINCINNATI

(.....Ohio.....)

- *1. An amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it; the whole statute, after the amendment, has the same effect as if re-enacted with the amendment, and hence, an unconstitutional statute may be amended into a constitutional one so far as its future operation is concerned, by removing its objectionable provisions, or supplying others, to conform it to the requirements of the constitution.
2. The Act of April 13, 1893, as amended April 24, 1893, authorizing cities of the first grade of the first class to annex contiguous municipalities of other grades and classes, is a subsisting and constitutional law.
3. It is not a valid objection to the statute, or to annexation under it, that a municipal corporation may be so annexed without the consent of its constituted authorities, or of its inhabitants; nor, that the taxable property within such municipality will become subject to taxation for the payment of previously incurred indebtedness of the city to which the annexation shall be made.

*Headnotes by the Court.

NOTE.—Power of legislature to annex territory to municipalities.

Besides the attempts which have been made to overthrow the action of municipal corporations in annexing territory under delegated power, and which will not be directly considered in this note, the cases are quite numerous in which the authority of the legislature itself to change municipal boundaries has been directly questioned or at least passed upon. These attacks come from two directions. First on the part of the municipality itself and second on the part of individuals who are in some way affected by the change. So far as the rights of the municipality itself are concerned, the power of the legislature has always been held to be absolute in the absence of some constitutional provision directly controlling the matter, and such provisions are few. The grounds for attack by individuals are somewhat more numerous and have in some quarters been more successful, although in a great majority of the cases the action of the legislature has been implied.

Power as against municipality.

In *Stone v. Charlestown*, 114 Mass. 214, the court in considering the validity of the annexation of certain towns to the city of Boston said, the power to alter the boundaries of counties, towns, and cities into which the territory of the commonwealth has been divided for political and municipal purposes is an inherent attribute of the legislature to be exercised according to its own views of public expediency unless restrained by express constitutional provisions.

In *Galesburg v. Hawkinson*, 75 Ill. 122, the court in passing upon the question of the power of the legislature to delegate to the courts the right to alter the boundaries of municipal corporations,

4. The statute does not require that, at the election held to determine whether annexation shall be made, the question be so submitted that the electors of each municipality sought to be annexed may vote for or against its annexation; nor is it essential to the annexation that a majority of the votes cast by the electors of any such municipality shall be in favor of it. The question to be voted upon is whether all of the municipalities included in the proceeding shall be annexed, when it is sought to annex more than one, and the proposition is deemed carried if a majority of the aggregate vote cast be in favor of annexation.

(March 28, 1893.)

APPPLICATION for a writ of quo warranto to determine by what right defendant was exercising the franchise of annexing contiguous territory and to prevent it from exercising such franchise. *Refused.*

Statement by Williams, J.:

The petition alleges that the defendant, which is the only city of the first grade of the first class in this state, has instituted, and is about to carry to completion, proceedings to extend its corporate limits by annexation, so as to include the contiguous villages of Riverside, Westwood, Clifton, Avondale, and Linwood, and claims the right to do so, under and by virtue of an act of the general assembly, passed April 13, 1893, entitled "An

says "that the authorities are all in favor of the proposition that the legislature may alter the boundaries of municipal corporations at pleasure.

In *Laramie County Comrs. v. Albany County Comrs.*, 22 U. S. 307, 23 L. ed. 552, the court in deciding that a portion might properly be cut off from a county, says, unless the constitution otherwise provides the legislature has authority to extend or limit the boundaries of such corporations or even abolish them altogether in the legislative discretion. And the same rule was applied in *Hagie v. Beard*, 33 Ark. 497.

The legislature may properly annex territory to a town for the purpose of forming a taxing district to further the raising of a tax for local improvements. *Henderson v. Jackson County*, 2 McCrary, 615.

So far as public and municipal franchises and existence of municipal corporations are concerned, the legislature may exercise over them exclusive control and may constitutionally enlarge, restrict, or even destroy their municipal existence. *Montpellier v. East Montpellier*, 20 Vt. 12, 37 Am. Dec. 743.

As against the municipality itself, its boundaries may be changed at the pleasure of the legislature. *Morford v. Unger*, 5 Iowa, 32; *Ham v. Sawyer*, 33 Me. 37.

The legislature has absolute control over municipal corporations to create, change, modify, or destroy them at pleasure. *People v. Wren*, 5 Ill. 236; *Cole v. Madison County*, 1 Ill. 120, 12 Am. Dec. 154; *Grady v. Lenoir County Comrs.* 74 N. C. 101; *Greenleaf v. Trustees of Twp.* No. 41 N. R. 14 E., 23 Ill. 236.

In *McCormick v. St. Louis I. M. & S. R. Co.*, 20 Mo. App. 640, it is said that the power of the legislature at the time of passing the Act of May 16, 1860, contracting the boundaries of a town, to ex-

act to authorize cities of the first grade of the first class to annex contiguous municipal corporations of other grades or classes lying within any county containing such cities of the first grade of the first class," and an act amendatory thereof, passed April 24, 1898. The first-mentioned act reads as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Ohio:* That any city of the first grade of the first class shall have the power to annex to its present corporate limits any contiguous municipal corporation or corporations of other grades or classes situate in the county containing such city of the first grade of the first class, upon compliance with the terms and conditions hereinafter recited.

"SEC. 2. That any such city of the first grade of the first class desiring to annex any contiguous municipal corporation or corporations of other grades or classes, lying within the county containing such city shall, by its board of legislation, pass an ordinance declaring such intention and describing the municipal corporation or corporations which it desires to annex; and it shall be the duty of the mayor of such city of the first grade of the first class seeking such annexation, to cause such ordinance to be published once a week for four consecutive weeks in two newspapers published and of general circulation in the county; and if there be any objections to or remonstrances against the proposed annexation the same shall be filed with the clerk of the board of legislation of such city, and the clerk shall present the same at the next

regular meeting of such board of legislation; and such board shall hear all objections and remonstrances and finally determine the same by ordinance.

"SEC. 3. That if said board of legislation after such hearing determines in favor of such annexation, then the mayor of such city of the first grade of the first class, and also the mayors of the different municipal corporations sought to be annexed, shall each cause their separate proclamations to be issued, as in the case of municipal elections, notifying the qualified voters of their respective municipalities of the time and place of the holding of an election to determine whether such municipalities shall be so annexed. The time for such election shall be fixed by the ordinance of the board of legislation determining in favor of such annexation, and shall be not less than thirty days after the passage of such ordinance. Before such annexation shall be deemed to have carried, it shall have received a majority of all votes cast upon such proposition. Such election shall be conducted in the same manner as is now by law provided for the conduct of municipal elections in such cities and municipal corporations, respectively, except that no additional registration shall be required. The form of the ballots to be used at such election shall be determined by the board of elections of such county.

"SEC. 4. That it shall be the duty of the judges of election to return the result to the board of elections for such county, and it shall be the duty of such board to ascertain

tend or contract the limits of towns, was absolute and not subject to any judicial control.

In *Darby v. Sharon*, 112 Pa. 66, the court in considering the validity of the annexation to one county of territory formerly belonging to another, assumes as a premise that the legislature may by appropriate general laws either enlarge or contract the boundaries of municipalities; may consolidate several into one or divide one into several.

In the absence of express constitutional prohibition, territory may be lawfully detached from one municipality and added to another. *Metcalf v. State*, 49 Ohio St. 526; *Town of Milwaukee v. City of Milwaukee*, 13 Wis. 96; *State v. Lake City*, 23 Minn. 404; *Teaulet's Succession*, 28 La. Ann. 42; *Dare County Comrs. v. Currituck County Comrs.* 96 N. C. 189.

In *Coolidge v. Brookline*, 114 Mass. 592, the court held that a town had no right to its territorial limits which it had a corporate duty to defend as against the action of the sovereign power, so that it could lay a tax to pay the expenses of the defense. The court says within what limits a particular municipality shall exercise its powers, whether it shall be divided, its boundaries changed, or its territory annexed to another municipality, is for the legislature in the absence of constitutional restrictions to determine. The change in the boundaries of a town or its annexation to another may seriously and vitally affect the interests of its present inhabitants and be repugnant to the feelings and wishes of a large majority, but they cannot use the corporate powers of the town to enable them to oppose the change and thereby impose burdens upon the tax-payer, when the town has no corporate duty imposed or implied by law.

It was likewise held that a town cannot raise money to oppose the division of its territory by the legislature, in *Westbrook v. Deering*, 68 Me. 231. 37 L. R. A.

Power as against the inhabitants of the town.

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 690, the court in determining the liability of a town for the debts of another town which had been annexed to it, says, power exists in the legislature not only to fix the boundaries of such a municipality when incorporated but to enlarge or diminish it subsequently, without the consent of the residents by annexation or set-off unless restrained by the constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality. Property set off or annexed may be benefited or burdened by the change and the liability of the residents may be increased or diminished, but the question in every case is entirely within the control of the legislature, and if no provision is made every one must submit to the will of the state as expressed through the legislative department.

In considering the question of the constitutionality of the annexation of a village to a city, the court said, the annexation may increase or it may decrease the taxes of those owning property situated within the limits of the village or city, it may or it may not subject property within such limits to pre-existing indebtedness. In any event these circumstances constitute no legal or constitutional objection to annexation. Objections to, as well as arguments for, annexation based upon such supposed increase or decrease of taxation rest wholly upon grounds of expediency and do not affect the legal or constitutional rights of either municipality or of the residents thereof. *Valverde v. Shattuck*, 19 Colo. 104.

As against owner of annexed territory.

The effort to restrict the legislative power has been granted on behalf of the owners of property which was taken into the municipality. The ob-

the result of such election and certify the same to the secretary of state and to the board of legislation of the city seeking the annexation.

"SEC. 5. That if such election shall have resulted in favor of such annexation, it shall be the duty of the mayor of such city to whose limits are to be so attached such municipality or municipalities, to immediately notify the court of common pleas of the county containing such city of the result of such election, and thereupon such court shall appoint three commissioners, who shall be residents of such county. And such commissioners shall be sworn in by the judge of such court to faithfully, honestly and impartially discharge their duties, and such commissioners' compensation shall be fixed by such court, and the same shall be paid out of the general fund of the treasury of the city making such annexation, upon vouchers to be issued by the mayor of such city.

"SEC. 6. That it shall be the duty of such commissioners to make a full and detailed account of the indebtedness due by each municipality so annexed and of the several school districts affected by such annexation; that they shall also report what number of bonds or other evidences of debt have been issued by each corporation, and of the several school districts. That such commissioners, in connection with the sinking fund trustees of such city of the first grade of the first class, shall arrange the terms and conditions for the final annexation of such municipali-

ties, and report the same to said court. That whenever their report shall have been so made and approved by the court such annexation shall be deemed complete.

"SEC. 7. That if any municipality so annexed shall complain, in writing, that the terms and conditions for such annexation are unjust and unfair in whole or in part towards its interests, such corporation or corporations shall have the same heard by the court appointing such commissioners. That such court shall have the power to modify such report, if in its judgment the conditions and terms are unfair to the interest complaining, but shall not have the right to set aside the annexation of such municipality or municipalities to such city. That neither an appeal nor writ of error shall be allowed to reverse or set aside such final decree of the court.

"SEC. 8. That whenever the terms and conditions of such annexation shall have been completed, the commissioners herein designated shall file a transcript of such terms and conditions with the recorder of such county, and also transmit a certified copy of the same to the secretary of state, and the same shall be by such secretary recorded in his said office. And thereafter such territory and municipalities so annexed shall be governed by the respective boards and officers of such city annexing the same. Upon such annexation, the board of legislation shall by ordinance provide for the division of such annexed municipality or municipalities into wards, and thereafter members of the

jection in such cases is not so much against being made a part of the municipality as against bearing the added burden caused thereby. As to many kinds of corporations which are sometimes classed as municipalities, such as counties and townships, there can be little ground for objection because the difference in burden in the different organizations is so slight that it must be practically immaterial in which one property is located. But when the population at one point has become so great as to require special and expensive forms of government, so that it is inequitable to cast the burden of it upon the state, county, or township at large, and it becomes necessary to organize a special government for such center of population, then it becomes very material to the individual where his property is situated.

As stated in a New York case, it is wrong that a few should be taxed for the benefit of the whole, and it is equally wrong that the whole should be taxed for the benefit of the few. *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 268.

If a reason for erecting city and village governments is to relieve the people at large from the expense of governing dense centers of population, it would seem especially inequitable to include a small parcel of property situated precisely like that for which relief is demanded within the lines devoted to the municipality and thereby add to the burden which it would have to bear in case there was no incorporation its share of the burden taken off from the other property of its class. This inequity has led to a very determined effort to have the courts set the matter right.

Power of court to control legislature.

There is a very great uniformity in the authorities to the effect that the question is one for the 27 L. R. A.

legislature which the courts have no power to control.

The propriety of annexing agricultural lands to a municipality rests entirely within the discretion and under the control of the legislature. *Washburn v. Oshkosh*, 60 Wis. 453.

The decision of the legislature as to the necessity of bringing property within the limits of the municipality is not subject to review by the courts at the instance of an aggrieved tax-payer. *Madry v. Cox*, 78 Tex. 588.

The legislature having prescribed a certain limit to which the boundaries of a city may be extended without expressing any qualifications, the right to so extend them results without regard to the use or character of the occupation of the annexed territory. *State v. Warachchie*, 81 Tex. 628.

In *Edmunds v. Gookins*, 20 Ind. 477, the court seems to assume the power of the legislature to annex territory in deciding upon the validity of annexation proceedings by a city which had been validated by a legislative act.

Fraud cannot be imputed to the legislature in the passage of an act, so as to overthrow it. *Davis v. Point Pleasant*, 22 W. Va. 220.

The courts cannot declare an act of the legislature invalid on the sole ground that it is repugnant to natural justice or expediency. *People v. Fleming*, 10 Colo. 568.

The legislature has power to enlarge the limits of towns and cities and impose taxes for all the purposes of the corporation. The question whether the benefits resulting from the extension authorize the burden of contributing to the payment of existing debt is one for the legislature to determine in annexing new territory. *Stoner v. Flournoy*, 23 La. Ann. 850.

The question of the annexation of territory to a town is not, one for the courts. *Powers v. Wood*

board of legislation and members of the board of education of a school district affected by such annexation shall be elected in the even and odd numbered wards, respectively, whenever members of said boards for the even and odd numbered wards, respectively, are elected in the city and school district to which such annexation is made; provided, that at the first annual municipal election held after such annexation members for the ward in such annexed territory shall be chosen for one or two years, as the case may require, so that the terms expire whenever terms of existing members in odd and even numbered wards, respectively, expire.

"Sec. 9. That all officers and boards created for the government of the different municipal corporations so annexed to such city existing before such annexation, and of the several school districts in the territory and municipal corporations so annexed shall be abolished whenever such annexation is complete; and the title to all real estate and property of all description heretofore vested in such municipal corporations so annexed, and in the several school districts so annexed, shall be by this act transferred to such annexing city and school district of such city, respectively.

"Sec. 10. That all acts or parts of acts inconsistent with the provision of this act are hereby repealed.

"Sec. 11. This act shall take effect and be in force from and after its passage."

The amendatory act re-enacts the first section, omitting the word "present," and makes no other change in the statute.

The petition avers that the foregoing statutes are unconstitutional, and that the defendant in proceeding to make the annexation is exercising a franchise not conferred on it by law. It is further averred that the proceeding is not in conformity with the statute, in that, at the election held under its provisions, the question of the annexation of all of the villages named was submitted as the only one to be voted upon, when, it is claimed, each village should have been allowed to vote upon the question of its annexation, and a majority of the votes cast by its electors is necessary to authorize its annexation; and furthermore, the election was called and held in each of the villages of Riverside, Clifton, and Linwood, against the protest of their respective municipal authorities. A large majority of the aggregate vote cast was in favor of the annexation of all the villages, and a majority of the vote cast in Cincinnati, and in each of the villages, was in favor of it, except that cast in Clifton, where the majority was against annexation. The petition prays that the defendant be required to show by what authority it is exercising the right claimed, and that it be ousted therefrom.

The defendant pleads the statutes referred to, in justification of its action, alleging that the proceeding had, up to the time of the filing of the petition, has been regular, and in strict accordance with their provisions, and claiming under them the right to complete the annexation, which has so far progressed as to call for the appointment of commissioners as provided in section five of the statute.

County Comrs. 8 Ohio St. 235; *Blanchard v. Bissell*, 11 Ohio St. 93.

The propriety of annexing land to a municipal corporation is a question for the legislature. *Weeks v. Milwaukee*, 10 Wis. 243.

The expediency of the extension of a city's limits is exclusively for the legislature. *Wade v. Richmond*, 18 Gratt. 553.

What property should be embraced within the municipality and whether it should be taken for municipal purposes are political questions to be determined by the law-making power and an attempt by the judiciary to revise the legislative act would be a usurpation of power. *Norris v. Waco*, 57 Tex. 635.

There are a few expressions tending towards an opposite conclusion.

There are limits in the extension of boundaries of municipalities, beyond which the legislature cannot go. *Morford v. Unger*, 8 Iowa, 52.

In *Vestal v. Little Rock*, 11 L. R. A. 732, 54 Ark. 281, the court in considering the action of a city in annexing territory consisting of farm and garden property which was not needed for city use, and the annexation of which would subject their owners to the burdens without the benefits of local government, states: "Courts of wisdom and learning have upon the same facts in the protection of private rights set aside the solemn acts of a co-ordinate branch of government;" and continues: "Without committing ourselves to the entire approval of those cases we cannot in the exercise of ordinary appellate jurisdiction ignore the considerations of justice and right that prompted them,"—and it annulled the action of the city, and a few courts have made a distinction between the power to annex territory and that to tax the added land.

Thus it is held that courts will not interfere with 27 L. R. A.

the exercise of the power to extend city limits, but they will restrain municipal taxation where practicable in cases in which it is shown that the proprietor of the property taxed cannot be benefited by the proximity of the municipality. *Langworthy v. Dubuque*, 16 Iowa, 271; *Durant v. Kauffman*, 34 Iowa, 191; *Deeds v. Sanborn*, 25 Iowa, 419; *Deiman v. Fort Madison*, 30 Iowa, 543.

And in *Evans v. Council Bluffs*, 65 Iowa, 233, it is said cities should not be permitted to retain lands within their limits which are not needed for city purposes and which are not benefited by being within the corporation.

But the majority of the courts do not recognize such a distinction.

The power to determine the proper territory for the municipal taxation is with the legislature. *Turner v. Althaus*, 6 Neb. 54; *Kountze v. Omaha*, 5 Dill. 443.

The courts cannot interfere with the assessments of agricultural lands within a city for municipal purposes. *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633; *Hewitt's App.* 88 Pa. 55.

The legislature may by adding agricultural lands to a municipality subject them to municipal taxation. *Washburn v. Oshkosh*, 60 Wis. 453.

In *New Orleans v. Michoud*, 10 La. Ann. 763, the court says that the remedy for burdensome taxation upon rural property for city purposes rests with the legislature, and not with the courts.

There is no power in the courts to control the taxing power, when it is conferred in good faith to uphold local government and give police regulations to the population, and not merely to embrace taxable property for the revenue purposes in order to lighten the burdens of others. *Arbogast v. Louisville*, 2 Bush, 27; *Swift v. Newport*, 7 Bush, 37.

If the act cannot be declared to be unconstitu-

The reply contains allegations showing that the indebtedness of the defendant is something over twenty-six millions of dollars, a large part of which was incurred in the construction of what is known as "the Cincinnati Southern Railroad," and other considerable portions for water-works, city hall, and other purposes purely local, to the creation of which indebtedness the villages sought to be annexed have not consented, or in any way given their approval.

The cause has been submitted upon evidence, and an agreed statement of fact, which show that the annexation proceedings thus far prosecuted, are in substantial conformity with the statute, unless it be in respect to the method of the vote as before stated, which will be more particularly noticed in the opinion. It also appears that improved streets of the several villages extend to their respective corporate limits, and there connect with the improved streets of the defendant, thus forming continuous thoroughfares, on some of which street railroads are constructed and operated to and from the business portions of Cincinnati. It further appears that the defendant is indebted as heretofore stated; and, that for the year 1894 the rate of taxation in Cincinnati is slightly larger than in each of the villages, except Linwood, where the rate is slightly greater than in Cincinnati. Any other facts deemed material in the disposition of the case will be noticed in the opinion.

Messrs. John E. Richards, Atty. Gen., D. Thew Wright, John W. Warrington, and Stanley E. Bowdle, for plaintiff:

tional there is no other ground upon which the collection of a tax upon agricultural land annexed to a city can be interfered with by the courts. *Santa Rosa v. Coulter*, 58 Cal. 537; *Dixon v. Mayes*, 72 Cal. 166.

The collection of taxes on agricultural lands cannot be enjoined. *Cary v. Pekin*, 38 Ill. 154, 30 Am. Rep. 543.

Taxation of agricultural property for city purposes is not unconstitutional. *Linton v. Athens*, 58 Ga. 553.

The court cannot relieve from the assessment of taxes upon agricultural property in a city. *Davis v. Point Pleasant*, 39 W. Va. 239.

Rights of land owner.

Consent of the owner of property to be embraced is not necessary to enable the legislature to enlarge the territory of the municipality so as to take in his property. *St. Louis v. Russell*, 9 Mo. 507; *St. Louis v. Allen*, 18 Mo. 412; *Walden v. Dudley*, 49 Mo. 421; *Giboney v. Cape Girardeau*, 58 Mo. 141.

The legislature has power to extend the limits of an incorporated town without the consent and against the wishes of the citizens who live on or own lands comprising the property to be annexed. *Manly v. Raleigh*, 57 N. C. 370.

The legislature may enlarge the boundaries of a municipal corporation without submitting the question to a vote of the people. *Smith v. McCarthy*, 56 Pa. 369.

The extension of corporate limits is an exercise of governmental power of which the persons newly taken in cannot be heard to complain. They have no voice in the matter, no power to resist, nor is any legal right of theirs infringed thereby. *McCallie v. Chattanooga*, 3 Head, 317.

A legislature may without the infringement of 37 L. R. A.

The act must be uniform in operation.

State v. Cincinnati, 20 Ohio St. 18.

The Act of April 13, 1894, did not have uniform operation throughout the state, but was limited in operation to the city of Cincinnati, by virtue of the word "present."

Endlich, Interpretation of Statutes, § 25; *People v. Burns*, 5 Mich. 114.

Mere words will not save an act if its practical operation is confined to a single municipality.

State v. Mitchell, 31 Ohio St. 592; *Welker v. Potter*, 18 Ohio St. 85; *State v. Covington*, 29 Ohio St. 102.

As it stood upon the legislative records it was in legal contemplation as though it had not been passed. The attempted amendment of April 24 was consequently ineffectual, as there was nothing to amend. It clearly could not give life to something that had no existence.

Ash v. Ash, 9 Ohio St. 883; *Emporia v. Norton*, 16 Kan. 236; *Stange v. Dubuque*, 62 Iowa, 303; *Reading v. Savage*, 120 Pa. 198; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421.

Defendant claims that regard must be given only to the majority of the joint vote of all the municipalities concerned; and that the majority in each separate municipality voting must be disregarded.

Defendant's interpretation leads to absurdity. It cannot be adopted for that reason alone.

Sutherland, Stat. Constr. § 828; Ex parte Walton, Re Levy, L. R. 17 Ch. Div. 746; *Potter's Dwarr. Stat. cl. 2, p. 188; Smith v. People*, 47 N. Y. 330.

constitutional rights extend the limits of a city to embrace new territory. *New Orleans v. Caselar*, 27 La. Ann. 154.

Taking property without compensation or due process of law.

Taxing for municipal purposes lands which receive no benefit from the municipal government is a taking of property without compensation. *Morford v. Unger*, 3 Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86.

An act embracing farm property without the limits of a town though on its face simply extending the limits of a town and presumptively a legitimate exercise of power for that purpose, would in reality when applied to the facts be nothing more nor less than an authority to the town to tax the land to a certain distance outside its limits, and in effect to take the money of the proprietor for its use without compensation to him.

Where the original limits of a town are not filled out, and it has not in fact extended itself beyond them on either side and upon petition to the town the adjacent vacant land or cultivated farm, not necessary or wanted for streets or houses, is brought within it by an extension of its boundaries, the whole force and effect as well as obvious intent of the act is to subject this exterior land to the taxation of the town without even the pretext of extending the protection or control of the town over them. And the power of local regulation and government would furnish no legitimate or real basis for the act. *Cheaney v. Hooser*, 9 B. Mon. 346.

Something more than benefit is necessary to warrant municipal taxation. There must be both benefit actual or presumed, and a town or city population on or near the land creating a neces-

The interpretation for which defendant contends sets at naught the settled state policy.

Sutherland, Stat. Constr. § 821; *Opinion of the Justices*, 7 Mass. 524.

The duty conferred on the commissioners is of a legislative or political character; and, as such, not susceptible of delegation to the judiciary.

Powers v. Wood County Comrs. 8 Ohio St. 285; *Bristol v. New-Ohester*, 8 N. H. 585; *Barker Dist. Board of Education v. Valley Dist. Board of Education*, 30 W. Va. 438; *Re Board of Review*, 27 Ohio L. J. 834.

These commissioners who would be strangers in every legal sense to the municipalities, would be empowered to bind persons and property by "terms and conditions;" and to that extent would assume legislative or governmental control over them.

To thus subject municipalities to the control and interference of an authority which they have not constituted has been repeatedly decided to be invalid.

Healer v. The Drainage Comrs. 58 Ill. 105; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *People v. Huribut*, 24 Mich. 44, 9 Am. Rep. 108; Cooley, Const. Lim. 5th ed. pp. 209, 285.

The court's action here must have the effect of authorizing a change in the boundaries of an existing government. Such power is legislative and cannot be vested in the judiciary.

Galesburg v. Hawkinson, 75 Ill. 152; *State v. Simons*, 32 Minn. 540; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *People v. Carpenter*, 24 N. Y. 86; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 86.

city, or at least rendering it not unreasonable that the municipal government should extend over it. *Courtney v. Louisville*, 12 Bush, 420.

The court cannot interfere with the action of the legislature in extending the boundaries of a city, but the authority to tax rural property for the benefit of a city is taking property without compensation and is unconstitutional. *Bradshaw v. Omaha*, 1 Neb. 18; *Oliver v. Omaha*, 3 Dill. 363.

The doctrine of those cases was, however, departed from in the subsequent case of *Turner v. Althaus*, 6 Neb. 54.

In *Cheaney v. Hooser*, *supra*, the extension was held to be proper, and in *Sharp v. Dunavan*, 17 B. Mon. 222, the statements of that case as to the illegality of the extension of boundaries was limited, and it was held that if the included property was near enough to the city to enjoy its substantial benefits, it might be included within the boundaries of the city. The court says the judgment of the legislature "cannot be controlled on the ground of a mere difference of opinion as to the necessity of the town or upon mere conjecture or opinion as to the motives of the extension but only upon the ground of a flagrant violation of the constitutional right to be demonstrated by the extrinsic fact showing the actual condition of the town with respect to the territory, population, and locality and the condition of the added territory with respect to the population and in relation to the existing town.

A bridge although within the limits of a city is not subject to municipal taxation if it receives no benefits from the city government which will justify it. Such taxation will be taking private property for public use without just compensation. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

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The legislature could not, therefore, make these powers valid in the court, by either calling or treating them by a wrong name.

State v. Hipp, 38 Ohio St. 199, 329; *Merrill v. Sherburne*, 1 N. H. 203, 8 Am. Dec. 52; *State v. Hawkins*, 44 Ohio St. 109; Cooley, Const. Lim. 6th ed. 109; *Ex parte Shrader*, 38 Cal. 279; *Houssman v. Montgomery*, 58 Mich. 364; *People v. Netada*, 6 Cal. 143; *Denny v. Mattoon*, 2 Allen, 361, 79 Am. Dec. 784; *Case of Election of Suprs.* 114 Mass. 247, 19 Am. Rep. 841; *State v. Noble*, 4 L. R. A. 101, 118 Ind. 852; *Kilbourn v. Thompson*, 103 U. S. 169, 26 L. ed. 877; *State v. Railway*, 48 N. J. L. 888.

As respects farming property, the operation and effect of the act is to authorize the taking of private property without compensation, and is therefore in violation of article 1, section 19, and article 18, section 5, of the Constitution.

Morford v. Unger, 8 Iowa, 82; *Arbogast v. Louisville*, 2 Bush, 275; *Covington v. Southgate*, 15 B. Mon. 492; *Prince George's County Comrs. v. Bladenburg*, 51 Md. 465.

The legislation of Ohio has hitherto so far recognized the autonomous character of municipalities as to require their mutual assent to annexation.

Rev. Stat. §§ 1606-1616; 3 Sayler, Stat. §§ 697-705, pp. 2090, 2091, including 2 Swan & C. Stat. § 15, p. 1496; 36 Ohio Laws, 219; 46 Ohio Laws, 146; Act Feb. 18, 1848; 49 Ohio Laws, 318.

State v. Perrysburg, 14 Ohio St. 473, decides that the repealing clause of the old Towns and Cities' Act of May 8, 1852, did not annihilate and recreate the municipal corporations of the

It is the tax and not the boundary which is unconstitutional. *Covington v. Southgate*, 15 B. Mon. 492.

But the majority of the courts do not agree with the reasoning of the above cases.

In *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, plaintiff's farm was annexed to the city of Pittsburgh. When it was taxed for city purposes he alleged that it was a taking of his property without due process of law. The court said: "It is not denied that the legislature could rightfully enlarge the boundary of the city so as to include the defendant's land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city and governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory must be settled so organized into a city must be one of the matters within the discretion of the legislative body. . . . It may be true that plaintiff does not receive the same amount of benefit from some of these taxes, or from any of them, as do citizens living in the heart of the city. . . . But who can undertake to adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain the organization? These are matters of detail within the legislative discretion and, therefore, of power in the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payer without due process of law."

In *State v. Brown*, 53 N. J. L. 162, the court in deciding that agricultural land which had been originally embraced within the limits of a town

state, but recognized and continued them, leaving their corporate identity unaffected.

See *People v. Detroit*, 28 Mich. 239, 15 Am. Rep. 202; *Rosebaugh v. Saffin*, 10 Ohio, 37; *People v. Draper*, 15 N. Y. 532.

There is a completely recognized and preserved principle of local autonomy, demonstrated local self government, which has been reserved to the people of those localities.

Dill. Mun. Corp. §§ 1-17; 1 Kyd, Corp. pp. 1-12, 28; Ang. & A. Priv. Corp. 11th ed. § 18; 2 Kent, Com. 4th ed. p. 274; *Re Flatbush*, 60 N. Y. 898.

Mandatory legislation for local objects is not sustainable.

People v. Detroit, 28 Mich. 238, 15 Am. Rep. 202. Dill. Mun. Corp. 4th ed. § 73; *Webb v. New York*, 64 How. Pr. 10; *State v. Smith*, 44 Ohio St. 373; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Callam v. Saginaw*, 50 Mich. 7; *Wasson v. Wayne County Comrs.* 17 L. R. A. 795, 49 Ohio St. 622; *Mills v. Charleston*, 29 Wis. 400, 9 Am. Rep. 578; *Hasbrouck v. Milwaukee*, 13 Wis. 42, 30 Am. Dec. 718; *People v. Batchelor*, 53 N. Y. 128, 13 Am. Rep. 480; *People v. Albertson*, 55 N. Y. 50; *People v. Shepard*, 86 N. Y. 285; *People v. Chicago*, 51 Ill. 17, 62; *Lovington v. Wider*, 53 Ill. 302.

The power to annex includes the power to impose a debt (for local objects, be it remembered), to be discharged by the levy of a tax against taxable inhabitants of a corporation which never assented thereto.

People v. Canty, 55 Ill. 33.

In *Wider v. East St. Louis*, 55 Ill. 133, it

was held "that the legislature ordinarily has no power to impose a debt or levy a tax upon a municipal corporation without its assent."

Marshall v. Stillman, 61 Ill. 218; *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505; *Barnes v. Lacon*, 84 Ill. 461; Cooley, Const. Lim. 5th ed. p. 235; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Wheeler v. Cincinnati*, 19 Ohio St. 21, 2 Am. Rep. 368; *Toledo v. Cone*, 41 Ohio St. 160; *Robinson v. Greenville*, 42 Ohio St. 628, 51 Am. Rep. 857; 1 Dill. Mun. Corp. 4th ed. §§ 66, 68 a, and cases cited.

This is a special law.

67 Ohio Laws, 141; *State v. Cincinnati*, 20 Ohio St. 18; *State v. Pugh*, 43 Ohio St. 118; *Springer v. Avondale*, 35 Ohio St. 626; *State v. Brewster*, 39 Ohio St. 658; *Costello v. Wyoming*, 49 Ohio St. 202; *State v. Smith*, 43 Ohio St. 211; *Carr v. West Carrollton*, 8 Ohio C. Ct. Rep. 7.

This law provides that the votes of all the electors of the villages and in Cincinnati shall be cast, not upon any one single question,—not upon any one question in which the voter is distinctly and solely interested; but he is required to vote upon a large number of questions, in many of which he has no interest.

State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 893.

This law is invalid, because it deprives three villages of the franchise to be a corporation without their assent.

1 Dill. Mun. Corp. 3d ed. § 69, p. 98;

could not be exempted from taxation for municipal purposes, says in commenting on the rule that taxation of property which receives no benefit from the expenditure of the money was taking private property for public purposes without compensation, except in a few states "the doctrine thus promulgated has no support in the jurisprudence of this country. . . . In the case of general taxation for governmental purposes, benefit is presumed to accrue to all."

Annexing territory to a municipality and subjecting it to taxation for municipal purposes is not taking property without compensation, but subjecting it to public burdens for the compensation presumed to result from the benefit of the corporation. *Dodson v. Fort Smith*, 38 Ark. 517.

The annexation of territory to a municipal corporation is not a taking of property for public use without compensation, nor a taking of property without due process of law. *Williams v. Nashville*, 60 Tenn. 437.

More extension of town limits is not a taking of property without due process of law. *Martin v. Dix*, 53 Miss. 53, 24 Am. Rep. 661.

An act extending the limits of a municipality does not take private property without just compensation. That provision is a limitation upon the power of eminent domain, and has no relation whatever to the taxing power. *Groff v. Frederick City*, 44 Md. 67; *Martin v. Dix*, *supra*.

A change of status of a tract of land from a farm to city lots by the exercise of a power granted to cities to extend their limits, is not a taking of property without due process of law. *Callen v. Junction City*, 7 L. R. A. 738, 43 Kan. 627.

The provisions against taking property without compensation has reference only to the taking of specific pieces of property of an individual. *Logansport v. Seybold*, 59 Ind. 235.

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Annexation by special law.

Where the constitution requires the regulation of municipalities by general laws, the legislature cannot destroy a municipal corporation by an act amending the charter of another municipality to which the former is to be annexed, although the act is valid so far as it relates to the latter municipality alone. *Re Extension of Boundaries of Denver*, 18 Colo. 228.

Under a constitutional provision that corporations shall be created by general laws but continuing those already existing under special charters, with power in the legislature to modify them, they may be amended by special laws so as to enlarge their boundaries. *Willey v. Bluffton*, 111 Ind. 153.

A constitutional provision that no corporation shall be created or its powers increased or diminished by special law does not apply to municipal corporations. *Williams v. Nashville*, 60 Tenn. 437.

The amendment of a city charter so as to permit it to annex territory does not require a general law. *Longworth v. Evansville*, 32 Ind. 322.

In *Callen v. Junction City*, 7 L. R. A. 738, 43 Kan. 627, it is said the particular necessity of each city of the second class are such that, coupled with our constitutional provisions, the only manner in which their corporate limits can be extended is by a general law authorizing the extension on such terms and conditions as will not result in the injury of owners of adjacent property, or will not empower a city government to arbitrarily include agricultural lands within the corporate limits.

A constitutional provision against special legislation will prevent the legislature from extending the limits of a city by special act. *Wyandotte v. Wood*, 5 Kan. 603.

And the authority of that case was recognized in *Gray v. Crockett*, 30 Kan. 123, a case in which it

United States v. Quincy, 71 U. S. 4 Wall. 535, 18 L. ed. 403; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

This law is invalid, for it seeks to confer upon the court of common pleas powers not judicial in their nature.

Marbury v. Madison, 5 U. S. 1 Cranch, 187, 2 L. ed. 60; *Hayburn's Case*, 2 U. S. 2 Dall. 409, 1 L. ed. 486; *United States v. Ferreira*, 54 U. S. 18 How. 40, 14 L. ed. 42; *Ex parte Logan Branch at Logan of State Bank of Ohio*, 1 Ohio St. 438; *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500, 7 Am. Rep. 575; *Ex parte Griffiths*, 8 L. R. A. 398, 118 Ind. 83; *State v. Judges of Common Pleas Ct.* 21 Ohio St. 2.

The power to change the territorial limits of a municipal corporation is legislative, not judicial, and cannot be exercised by courts.

Willett v. Bellville, 11 Lea, 1; *State v. Armstrong*, 3 Sneed, 684; 1 Dill. Mun. Corp. §§ 41, 188, 185; *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Nevada*, 6 Cal. 148; *People v. Riverside*, 70 Cal. 461; *People v. Bennett*, 29 Mich. 457, 18 Am. Rep. 107; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

Messrs. Frederick Hertenstein and Frank F. Dinamore, for defendant:

The validity of classification by the legislature has been repeatedly recognized and sustained by this court.

If just and reasonable, and in no manner arbitrary, classification is proper.

Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; *Costello v. Wyoming*, 49 Ohio St. 202.

In the present case the plaintiff cannot avail

itself of a privilege which the court only can claim.

State v. Gaslay, 5 Ohio, 14; *State v. Judges of Common Pleas Ct.* 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

All corporations are organized and sustained by general laws, and the legislature, by a repealing act, may take the life of every corporation in this state.

Metcalf v. State, 49 Ohio St. 586.

If this principle be followed to its legitimate conclusion, all municipalities are under the absolute control of the legislature.

The wisdom of the legislature is supreme. It is the sole judge of the necessity of legislation, and a court should not assume the responsibility of deciding a question which the people have entrusted to their representatives.

Baker v. Cincinnati, 11 Ohio St. 542; *State v. Covington*, 29 Ohio St. 102; *Cass v. Dillon*, 2 Ohio St. 607; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *State v. McCann*, 21 Ohio St. 198; *State v. Dudley*, 1 Ohio St. 437; *Lehman v. McBride*, 15 Ohio St. 578; *Hill v. Higdon*, 5 Ohio St. 249, 67 Am. Dec. 289.

Municipal corporations are created by the authority of the legislature, and derive all their powers from the source of their creation.

The legislature, at any time, within its own discretion, unless restrained by constitutional provisions, may enlarge or diminish the powers of a municipal corporation; may attach to or take from its corporate limits; may consolidate or annex it to another, and indeed may

was attempted to abridge the limits of a city by special act.

In Ohio the territory cannot be added by special act. *State v. Cincinnati*, 20 Ohio St. 13.

The fact that general provisions have been made for the enlargement of municipalities and the constitution provides that the legislature shall have no power to suspend any general law for the benefit of any individual will not prevent the legislature from enlarging the boundaries of a municipality by special law. *Williams v. Nashville*, 89 Tenn. 487.

In Missouri the annexation may be made by general law without the necessity of the notice required by the constitution to be given in case of the enactment of special laws. *Copeland v. St. Joseph (Mo.)* Jan. 21, 1896.

Interference with election districts.

In Michigan annexation cannot interfere with boundaries of representative districts. *People v. Holihan*, 29 Mich. 116. But the legislature may change representative districts after an enumeration as provided by the constitution. *People v. Bradley*, 36 Mich. 447.

The consolidation of two cities will not contravene the constitutional provisions against the change of representative districts, if the statute expressly provides that, notwithstanding the change, such districts shall remain as before. *Smith v. Saginaw*, 81 Mich. 123.

In Massachusetts the legislature has constitutional power to change county or town lines at will unless they interfere with the provisions of the constitution as to the formation of districts for the election of senators and representatives. Opinion of the Justices, 6 Cush. 580.

The Massachusetts Act of 1854 for the annexation of Charlestown to Boston was held unconstitutional. 27 L. R. A.

tional for interfering with the constitutional rights of the inhabitants to elect representatives and senators in the general court. *Warren v. Charlestown*, 2 Gray, 104.

Other constitutional requirements.

The right to annex may be made so dependent on the duty to exempt agricultural lands from taxation that if the exemption is void the whole act may be void. *Copeland v. St. Joseph (Mo.)* Jan. 21, 1896.

That the annexed territory is not given representation on the board of aldermen is not fatal to its validity. *Valverde v. Shattuck*, 19 Colo. 104.

A constitutional provision prohibiting the transferring of territory from one county to another without consent of the parties residing in the territory so transferred, does not prevent the annexation of a portion of the territory of a county, or to a city, although they constitute separate political divisions. *Daly v. Morgan*, 1 L. R. A. 757, 60 Md. 460.

A constitutional provision against the making of a city unless the territory contains a certain number of inhabitants does not apply to the annexation of such territory to a city already existing. *Chandler v. Boston*, 112 Mass. 204. In that case the court says the control of the general court over the territorial division of the state into cities, towns, and districts unless controlled by some specific constitutional limitation must necessarily be supreme. If injuriously affected by legislative action upon these political relations, within constitutional limits, the court can afford no remedy.

The consolidation of two or more municipal corporations all of which are indebted is not prohibited by constitutional prohibition that no municipality shall become indebted to more than a certain amount, although the indebtedness of

abolish or destroy its corporate character entirely.

Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Philadelphia v. Fox*, 64 Pa. 169; *People v. Morris*, 18 Wend. 325; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 58; *Cooley*, Const. Lim. 192; 1 Dill. Mun. Corp. §§ 54, 67; *Chandler v. Boston*, 112 Mass. 204; *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 18 L. ed. 518; *Layton v. New Orleans*, 12 La. Ann. 516; *North Yarmouth v. Skillings*, 45 Me. 183, 71 Am. Dec. 580; *Terrett v. Taylor*, 18 U. S. 9 Cranch, 43, 8 L. ed. 650; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620; *Jefferson City Gas-Light Co. v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Laird v. De Soto*, 22 Fed. Rep. 421; *Thompson v. Abbott*, 61 Mo. 176; *St. Louis v. Allen*, 18 Mo. 412; *Berlin v. Gorham*, 84 N. H. 266; *People v. Pinckney*, 32 N. Y. 877; *People v. Draper*, 15 N. Y. 582; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Demarest v. New York*, 74 N. Y. 161; *Piqua Branch of State Bank of Ohio v. Knoop*, 57 U. S. 16 How. 369, 14 L. ed. 977; *United States v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 322, 21 L. ed. 597; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Broughton v. Pensacola*, 98 U. S. 266, 23 L. ed. 896; *United States v. Port of Mobile*, 12 Fed. Rep. 768; *Knight v. Ashland*, 61 Wis. 238; *Morford v. Unger*, 8 Iowa, 90; *Richland County v. Lawrence County*, 12 Ill. 1.

It is not necessary that the legislature should first obtain the consent of the persons to be

annexed to a city before passing the law of annexation.

1 Dill. Mun. Corp. § 185; 1 Beach, Mun. Corp. chap. 12; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *North Yarmouth v. Skillings*, 45 Me. 142, 71 Am. Dec. 580; *Windham v. Portland*, 4 Mass. 389; *Cheaney v. Hooser*, 9 B. Mon. 346; *Ham v. Sawyer*, 88 Me. 37; *Kelly v. Meeks*, 87 Mo. 896; *St. Louis v. Allen*, 18 Mo. 400; *Montpelier v. East Montpelier*, 29 Vt. 20, 67 Am. Dec. 748; *Berlin v. Gorham*, 84 N. H. 266; *Gorham v. Springfield*, 21 Me. 58; *Daly v. Morgan*, 1 L. R. A. 757, 69 Md. 480; *Valverde v. Shattuck*, 19 Colo. 104; *Powers v. Wood County Comrs.* 8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96.

The necessity for such annexation is a question of public policy to be decided by the legislature, or by such tribunal as it may provide.

Berlin v. Gorham, 84 N. H. 275; *St. Louis v. Allen*, 18 Mo. 412; *Stils v. Indianapolis*, 55 Ind. 515; *People v. Carpenter*, 24 N. Y. 86; *Kelly v. Meeks*, *supra*; *Hurla v. Kansas City*, 46 Kan. 798; *Taylor v. Fort Wayne*, 47 Ind. 274; *Devore's App.* 56 Pa. 163; *Smith v. Saginaw*, 81 Mich. 123; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 53.

The city of Cincinnati is the taxing district, and this may be enlarged by the legislature. If this be done, whatever property is thus brought within the city of Cincinnati must contribute to the public support, and must share in the public benefit because within the district.

some of them exceeds the limit and the result may be that the indebtedness of the new corporation may exceed the limit. *True v. Davis*, 6 L. R. A. 266, 138 Ill. 522.

Whether the land is used for one purpose or another is wholly immaterial. The law has fixed a more certain and less fluctuating test for determining so important a right as that of local or municipal taxation. *Malrus v. Shields*, 2 Mer. (Ky.) 553.

Territory of a city may be enlarged under a statute entitled "to define" the boundaries of the city. *People v. Bradley*, 26 Mich. 447.

Under the Missouri constitution territory cannot be cut off from one county for annexation to another if the effect will be to leave the former with less than 500 square miles of territory. *Woods v. Henry*, 55 Mo. 560.

The question of the constitutionality of the act cannot be raised by quo warranto proceedings. *People v. Whitcomb*, 55 Ill. 172.

Held valid on facts.

There are cases even in states which hold that the power of the legislature is not unlimited which have held the annexation to have been proper upon the facts. *Ford v. North Des Moines*, 80 Iowa, 236; *Beattyville Trustees v. Daniel*, 15 Ky. L. Rep. 798; *Elkton Trustees v. Gill*, 94 Ky. 128; *Brown v. Denver*, 3 Colo. 169; *Burlington & M. R. Co. v. Spearman*, 12 Iowa, 118; and similar rulings have been made with reference to taxation. *Mendenhall v. Burton*, 42 Kan. 570; *Butler v. Muscatine*, 11 Iowa, 453; *Brooks v. Polk County*, 52 Iowa, 460.

When the proprietors of undedicated town property being legally within the town limits hold such close proximity to the settled and improved portion of the town that the corporate authorities cannot open and improve its streets and alleys and extend to the inhabitants thereof its usual police

regulations and advantages without incidentally benefiting such proprietors in the personal privileges and accommodations or in the enhancement of their property, then the power to tax the same arises. *Fulton v. Davenport*, 17 Iowa, 404; *Davis v. Dubuque*, 20 Iowa, 458; *O'Hare v. Dubuque*, 22 Iowa, 144.

Limitation on legislative power.

There are some judges who have refused to subscribe to the doctrine of the unlimited power of the legislature when uncontrolled by constitutional provisions. It has been held that the legislature cannot authorize a municipality to tax land lying beyond its corporate limits. *Wells v. Weston*, 22 Mo. 384.

The strongest presentation of this view is to be found in a dissenting opinion by Agnew, *Ch. J.*, in *Kelly v. Pittsburgh*, 85 Pa. 180, 27 Am. Rep. 699, which so fully discusses the question as to justify extended extracts from the opinion. The judge said: "If the legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given limits, outside of the city, to pay these city taxes. Thus, when we get rid of that confusion of thought which confounds extension of boundary and power of taxation, we perceive that taxes laid on mere farm lands to pay city levies applicable only to the built-up or true city is nothing more than an order to farmers to pay for the benefit of the city residents; it is taking the money of A. to pay for improvements made for the use of B. This is palpably and flagrantly unjust, and, therefore, against common right. If the legislature itself cannot compel farmers to pay city taxes for purely local purposes in which they have no share, it is clear it cannot authorize the city to do indirectly what it cannot do

Powers v. Wood County Comrs. and Blanchard v. Bisell, *supra*.

The power of the legislature to authorize the annexation of farm lands is ample.

Cheaney v. Hooser, 9 B. Mon. 830; *Covington v. Southgate*, 15 B. Mon. 491; *Morford v. Unger*, 8 Iowa, 82; *Butler v. Muscatine*, 11 Iowa, 448; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 404; *Langworthy v. Dubuque*, 16 Iowa, 271; *Durant v. Kauffman*, 34 Iowa, 194; *Giboney v. Cape Girardeau*, 58 Mo. 141; *St. Louis v. Russell*, 9 Mo. 507; *St. Louis v. Allen*, 18 Mo. 400; *State v. Reynolds*, 61 Mo. 208; *Linton v. Athens*, 58 Ga. 598; *Martin v. Dir.*, 52 Miss. 58; *Municipality No. 3 of New Orleans v. Mahoud*, 6 La. Ann. 605; *Washburn v. Oshkosh*, 60 Wis. 453; *Madry v. Coz*, 78 Tex. 588; *Cary v. Pekin*, 88 Ill. 154, 80 Am. Rep. 543; 2 Dill. Mun. Corp. 794; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 659; 85 Pa. 170, 27 Am. Rep. 688; *Norris v. Waco*, 57 Tex. 685.

directly. An order, with or without the extension of boundary, upon a certain class to pay taxes for local benefits conferred on others is wholly different from a power to lay a general tax for the support of government. The latter is a power to which every citizen of a state submits himself in consideration of the general benefits derived from government. But as to the former . . . the object is to make the owners of farms divide the expense of supporting municipal government with those who need it; . . . the true city is the built-up part, while the levy of taxes on farms is to confiscate property outside for the benefit of those within the true city."

"The power of the legislature is clear to divide the state, for convenient local government, into counties, townships, cities, boroughs, etc., conferring on each an appropriate autonomy. But in doing this the powers conferred must be adapted to the ends to be accomplished by each. A sound and large discretion is necessarily exercised in this adaptation of powers. But it is equally clear that the powers conferred must have a reasonable appropriateness to the end proposed. Such an exercise of power only can fairly comport with the true and acknowledged principles of our American governments, which are well founded on the rights of the people, and for their 'peace, safety, and happiness.'"

And he quotes from *Calder v. Bull*, 81 U. S. 8 Dall. 386, 1 L. ed. 648: "The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. . . . Therefore, while we concede the wide range to be given to legislative discretion in adapting the means to the end, that is, to the purposes of local government, there is a limit beyond which the legislative power cannot sacrifice the sacred right of private property. This limit is reached when it palpably and plainly sacrifices this right, which the people themselves have jealously guarded against transgression in their fundamental law. There must be, therefore, a reasonable appropriateness in the means employed to execute the legislative purpose. The taxing power conferred on the city, therefore, cannot extend to such a case as this, where a ruinous burden is laid on land wholly rural and outside of the city proper, for purely local and city objects, in which . . . the owner has no interest. This distinction between
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Williams, J., delivered the opinion of the court:

The statute relied on by the defendant as authority for the annexation it is attempting to accomplish, is assailed on various grounds, one of which is, that it is in conflict with section 1 of article 18 of the Constitution, which prohibits the conferring of corporate power by special legislation.

As this objection is predicated largely, if not entirely, upon the first section of the original act, and seems to rest upon the word "present," therein contained, which was eliminated by the amendment adopted before any steps toward the annexation were taken, it is proper to consider the effect of that amendment. We understand the plaintiff's counsel to contend, that the first section rendered the whole statute obnoxious to the constitutional provision referred to, and, that it could not, therefore, be made valid by amendment, though the unconstitutional feature be thereby

local taxation for purely local purposes, and general taxation by the state, in which all are interested, cannot be overlooked or thrust aside. . . .

"In discussing this question, the advocates of unlimited power ignore the distinction so palpable between the general power of taxation for the benefit of the whole state, though laid in districts, and the imposition of local burdens in return for specific benefits. As to the former all men participate more or less in the general advantages of government; but there can be no such postulate for the latter where it is palpably clear the local burden is imposed without just cause and is plainly for the benefit of others. And a court must regard a substantial return not a merely speculative or shadowy benefit, which amounts to no more than a pretext. . . . If the rights of property can be taken or taxed away, without a justifiable cause to bring the legislative act within the just powers of government it is confiscation, not legal contribution."

Closely in line with that reasoning is *DENVER v. COULEHAN*, *post*, 751. The latter case is supported in other jurisdictions.

Thus under a grant of power to county boards to change boundaries of towns, a change cannot be made so as to include two detached tracts of territory. *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 38 Am. Rep. 840.

So the legislature cannot annex non-contiguous territory. *Smith v. Sherry*, 50 Wis. 218.

In *Hurla v. Kansas City*, 46 Kan. 738, the court in considering the regularity of the action of a city in enlarging its boundaries under authority of a statute says: "We doubt, under the power delegated in this section, if the city council is authorized to leave out or disregard small tracts adjoining the city limits and pass over them and attempt to take within the city a detached tract not adjoining its boundaries."

Making special taxing district.

The object of raising funds for special purposes may be accomplished without annexing the territory to the town for all purposes. In a recent case it was held that the legislature may lawfully erect territory contiguous to a town and the town into a district for the purpose of enabling it to vote aid to an internal improvement and raise the money by taxation on the property in the district. *Henderson v. Jackson County*, 13 Fed. Rep. 578.

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removed. Assuming the premises to be sound, the conclusion, we think, does not follow.

"Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections so amended must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act as it stands after the amendatory sections, are so introduced."

McKibben v. Lester, 9 Ohio St. 627.

And, it may be added, the other sections are to be interpreted in connection with, and in view of, the amended section or sections, and, in its application to cases arising after the amendment has been made, the whole statute must have the same operation and effect as if it then had been re-enacted, in terms. Hence, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution. It is, therefore, unnecessary, in passing upon the constitutionality of this statute, to consider the first section before it was amended.

1. This court decided, in *State v. Cincinnati*, 20 Ohio St. 18, that the extension by a municipality of its corporate jurisdiction, by the enlargement of its territorial boundaries, is the exercise of a corporate power which cannot be conferred by special act; so that, the question here is whether the statute under consideration, in its amended form, is an act of that nature. The first section provides: "That any city of the first grade of the first class shall have the power to annex to its corporate limits any contiguous municipal corporation or corporations of other grades or classes situate in the county containing such city of the first grade of the first class, upon compliance with the terms and conditions hereafter recited." The classification of municipal corporations, adopted by the codification of 1890, has been continued in force. By it, such corporations are divided into cities, villages, and hamlets; and cities into two classes, first, and second, and each class into grades; those of the first class into three grades, with provision for a fourth, and those of the second class into four grades. At no time since the adoption of that classification has there been more than one city belonging to either grade of the first class; Cincinnati being the only city of the first grade, Cleveland the only city of the second and Toledo the only one of the third grade of that class; and, while other cities might have come, or may hereafter come into one or the other of those grades, no doubt one purpose of the classification, if indeed that was not its only purpose, was to provide a plan by which legislation applicable alone to each of those cities might be enacted without overstepping the limitations of the constitution. The validity of legislation of that class was early called in question, but its constitutionality has been repeatedly

maintained. It is said, in *State v. Brewster*, 39 Ohio St. 653: "The objection that the classification was illusory was conceded to be forcible, but did not prevail." In view of the volume to which such legislation has grown, and is likely to further grow in the future, it is still urged that a better, as well as a sounder rule would have been established, if the objection had prevailed. But whatever the individual views of judges on that subject may now be, the validity of legislation of that kind has been so long recognized, and it enters so largely into the government of the cities of this state, that the evil consequences to be apprehended from overturning the established rule would greatly exceed any likely to result from adhering to it. At all events, as has been declared more than once by this court, the rule has become so firmly established that it is no longer open to controversy. *State v. Pugh*, 43 Ohio St. 98; *State v. Hawkins*, 44 Ohio St. 98; *State v. Hudson*, Id. 187; *State v. Wall*, 47 Ohio St. 499; *State v. Smith*, 48 Ohio St. 211.

The question is always open, however, whether a particular statute is within the rule; and it is held not to be a valid objection "against legislation, general in form, concerning cities of a designated class and grade, that but one city in the state is within the particular classification at the time of its enactment;" nor, "that the belief or intent of the individual members of the general assembly who voted for the act was that it should apply only to a particular city." *State v. Pugh*, *supra*. Nor is the power of classification confined to that based upon population, or the division of municipalities into classes or grades according to the number of their inhabitants; and while it is difficult, if not impossible, to accurately define the power by any general rule, it is settled that proper classification may be based upon the peculiar situation of municipalities, their conditions, internal and surrounding, which render different legislation with respect to them necessary, or especially appropriate. *Bronson v. Oberlin*, 41 Ohio St. 476; *Costello v. Wyoming*, 49 Ohio St. 302. And, whatever the plan or basis of classification, the principle upon which the validity of legislation with respect to a particular class depends, is, that other municipalities may attain to the same class, and become subject to, and avail themselves of, the benefits of the act; if that may be done, the statute is a law of a general nature, and not invalid, though it confer corporate power. *State v. Pugh*, and *State v. Hawkins*, *supra*.

Tested by that principle, the statute under which the annexation proceeding here involved was instituted, is not a special act. It is continuing in its operation, and adapted to future proceedings of the same kind, as well as to the present one. And, though the defendant is now the only city of the first grade of the first class in the state, every city hereafter coming into that grade and class may, under the same circumstances, without further legislation, avail themselves of the provisions of the act, and exercise the power of annexation in the manner and upon the conditions prescribed in the act. Under

existing legislation, every such city will be provided with the same officers and governmental machinery as the defendant, and be subject to the same general laws that are applicable to the defendant; and the like result will ensue with regard to contiguous municipalities of other grades; those contiguous to future cities of the first grade of the first class, will, without further legislation, be under the same general laws that those now contiguous to existing cities of that grade and class are, and have the same form of government.

2. The act being of a general nature, is it in conflict with section 26 of article 2 of the Constitution, which requires that all laws of a general nature shall have a uniform operation throughout the state? We think it is not. In order that a law may have such operation, it is not necessary that there be in every part of the state persons or objects upon which it can operate, nor that many persons or objects be within the scope of its operation; it is sufficient if the law operate uniformly upon all persons or objects, or classes of either, in the same situation and condition, and all that may come within the relation and circumstances for which it provides; and it is clear the statute in question has such operation, since all cities of the class and grade of the defendant, and all that may hereafter attain to that grade and class, may avail themselves of the provisions of this statute, and annex contiguous municipalities of other grades, upon the same conditions and terms under which the defendant is authorized to make such annexation, and by the same mode of procedure. *McGill v. State*, 34 Ohio St. 228; *Senor v. Ratterman*, 44 Ohio St. 661.

3. It is further claimed that the statute is repugnant to those sections of the judicial article of the constitution (sections 1 and 4 of article 4), which declare that the judicial power of the state shall be vested in certain courts, among them the courts of common pleas, and that "the jurisdiction of the courts of common pleas and of the judges thereof shall be fixed by law." The particular provisions of the statute pointed out as being so repugnant, are those contained in sections 5, 6, and 7, which confer authority on the court of common pleas to appoint three commissioners, fix their compensation, and approve or modify their report. These commissioners are required to make a detailed account of the indebtedness of each municipality included in the annexation, and of the school districts affected by it, and arrange the terms and conditions of the annexation, and make report to the court, which may approve it as made, or modify it, and then approve it. When the report is approved, the annexation, it is declared, shall be deemed complete, and the action of the court shall be final. The powers to be exercised under these provisions of the statute, it is said, are not of a judicial nature, and cannot, therefore, be conferred on the court; and, as the annexation cannot be consummated without their exercise, the whole statute, it is contended, becomes inoperative. There appears to be no constitutional obstacle in 27 L. R. A.

the way of investing a court or judge with such powers. Nor is there any valid objection to their due execution, if the court or judge chooses to perform them, for third persons cannot complain on the ground that their performance could not have been enforced. *State v. Gaslay*, 5 Ohio, 14; *State v. Judges of Common Pleas Ct.* 21 Ohio St. 1; *Walker v. Cincinnati*, Id 14, 8 Am. Rep. 24. In the two cases in 21 Ohio St., above cited, powers analogous to those pointed out as objectionable in this statute were conferred on the judges instead of the courts; and in that respect the cases are distinguishable from this one; but the distinction is not important. In the case of the *State v. Gaslay*, the statute, as appears from the report, authorized the court to assess a tax upon lawyers, which, while in no sense judicial action, is something more than the appointment of a ministerial or administrative board or officer; and this court upheld the law, and enforced the tax. All such powers, when the court is directed to execute them, are necessarily to be performed by the judge, for they can be in no other way; and hence, it can make no substantial difference whether the statute confers them in terms on the court, or on the judge of the court. It will be found that in many instances, in providing measures of importance in the municipal government of the defendant, and other cities, and in the conduct of public affairs generally, the legislature has imposed upon the court, *eo nomine*, duties not dissimilar to those the court is required to perform by the statute in question. Thus, it is required to fix the number of justices of the peace in new townships (Rev. Stat. § 566); to approve the report and fix the compensation of commissioners appointed to establish the seat of justice of new counties, and to appoint a director to purchase land and lay the same into lots, and alleys, in such county seat, and prescribe regulations for the action of the director in so doing, and in the disposition of the lots (sections 882-887); to appoint persons to examine the reports of county commissioners, and persons to examine the county treasury (sections 917, 1181); to appoint city hall trustees (section 2559, a, 1); a board of tax commissioners (section 2690, a); trustees of the sinking fund (section 2715); directors of certain universities (section 4098); trustees of children's homes (sections 7913-7937); and to grant licenses to ferries and auctioneers (sections 4222-4225), (4256-4259); and perform many other similar duties. Other statutes confer like powers upon judges. And in whichever form the power has been given, the judges, so far as we are aware, have conformed to the legislative will, whether they could have been compelled to do so or not; and many important public results have been, and are being accomplished, in consequence. The legislature has, no doubt, empowered the courts and judges to perform these acts, and others of like nature, because in that way the best public agencies necessary in carrying the legislation into effect, are most likely to be obtained; and we are not convinced, either that the legislative judgment in that regard is at fault, or, that the legislative purpose

must fall; at least, so long as the courts and judges charged with the performance of the act interpose no objection. In regard to the power to be exercised by the court of common pleas in approving or modifying the report of the commissioners appointed to adjust the terms of annexation, and the dangers suggested, of impairing the rights of creditors of either of the municipalities, or other private rights, it is sufficient to say, the case has not yet reached that stage where any actual violation of those rights has occurred, or any probable violation of them is apparent. For aught that can be now known, the terms of annexation may be adjusted to the satisfaction of all concerned; and if the rights of creditors, and others be violated, the individuals affected must seek the needed redress.

4. Another objection made to this statute is, that the object sought to be accomplished by it, in the mode provided, is beyond the range of legislative authority, because it authorizes annexation, and consequently taxation, without the consent of those who are affected by it. The proposition of counsel, as stated in the brief, is: "If annexation of one municipal corporation to another be so authorized as to vest in the agencies empowered to effect the union final authority to require substantial taxes for objects accomplished, and purely local to the annexing corporation, to be imposed upon the taxable inhabitants of the municipality proposed to be annexed, then the exercise of power to annex must be founded in mutual consent."

That the enlargement of the territorial boundaries of municipal corporations by annexation, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation, must be admitted; and hence, the extent to which such legislation shall be enacted, both with respect to the conditions and circumstances under which the annexation may be had, and the manner in which it may be made, rests wholly in the discretion of the general assembly, except in so far as limitations upon its power are contained in the constitution. Accordingly, legislation has been sustained, which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation. *Powers v. Wood County Comrs.* 8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96. In both of these cases it was held that the annexation might be made without the consent, and even against the remonstrance of a majority of the persons residing on the annexed territory, that the lands thus annexed were liable to local taxation for the payment of the pre-existing indebtedness of the municipality, and that the statute authorizing such annexation was constitutional; the court saying in the first of the cases that there is no constitutional provision on the subject, and that, "it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which

owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debt, on the ground that the property annexed was condemned for public use;" and further, that it is not "to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited." And in *Melcalf v. State*, 49 Ohio St. 586, a statute was held valid which, in turns, detached from a city, without its consent, territory included in its corporate limits, and attached to it another taxing jurisdiction. The principle established by these cases must control the decision of this one, so far as the question now under consideration is concerned, unless, as counsel for the plaintiff contend, the principle is inapplicable on account of the nature of the indebtedness of the defendant, or because the territory proposed to be annexed is already embraced in organized municipalities.

The indebtedness of the defendant, which, it is claimed distinguishes this case from those above referred to, is that incurred for what is known as "the Cincinnati Southern Railroad," for waterworks, city hall, and some other local improvements aggregating many millions of dollars. It does not appear what was the nature or amount of the indebtedness of the respective municipalities involved in the cases of *Powers v. Wood County Comrs.*, or *Blanchard v. Bissell*; and it should be presumed, counsel claim, that it was created for the necessary or usual governmental purposes, and not for local improvements. Allowing the presumption, it is not perceived how the amount or nature of the municipal indebtedness can affect the right of annexation, if it be otherwise legal; for the power to bring into a municipal corporation, by annexation, property not theretofore subject to taxation for municipal purposes, and lay taxes upon it to raise funds for the payment of any previously existing municipal debt, necessarily includes the power to do so for the payment of every such debt lawfully incurred. Persons thus brought into the annexing corporation, and their property, like all of its other inhabitants and their property, receive and enjoy the benefits of all local improvements, and should share the burdens existing when the enjoyment commences; and, in like manner, the inhabitants of the annexing corporation enjoy the benefits and share the burdens arising from the local improvements of the municipalities annexed. If a valid objection to the annexation could be predicated upon the nature of the indebtedness for the payment of which the property included in the annexation may be taxed without the consent of its owners, the reason would seem to be stronger for allowing it where the debt was incurred for purely governmental purposes; for the benefits derived therefrom are not continuing, nor the results tangible, like those arising from permanent public improvements, but may have entirely ceased, and so be no longer capable of enjoyment by the persons included in the annexation, except what may be attributed to good municipal government resulting from the ex-

penditure. But the power of taxation does not rest upon the consent of the taxed, except as that consent is implied or shown in the enactment of laws by the representatives of the people, or is made requisite by legislation; and, therefore, taxes may be imposed, or authorized by the legislative body, within its discretion, for all public purposes, so long as the fundamental law is not violated. We cannot think that, because the annexation authorized by the statute may result in the taxation of property without the owner's consent, for the payment of the lawful indebtedness of the annexing corporation, the passage of the act was a usurpation of legislative power. If either of the municipalities sought to be annexed should be the owner of private property which may be taxed, it stands on the same footing as other owners of private property; its rights can be no greater than theirs, and hence, there can be no more necessity for its consent, than for theirs; and property held by it for public purposes will continue to be held for such purposes, after the annexation is completed, until other lawful disposition is made of it. Nor do we think the general assembly exceeded its legislative power in authorizing the annexation of municipalities of a lower grade to one of a higher grade. Grant its powers to annex, or provide for annexing to a city or village, adjacent territory against the will of its owners and occupants, and there does not appear to be any satisfactory reason for denying the power where the territory is coextensive with the boundaries of another municipal corporation, especially when there is no such limitation in the constitution.

It is maintained by very high authority that it is clearly within the legislative discretion to extend or restrict the boundaries of municipal corporations, "or consolidate two or more into one." Cooley on Constitutional Limitations, 6th ed. 228; and it is declared by *Mr. Justice Clifford*, in *Mount Pleasant v. Beckwith*, 100 U. S. 515-524, 25 L. ed. 699-701, to be the constant practice for legislative bodies to divide or consolidate municipal corporations, and that such action is often necessary for the public interests and convenience. And in *Merritt v. Garrett*, 102 U. S. 472-511, 26 L. ed. 197-204, it is said by *Mr. Justice Field*: "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers. There is no contract between the state and the public that the charter of a city shall not be at all times

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subject to legislative control. . . . There is no such thing as a vested right held by any individual in the grant of legislative power to them." Many other authorities, much to the same effect, are cited in the brief of counsel for the defendant which we deem it unnecessary to notice further. We have been referred to none maintaining the contrary doctrine, and have found none. In the light of these authorities, we would be unwarranted in holding that the legislature transcended its powers in passing the act in question; and, observing in this case the well-established rule that the courts should not declare a statute unconstitutional unless convinced that it is clearly so, we hold the statute in all respects constitutional and valid.

5. The remaining question is whether the statute has thus far been complied with. The plaintiff claims it has not been in the mode of submitting the question of the annexation at the election held under the statute; that the question of the annexation of all the villages sought to be annexed was the only one submitted, so that the electors of each village was denied the right to vote on the question of its annexation, and could only vote for or against the annexation of all. This seems to be in strict conformity with the statute. The second section provides that the city desiring to annex any contiguous municipal corporation or corporations shall pass an ordinance declaring such intention, and describing the municipal corporation or corporations it desires to have annexed; and section three provides that when the city desiring the annexation determines in favor of the same, its mayor, and the mayors of the different municipal corporations sought to be annexed shall each issue a proclamation, notifying the qualified electors of their respective municipalities, of the time and place of holding an election "to determine whether such municipalities shall be annexed." There is but one question to be determined, and that is whether all the municipalities sought to be annexed, if more than one, shall be annexed; and in the determination of that question the electors of all such municipalities, and of the city desiring the annexation, are equally interested. The statute further provides that the annexation shall be deemed to have carried, if a majority of the votes "cast upon such proposition shall be in favor of annexation." We find no provision in the statute which contemplates a separate vote by the electors of each municipality upon the question of its annexation.

The defendant, having shown that it is lawfully possessed of the privileges and franchises it is charged with exercising, is entitled to judgment.

COLORADO SUPREME COURT.

City of DENVER *et al.*, *Appts.*,

v.

Jeremiah COULEHAN *et al.*

(.....Colo.....)

"The legislature of this state does not have the power to extend or enlarge the territorial limits of a specially chartered town or city by adding thereto noncontiguous lands,—that is, lands entirely separated from the municipality by intervening territory; and the courts may declare the annexation of such noncontiguous territory invalid, and enjoin the collection of municipal taxes upon the property thus sought to be annexed.

(December 22, 1894.)

A PPEAL by defendants from a judgment of the District Court for Jefferson County in favor of plaintiffs in an action brought to enjoin the assessment, levy, and collection of taxes upon plaintiff's property for the use of the city of Denver. *Affirmed.*

• Statement by Elliott, J.:

Action to enjoin the assessment, levy, and collection of taxes upon certain property in Jefferson county by or for the use of the city of Denver. Trial, and judgment in favor of plaintiff, granting the perpetual injunction as prayed for. Defendants appeal. The complaint is very lengthy. The following extracts will be sufficient for an understanding of the opinion: "The plaintiff, suing as well for the behalf of all other owners of taxable property situate within the district of lands aforesaid, similarly situated, as for himself, complaining, saith that plaintiff is, and for twenty years and more last past hath been, the owner of those certain premises described as the northeast quarter of section twenty-three (23), township three (3) south, of range sixty-nine (69) west; . . . that by a certain act of the general assembly of the state of Colorado approved on the third day of April, A. D. 1893, entitled 'An act to revise and amend the charter of the city of Denver,' it was and is provided, among other things, that the corporate limits of the said city of Denver should begin, etc. [description, including lands of plaintiff], 'excepting, however, out of the said city, as so established, all towns and cities incorporated and then existing under the general laws of the state, situated within said last-mentioned boundaries.' . . . Plaintiff further avers that the plaintiff's land hereinbefore described, and all of the lands hereinbefore mentioned, situate in the said township three (3) south, of range sixty-nine (69) west, and township four (4) south, of range sixty-nine (69) west, are, and always have been, included within the limits of the said county of Jefferson; that the said lands of the plain-

tiff are agricultural lands, and now are, and for many years last past have been, by plaintiff planted and cultivated for the rearing of grasses, small grains, and small fruits; that the said lands are valuable only as agricultural lands; that the same are not and never have been divided into streets, alleys, lots, blocks, or outlots, nor doth plaintiff propose or intend, nor hath plaintiff ever proposed, intended, or desired, to so subdivide the same into parcels, or sell or expose the same to sale as urban or suburban property, nor are the same valuable for such purpose; that no public buildings or other improvements have ever been erected or made by the said city of Denver upon or within three miles of said lands of plaintiff or said district of lands aforesaid, situate in said county of Jefferson; that none of the public streets or alleys of the city of Denver extend into or near to the same, or any part thereof, or into or within two miles of any part of the said district of lands aforesaid; and that neither light, heat, police protection, water, nor other convenience or public service furnished by or under authority of the city of Denver for the benefit of the inhabitants thereof hath ever been extended or afforded to plaintiff or any of the people residing within the said district; nor doth or can plaintiff or the other owners of lands situate within the said district have any benefit, advantage, or convenience whatsoever of the government of the said city of Denver, or any department thereof; nor are the said lands of plaintiff, nor any of the lands situate within the district aforesaid, in range sixty-nine (69) aforesaid, necessary to be added to the city of Denver for opening streets or ways between other parts of the said city of Denver, or for any other municipal purpose whatsoever; and that the whole purpose of the city of Denver and those active in and about procuring such enlargement of the bounds of said city was and is to enable the authorities of the said city of Denver to levy taxes upon the lands and other taxable property within the said district for raising moneys for discharging the current expenses of the said city, and for discharging the principal and interest of the bonded indebtedness of the said city hereinafter mentioned. . . . Plaintiff further avers that the said district of lands in every part thereof was at the date of the passage of the said act, and still is separated from the bounds of the said city of Denver, as established prior to the passage of the said act, by a distance of two (2) miles or more, and by certain municipal corporations theretofore and now still existing, to wit the town of North Denver, the town of Highlands, the town of Colfax, and the town of Barnum, all which, as plaintiff on information and belief avers, at the date of the passage of the said act, and for many years before that, were, and still are, municipal corporations, lawfully organized and existing under the laws of the state of Colorado. . . . Plaintiff is advised by counsel, and therefore avers, that the attempt made by the

•Headnote by ELLIOTT, J.

NOTE.—As to power of legislature to annex territory to municipalities, see *note* to case immediately preceding this one.

said enactment to include the said district of lands within the limits of the city of Denver solely for subjecting the same to taxation for the purposes of the said city of Denver, and the attempt by the said enactment to subject the said lands to the burden of the indebtedness heretofore contracted by the said city of Denver for loans as hereinbefore mentioned and the other indebtedness of the said city of Denver, was beyond the authority of the general assembly, and wholly without effect. Nevertheless, plaintiff saith the city council of the said city of Denver threaten to and will levy upon the lands situate in said district, including the lands of plaintiff, hereinbefore described, taxes for city purposes to an amount not exceeding the limit in the said act provided, to wit, ten mills on the dollar upon the assessed value of said property, and cause the said levy to be certified to the county clerk of the said county of Jefferson; and the said John Vivian, who is the county clerk and recorder of the said county of Jefferson threatens to and will, unless restrained by the writ of injunction hereinafter prayed, extend the same upon the tax lists of the said county of Jefferson for the now current year and every year hereafter, in the manner directed in the said act, and include the said city taxes in his warrant to the county treasurer of the said county of Jefferson; and the said Robert E. Jones, who is the county treasurer of the said county of Jefferson, will, unless restrained as aforesaid, proceed to levy and collect the said taxes, either by sale of plaintiff's lands aforesaid or by distraint and sale of plaintiff's personal property. And plaintiff avers that the taxes so levied and assessed as aforesaid will be a cloud on the lands of plaintiff and all other lands situated within the district aforesaid whereupon such taxes shall be levied and assessed as aforesaid, and the levy and assessment of such taxes from year to year in every year hereafter, as the said city of Denver proposes and threatens to do, will be a continuous and constantly recurring injury, irreparable by any action at law. Plaintiff, therefore, as well for and on behalf of the owners of other taxable property within the said district similarly situated as for himself, prays judgment that the said city of Denver, and the said city council thereof, and all and singular the officers, agents, and servants thereof, be strictly restrained and prohibited from levying upon the lands aforesaid or the other taxable property within the said district, or other lands or taxable property similarly situated to the lands and taxable property of plaintiff aforesaid within the said district, any assessment or tax whatsoever to meet the expenses of said city of Denver, or for other purpose whatsoever, and from causing any such levy to be certified to the county clerk and recorder of said county of Jefferson; that the said county clerk and J. A. Ferris, assessor, as well as their successors in office, be likewise restrained and enjoined from levying or extending any such tax upon the tax list of the said county of Jefferson in any year, and from including any such taxes in any warrant to the county treasurer of said county; and that the

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said county treasurer and all and singular his successors in office be in like manner strictly restrained and enjoined from collecting, or assuming to collect, any such city taxes of the city of Denver at any time levied or assessed upon or against any such lands or other taxable property within the said district; and that plaintiff may have such other and further relief or such different relief as to the court shall seem meet, and his costs."

Messrs. A. B. Seaman and Louis K. Pratt, for appellants:

Plaintiff's attempt to set up a state of facts that would warrant a court of equity in relieving the property of a class of persons engaged in a particular occupation in a particular part of a taxing district from the collection of one of the lawful levies of taxes made in such taxing district by the proper authority, leaving the same levy to be collected upon all other persons having property in such district, this would be a palpable violation of that provision of the constitution that requires tax levies and collections to be uniform throughout the taxing district.

Breese v. Haley, 11 Colo. 351; *People v. Henderson*, 12 Colo. 369; *High, Inj. § 497*; *Miller v. Grandy*, 18 Mich. 540; *North Carolina R. Co. v. Alamance County Comrs.* 83 N. C. 259; *Turner v. Althaus*, 6 Neb. 54.

In the absence of specific constitutional restrictions the difficulty in the way of pronouncing such legislation unconstitutional or of affording judicial relief in such cases is almost insurmountable.

Dill. Mun. Corp. §§ 794, 795; *Cooley, Const. Lim. 501, note*.

As a charter cannot be made in the first instance or changed afterwards without fixing and changing boundaries either by enlargement or contraction, it necessarily follows that the extension of the boundaries by the Act of 1893 was fairly revisory and amendatory of the charter as it existed before.

Brown v. Denver, 7 Colo. 809; *Carpenter v. People*, 8 Colo. 116; *Rogers v. People*, 9 Colo. 450, 59 Am. Rep. 146; *Darrow v. People*, 8 Colo. 426; *People v. Londoner*, 6 L. R. A. 444, 18 Colo. 809; *Re Extension of Boundaries of Denver*, 18 Colo. 288.

Where, as in Colorado, the legislature is untrammelled by constitutional restrictions, the legislative control in the matter of fixing municipal boundaries and taxing districts is plenary and not subject to judicial interference.

Martin v. Dix, 53 Miss. 58, 24 Am. Rep. 661; *Galesburg v. Hawkinson*, 75 Ill. 152; *Gibson v. Cape Girardeau*, 58 Mo. 143; 1 Dill. Mun. Corp. §§ 183, 185, 189; *People v. Fleming*, 10 Colo. 553; 2 Dill. Mun. Corp. §§ 738, 794, 795, and notes; *Brown v. Denver*, 8 Colo. 169; 1 Beach, Pub. Corp. §§ 80, 397, 398; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 733; *Santa Rosa v. Coulter*, 58 Cal. 587; *Turner v. Althaus*, 6 Neb. 54; *Kountze v. Omaha*, 5 Dill. 445; *People v. Rennett*, 39 Mich. 451, 18 Am. Rep. 107; *Madry v. Cox*, 73 Tex. 538; *Blanchard v. Bissell*, 11 Ohio St. 96; *Chandler v. Boston*, 112 Mass. 200; *Washburn v. Oskosh*, 60 Wis. 453; *Cooley, Taxn. p. 149-237*; *Wade v. Richmond*, 18 Gratt. 583; *People v. Brooklyn* 4 N. Y. 419.

On petition for rehearing.

In matters of legislation the power of the legislature is absolute in the absence of either express constitutional limitations or limitations fairly to be implied from the constitution itself.

It is not within the power of the court to restrain the enforcement of a legislative act merely because the legislature acted improvidently in passing it.

Wadsworth v. Union Pac. R. Co. 18 Colo. 612.

If the people of this state desired to have municipal corporations made up of non-contiguous territory in different counties in the state, who is there to say nay?

If the people have vested all their legislative powers in the legislature of the state, the legislature of the state in that direction possesses all of the powers of the people, and what the people could do the legislature can do.

The making of a municipal corporation is a legislative act. The making of such an incorporated city out of non-contiguous territory is not a physical impossibility; it would not contravene any physical laws. It is, therefore, within the power of the legislature and cannot be controlled by the court.

People v. Rucker, 5 Colo. 455; *People v. Wright*, 6 Colo. 92; *People v. Osborne*, 7 Colo. 305; *Wadsworth v. Union Pac. R. Co.* 18 Colo. 600; *Alexander v. People*, 7 Colo. 155; *Re Kindergarten Schools*, 19 L. R. A. 469, 18 Colo. 334; *People v. Fleming*, 10 Colo. 558; *Potter's Dwar.* Stat. 368; *Cooley, Const. Lim.* pp. 200, 328; *Patterson v. Yuba County Suprs.* 18 Cal. 175; *Leonard v. Wiseman*, 81 Md. 201; *Flint River S. B. Co. v. Foster*, 5 Ga. 164, 48 Am. Dec. 248; *Merchants Union Barb Wire Co. v. Brown*, 64 Iowa, 275; *Washburn v. Oshkosh*, 60 Wis. 457; *Smith v. Sherry*, 50 Wis. 218; 1 Beach, Pub. Corp. § 397, p. 391; 1 Dill. Mun. Corp. 4th ed. §§ 54, 65, pp. 93, 107.

The question of the boundaries of an incorporated village belongs to policy rather than law, and is political and not judicial.

People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; 1 Beach, Pub. Corp. § 404, p. 397; *Daly v. Morgan*, 1 L. R. A. 757, 69 Md. 460.

Where the legislature exercises the power by direct legislation, it may annex to a municipal corporation any lands which it deems proper to be included within the limits of municipality; but where the power is delegated it is usually restricted to contiguous and adjoining lands.

15 Am. & Eng. Encyclop. Law, p. 1011; *True v. Davis*, 6 L. R. A. 266, 133 Ill. 522.

Messrs. Wells, Taylor & Taylor, for appellees:

The legislature cannot arbitrarily convert rural lands into town lands and burden the proprietor with taxation for municipal purposes, without any corresponding benefit.

Langworthy v. Dubuque, 13 Iowa, 86; *Needs v. Sandborn*, 26 Iowa, 419; *Deiman v. Fort Madison*, 30 Iowa, 548; *Winser v. Burlington*, 68 Iowa, 279; *Cheaney v. Hooser*, 9 B. Mon. 330; *Covington v. Southgate*, 15 B. Mon. 498; *Swift v. Newport*, 7 Bush, 37; *Courtney v. Louisville*, 12 Bush, 420.

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the proper case is countenanced in *Brown v. Denver*, 8 Colo. 171.

The legislature could not, upon any supposition of benefits received from the proximity of the municipality, have authorized the city of Denver to impose taxes upon the inhabitants of the annexed territory without annexation.

Cooley, Const. Lim. 6th ed. 615; *Wells v. Weston*, 22 Mo. 384; *Re Flatbush*, 65 N. Y. 398.

The attempted annexation is void, because the annexed territory was, and still is, separated from the then existing limits of the city of Denver by intervening municipal corporations.

Smith v. Sherry, 50 Wis. 210; *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

Elliott, J., delivered the opinion of the court:

The city of Denver was organized and existing under and by virtue of a special charter long before and at the time of the adoption of our state constitution. The constitution did not abrogate such charters, nor does it exempt them from legislative amendments. Const. art. 14, § 14; also, Id. art. 15, § 2; *Brown v. Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116. On April 3, 1893, the general assembly of Colorado passed "An act to revise and amend the charter of the city of Denver." See Sess. Laws 1893, p. 181. Prior to the passage of that act, the territorial limits of the city were wholly within the county of Arapahoe. Jefferson county bounds Arapahoe on the west, but between Jefferson and the western limits of the city of Denver there were at the time of the passage of the act above mentioned several municipal corporations, viz., the town of North Denver, the town of Highlands, the town of Colfax, and the town of Barnum. The territorial boundaries of these municipalities for the most part extended to the Jefferson county line, and so separated the city of Denver from that county. In fact, at the time of the passage of the act to revise and amend the Denver charter, no part of the territorial limits of the city of Denver was contiguous to any part of Jefferson county. Nevertheless, by the terms of said act, it was attempted to enlarge or extend the limits of the city of Denver by adding thereto a strip of land, $5\frac{1}{4}$ miles long by $1\frac{1}{4}$ miles wide, lying along the eastern border and wholly within the county of Jefferson.

If the act adding the Jefferson county strip to the city of Denver be upheld as valid, there might, perhaps, be no escape from the taxation complained of in the present action. The decisions exempting certain property within the territorial limits of a town or city from municipal taxation, on the ground that the property is so situated that it cannot receive its due proportion of municipal benefits, are strongly combated, on the ground that the doctrine they assert is illogical as well as impracticable, in that it amounts to a substitution of judicial opinion for legislative judgment in matters peculiarly within the province of the law-making power. Sec.

upon this subject, Cooley, Const. Lim. 6th ed. p. 616, note 3, and cases there cited; also, 3 Dill. Mun. Corp. 4th ed. §§ 794, 795, and notes. But it is unnecessary to decide this point.

In determining the present controversy, we shall endeavor to reach a proper solution of the following question: Has the legislature the power to extend or enlarge the territorial limits of a specially chartered town or city by adding thereto noncontiguous lands,—that is, lands entirely separated from such town or city by intervening territory? It is customary to speak of the power of the legislature over municipal corporations as "plenary." But this, like most attempts at epigrammatic statements of the law, must be taken *cum grano salis*. Certain it is that constitutional limitations must always be observed in respect to such legislation. Besides, insurmountable obstacles may arise out of the nature and subject-matter of the legislation to render the same ineffectual. In general, the boundaries of a specially chartered town or city may, by act of the legislature, be extended and enlarged so as to include additional lands, the property thus added becoming subject to municipal taxation, and entitled to municipal benefits. It is urged that power thus vested in the legislature is subject to abuse or improvident use. This may be true, and yet it does not necessarily follow that the courts can restrain the enforcement of a legislative act merely because the legislature acted improvidently in passing it. Before the courts will restrain the enforcement of a legislative act, it must appear beyond reasonable doubt that the legislature in passing the act exceeded its power, or attempted to exercise a power it did not possess. *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 612. The improvident use of power by the legislative department of the government does not justify usurpation by the judicial department. The remedy for the improvident use of official power is by appeal to the people, whose will, when legally expressed under the constitution, is sovereign over all departments. It is true that all remedies for maladministration in civil government may fail, because all governmental agencies must be intrusted to minds subject to human infirmities. In such case we can only suffer and wait while we strive for improvement. *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Turner v. Althaus*, 6 Neb. 54.

Is there, then, in the present case, no check that can curb the vaulting ambition of a great city in its efforts to enlarge its corporate boundaries and increase its corporate revenues? Has the legislature such transcendent power in respect to territorial additions to specially chartered towns and cities that the courts can give no relief? Is there nothing left but an appeal to the people as the dernier resort? The answer to these questions must depend upon the nature and scope, as well as the subject-matter, of the legislative act in question. As we have seen, the general rule is that the legislature has the power to extend the boundaries, and thus enlarge the territorial limits, of a town or

city existing under special charter. But may the legislative arm be extended as a great pothook into any and all the counties of the state, there to encircle, as in this case, many square miles of the territory of such outside counties, and make the same part and parcel of the city of Denver? May the legislature do this, without annexing any intervening territory, and without providing even a street or an alley to connect such outlying municipal additions to the city proper? It may be said that this is an extreme illustration; but, as was once said by *Chief Justice Shaw*, "it is necessary to put extreme cases to test a principle."

What is a city? With much research into the historical derivation of the word, Webster, pre eminently the lexicographer of the law as well as of the common people, defines a "city" in substance as follows: (1) A large town; (2) a corporate town; in the United States, a town or collective body of inhabitants, incorporated and governed by a mayor and aldermen; (3) the collective body of citizens or inhabitants of a city. Since a city is a large town we look for the meaning of the word "town." Again, we find from Webster that the primitive idea of a town was an inclosure. The popular use and meaning of the word is a large, closely populated place, whether incorporated or not, as distinguished from the country or from rural communities. These definitions are sustained and amplified by the Century Dictionary. The legal as well as the popular idea of a town or city in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants,—that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places; hence, locality, not localities; vicinity; vicinage; near, adjacent, not remote. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.

Legislative acts in the matter of extending the boundaries of municipal corporations are to be interpreted and applied according to the essential nature as well as the subject-matter of such legislation. In the nature of things, there must be some limit to legislative power. For example, the legislature cannot extend the municipal boundaries of a city into another state. Legislative acts upon such a subject would have no extraterritorial force. There are some things that in their very nature cannot be accomplished by any human power: A thing cannot be made to exist as a whole and in broken disjointed fragments at one and the same time. A thing essentially single in its nature cannot have a plural existence. Every municipality must have its territorial corpus, in which to exercise its corporate functions and powers. Such corpus may be enlarged or diminished by the action of the legislature. So the human body may grow or diminish by the action or nonaction of its vital forces; but neither the human body nor the municipal corpus loses its identity, its individuality,

or its unity by such growth or enlargement. It is a misnomer—a solecism—to speak of a growth of the human body not connected with the body itself. Such a growth is, in fact, not of the body. So, territory not in fact connected with or adjacent to a city cannot be regarded as a part of the municipal corpus, or as an addition thereto, in any true sense of the term. Analogous questions have been considered by the Wisconsin supreme court. *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 96 Am. Rep. 840; *Smith v. Sherry*, 50 Wis. 210. In the latter case *Mr. Justice Taylor* said: "We do not by this decision intend to set bounds to the discretion of the legislature in fixing the boundaries of a village, so long as the territory of which it is composed is adjacent or contiguous, nor to intimate that the legislature may not incorporate as one village two or more assemblages of inhabitants living at some distance from each other, with spaces of uninhabited lands intervening, when such intervening spaces are also included in such village, but that a village cannot be incorporated containing two or more tracts of territory not contiguous or adjoining, and separated by some other civil subdivision of the state, and especially that an uninhabited and separate tract of country cannot be annexed to or made a part of an incorporated village. If, by an act of the legislature, a tract of country not inhabited, and not adjoining a village, can be made a part of such village, then it would seem to follow that, by another act of the legislature, the inhabited part of such village might be separated therefrom; and we should have the anomalous thing of a village without inhabitants, and composed simply of a tract of territory, which would be an absurdity."

From careful investigation and consideration, it is evident that it was never contemplated by the law that the territorial limits of a town or city might include distinct, disjointed fragments or parcels of land, situate miles and miles distant from each other, and separated from the city proper by intervening territory. It is not to be understood from this that a city may not be formed from territory lying on different sides of a natural stream. Nor must anything in this opinion be construed as intimating that noncontiguous territory may be added to a city by connecting the same by a narrow street or alley. Annexation sought to be accomplished by such means might bear upon its face such earmarks of fraud as would vitiate an ordinary transaction, though we do not intimate that judicial inquiry may extend to the motives of a co-ordinate department of the government. *Kountze v. Omaha*, 5 Dill. 443, Fed. Cas. No. 7,928; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 733; *People v. Martin*, 19 Colo. 565, 24 L. R. A. 201; *Hudson v. Denver*, 12 Colo. 157. In *Galesburg v. Hawkins*, 75 Ill. 158, it is said that the boundaries of municipal corporations can be altered and changed by the legislature in its discretion, and that the authorities are all that way. The opinion, however, significantly adds: "Courts may determine what are the corporate limits already established; they

may determine whether what is claimed by the municipal authority to be the corporate limits is so or not; and they may inquire whether the legislative authority has exceeded the powers with which it is invested. But all this implies an existing law, applicable to the particular subject, and the inquiry is, What is the law, and has it been violated or complied with?"

Counsel for appellant relies upon the following from an eminent text-writer: "Not only may the legislature originally fix the limits of the corporation, but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of the contiguous or other territory; and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory." 1 Dill. Mun. Corp. 4th ed. § 185. The words "or other," in the foregoing extract, are not italicised in the published volume. The leading case cited in support of the text is *Blanchard v. Bissell*, 11 Ohio St. 96. That case was one wherein it was sought to annex an unincorporated village to the city of Toledo. It was objected that the territory sought to be annexed was not in fact contiguous to the city of Toledo. The opinion shows "that the center of the Maumee river formed the southeastern boundary of the city of Toledo; that the annexed territory [consisting of an unincorporated village called "Yondota"] is situated on the southeastern side of the river, in a bend running up near to the heart of the city, and that all of it is nearer to the center of the business and valuable property than many other portions of the original city territory; that the river is navigable, and, where it formed said original boundary, is of unequal width; but, for half a mile or more, does not exceed one fourth of a mile in width, and has been permanently bridged for railroad purposes, and may be bridged for other purposes; that Yondota depended mainly upon the influence of business and improvements in Toledo for its growth and importance. The transcript of the annexation proceedings, and the accompanying map, show that the annexation consists in an extension of the original boundaries, so as to include the whole of the river and a considerable tract of land on its southeast side. There is no territory intervening between that which was annexed and the original city limits. All the parts of the annexed territory are in immediate contact with each other; and the whole is in direct contact of several miles with original boundary. Contiguity cannot import more than immediate contact; and we think the objection founded on a want of contiguity is not well taken." It is clear that the Toledo case in no way militates against the views we have expressed, but rather confirms them; none of the other cases cited by counsel sustain the view that noncontiguous territory may be added to and made part of a town or city; hence we conclude that the text of *Judge Dillon* above quoted cannot be accepted as correct to its full extent and import. The dearth of authority upon this point leads to the belief

that legislatures have seldom, or never before, attempted to annex to an incorporated town or city territory so clearly non-contiguous as in the present instance.

It was argued orally that, while the legislature may not have the power to annex distant non-contiguous territory by a direct act for that purpose, yet in this case the Jefferson county strip must be regarded as a part of the city of Denver, for the reason that it is included in the boundary surveys as specified in the revised and amended charter, and that, unless so included, the city has no boundary lines, particularly on the west. This argument is without force. Equity looks to the substance rather than the form; it regards the result of an act rather than the mode of accomplishing it. There may be a wrong way of doing a right thing, but there is no right way of doing a wrong thing. An act essentially wrong does not become right by the manner of doing it. If the mode of making municipal additions as argued by counsel were to be upheld, any non-contiguous territory, however remote, might be surveyed in, and thus become attached to and made a part of, the city. The conclusion at which we have arrived need not disturb the boundary lines of the city as established by the amended charter, except on the west. As to these, the city limits must end where the insurmountable obstacles—that is, the territorial limits of the intervening municipalities—begin.

For the reasons stated, we are clearly of the opinion that the legislature did not have the power to extend or enlarge the territorial limits of the city of Denver by adding thereto the non-contiguous strip of lands situate in Jefferson county, and that the district court did not err in restraining the collection of taxes by or for the use of the city of Denver upon such Jefferson county property. This conclusion being decisive of the present controversy, other questions sought to be raised upon this appeal need not be discussed.

The Judgment of the District Court is accordingly affirmed.

A petition for rehearing was subsequently made in response to which on March 4, 1895, the following opinion was handed down:

Per Curiam:

Counsel for appellants have presented an elaborate argument in support of their petition for rehearing. Their contention is that since the constitution allows legislative amendments to special municipal charters, and does not expressly forbid the annexation of non-contiguous territory, therefore, under the power of amendment, the legislature may annex to a specially chartered town or city territory located in any part of the state, however disconnected and remote the same may be from the city to which it is sought to be annexed. Counsel earnestly contend that any question concerning the legality of such annexation is a matter for legislative, and not for judicial, determination. This view was thoroughly considered when the former opinion was announced. We were aware of the decisions by this court sustaining the power of the legislature to amend

special municipal charters. Without discrediting such decisions as have been made upon this subject, we have felt constrained to say that it was never contemplated to give the legislature the power, under the guise of amendments, to make such radical and unheard-of changes in specially chartered towns or cities as the annexation of territory entirely disconnected and remote from the original municipality. Such annexation would be foreign to the subject-matter of the original municipality, and hence not a proper subject of amendment; and the provisions therefor would not be germane to the one general subject of the act, or clearly expressed in the title, as required by section 21 of article 5 of our Constitution. There can be no doubt that the term "town" or "city" as used in the constitution in its ordinary signification, as denoting a single parcel of compact or contiguous territory, and not as including several distinct parcels of land situate at remote distances from each other. The idea of a town or city is that of unity, not plurality. Hence we have felt constrained to say that a thing essentially single cannot, by legislative act, be given a plural existence, especially where the legislative power over such subject is the power to amend rather than the power to change its essential character. There are several specially chartered municipal corporations in this state whose charters are subject to legislative amendment; but may the legislature, under the guise of amending these charters, add a section of land in Weld county to Central City, another section in El Paso to Georgetown, another section in Las Animas to Black Hawk, another section in Gunnison Valley to Denver, thus dotting the state over with municipal cases, at the discretion of the legislative department? We are of opinion that it is within the province of the judiciary to give the power of amendment in such cases a reasonable construction; and, if the legislature does not restrict itself to proper limits in exercising such power, the courts must exercise proper control over the subject.

In their argument upon the petition for a rehearing, counsel for the appellants challenge the court to point out the particular provision of our constitution which inhibits the legislation complained of. From what we have just said it follows that the provision for annexation of non-contiguous territory, not being germane to the subject-matter of the original municipality, is obnoxious to section 21 of article 5. In addition to this, if the effect of this act in its practical operation be practically, though indirectly, to destroy and annul the corporate existence of these intervening municipalities, then under the decision of this court in *Re Extension of Boundaries of Denver*, 18 Colo. 288, it can be said that this provision violates the spirit of section 13 of article 14 of our Constitution, which enjoins upon the legislature the duty to "provide by general laws for the organization and classification of cities and towns." See, on this point, *Smith v. Sherry*, 50 Wia. 210. One of the purposes of this act to revise and amend the charter of the city of Denver was to extend the boundaries of the city, and

this extension must have been designed either to provide the necessary territory for the growth and development of an enterprising city, for legitimate purposes of revenue, or some other proper municipal purpose; or else it must have been to accomplish by indirection what could not be done directly, viz., to annul these intervening corporations, or to cripple them, and deprive them of some of the privileges and powers which they possess under the general laws, and so force them, unwillingly, into the city of Denver. The section of said act which we held in the above-cited case to be in conflict with said section 13 of article 14 expressly provided for the disincorporation of these municipalities, and proposed to include them within the limits of the city of Denver as thus extended. In said case we held that, by a special act of the legislature, such as this confessedly is, the boundaries of the city of Denver could not be so enlarged as to include therein other municipalities incorporated under the general laws of the state; the reason given, *inter alia*, being that this would by special law disincorporate such existing corporations organized under the general incorporation laws, and that section 13 must be held to extend to the disincorporation, as well as to the incorporation, of such cities and towns. If it be said that the objection pointed out in *Re Extension of Boundaries of Denver*, *supra*, to the legislation embodied in the question submitted by the house of representatives, does not apply to the section now under consideration, our reply is that, although the two provisions are not literally the same, yet the evident object aimed at by both is the same, and the practical effect and operation of both will be the same. It is true that the section under consideration does

not include within the limits of the city of Denver these existing municipalities; but the proposed boundaries of the city of Denver go beyond these municipalities, and the city of Denver, as thus constituted, is made to surround these towns and cities on all sides, and they are thus cut off from any further growth or territorial expansion. The operation of the act, as well as its form and its words, must be looked to to determine the constitutionality of a measure.

If the legislature, by a special law, may thus extend the boundaries of a city so as to include therein non-contiguous territory, with a number of existing municipalities incorporated under the general laws of the state lying between such non-contiguous territory and the previously established limits of the city whose boundaries are thus sought to be extended, such legislation would just as effectually stop the growth and development and curtail the powers of these intervening corporations, which were granted to them under the general incorporation laws, and practically and just as effectually disincorporate them as to some of the powers and privileges granted to them by general law, as though the special legislative act, in so many words, swept them out of existence. Thus would the special law, in effect, repeal and render nugatory the general incorporation laws of the state. Thus would towns and cities incorporated under the general laws be forced by a special law involuntarily to surrender the powers and privileges acquired under such general laws. To accomplish such results by indirection, when the same could not be done directly, would nullify the limitations imposed by the constitutional provision referred to.

The petition for rehearing should be denied.

NEW YORK COURT OF APPEALS.

AMERICAN SUGAR REFINING CO.,
App't.,
v.

Charles H. FANCHER, Assignee, etc., of
Charles Burkhalter *et al.*, Resp't.

(146 N. Y. 552.)

1. **There is no adequate remedy at law for a defrauded vendor** of goods, who did not learn of the fraud until the purchaser had sold a large part of them to bona fide purchasers, and then had made an assignment for creditors which will defeat the jurisdiction of equity to aid him to reach the proceeds in the hands of the assignee.

2. **Claims for the purchase price of goods sold to bona fide purchasers by an insolvent**, who had procured them under fraudulent representations of solvency, can be recovered in lieu of the goods themselves from his voluntary assignee for creditors by the de-

frauded vendor on his timely election to rescind the original sale for fraud.

(April 9, 1895.)

APP^{EAL} by plaintiff from an order of the General Term of the Supreme Court, First Department, granting a new trial after a finding by a referee in his favor in an action brought to reach certain credits belonging to defendant insolvent assignors and representing property which had been fraudulently obtained by such assignors from plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles E. Hughes, Arthur C. Rounds, and Frederic R. Kellogg, for appellant.

The plaintiff, as a defrauded vendor, is entitled to recover from the vendee or his voluntary transferee the proceeds of the resale of the property fraudulently purchased.

Partridge v. Rubin, 15 Daly, 344; *Jackson v. Cadwell*, 1 Cow. 622; 2 Am. & Eng. Encyclop. Law, p. 444; *National Trust Co. v. Gleason*, 77 N. Y. 408, 33 Am. Rep. 632; *Talbot v. Bank of Rochester*, 1 Hill, 295; *Comstock v. Hier*, 78 N. Y. 269, 29 Am. Rep. 142;

NOTE.—The above case is of more than ordinary importance as one that decides a doubtful and unsettled question of commercial law. It is substantially a case of first impression.

37 L. R. A.

Keener, Quasi Cont. pp. 159, 170 *et seq.*; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Peter Adams Co. v. National Shoe & Leather Bank*, 28 Abb. N. C. 172; *Rothschild v. Mack*, 115 N. Y. 1; *Catts v. Phalen*, 48 U. S. 2 How. 876, 11 L. ed. 306; *People v. Wood*, 121 N. Y. 522; *Abbotts v. Barry*, 2 Brod. & B. 869; *Browning v. Bancroft*, 8 Met. 278.

The basis of the recovery in equity is a constructive trust, *i. e.* a trust *ex maleficio*.

Roberts v. Ely, 118 N. Y. 181; *Varet v. New York Ins. Co.* 7 Paige, 567, 4 L. ed. 277.

Where reality is involved equity will set aside the fraudulent conveyance, and if the grantee has resold will compel him to account for the proceeds.

Trevelyan v. White, 1 Beav. 589; *Cheney v. Gleason*, 117 Mass. 557; *Hammond v. Pennock*, 61 N. Y. 145.

In case of property misapplied by one holding a fiduciary relation to the injured party, equity will compel an accounting of the proceeds.

Re Hallett, L. R. 18 Ch. Div. 696; *Holmes v. Gilman*, 20 L. R. A. 566, 138 N. Y. 869; *Baker v. New York Nat. Bank*, 100 N. Y. 81, 58 Am. Rep. 150.

Where no fiduciary relation exists, yet if the wrongdoer "had no title *ab initio*," securities for which the goods have been exchanged may be reached in the hands of the thief or his assignees (voluntary or *mala fide*), equity constituting him and them trustees *ex maleficio*.

Newton v. Porter, 69 N. Y. 183, 25 Am. Rep. 152.

In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest equity impresses a constructive trust on the property thus acquired.

2 Pom. Eq. Jur. § 1058; Story, Eq. Jur. § 1265; Bispham, Eq. § 91; Perry, Tr. § 166; *Small v. Attwood*, Younge, 507; *Importers & Traders Nat. Bank v. Peters*, 123 N. Y. 272; *La Comité des Assureurs Maritimes v. Standard Bank of South Africa*, 1 Cab. & El. 87.

The goods were obtained from the plaintiff by larceny, and upon this ground the plaintiff is entitled to recover their proceeds from the voluntary assignee of the persons guilty of the theft.

Penal Code, §§ 528, 544.

A false statement of fact by a purchaser of goods as to his financial responsibility, upon the faith of which the sale was made, was within the statute.

People v. Haynes, 11 Wend. 557; *Robinson v. Dauchy*, 3 Barb. 20.

In *People v. Lyon*, 99 N. Y. 210, it was there held that the crime of obtaining goods by false pretenses was a felony.

People v. Dumar, 106 N. Y. 502.

Under the English statutes from the time of Elizabeth there has been no hesitation in awarding restitution of the proceeds of stolen property, or of property obtained by false pretenses, where this has been the more convenient course.

27 L. R. A.

Queen v. Justices of Central Crim. Court, L. R. 17 Q. B. Div. 598; L. R. 18 Q. B. Div. 814.

The original owner may by an equitable action secure the proceeds of the resale either from the thief or from his voluntary or *mala fide* assignees.

Newton v. Porter, 69 N. Y. 183, 25 Am. Rep. 152.

The court will not award to the voluntary assignee of a thief the proceeds of stolen property.

Riggs v. Palmer, 5 L. R. A. 340, 115 N. Y. 506.

Messrs. James B. Dill and Frederick Seymour, for Messrs. Stern & Rushmore, for appellee:

The whole object of the plaintiff is to secure a preference over other creditors of an insolvent estate from whom at the time of the assignment it differed in position only in that its contract was tainted with fraud.

The plaintiff is entitled to no preference over all the other creditors of the insolvent estate on the ground that his contract was tainted with fraud.

South Branch Lumber Co. v. Ott, 142 U. S. 622, 85 L. ed. 1186; *Hyman v. Kapp*, 9 N. Y. S. R. 69; *Tim v. Smith*, 18 Abb. N. C. 81; *Frilinghuyzen v. Nugent*, 86 Fed. Rep. 229.

The plaintiff cannot maintain this action because it failed to rescind the contract before the vendees sold the goods and before the assignment was made.

Re Gavin's Petition v. Gleason, 105 N. Y. 262; *Holmes v. Gilman*, 20 L. R. A. 566, 138 N. Y. 876; 1 Bigelow, Fr. 433; *Banque Franco-Egyptienne v. Brown*, 84 Fed. Rep. 163; *Bosley v. National Mach. Co.* 123 N. Y. 550.

The fraud of the Burkholders did not make the assignee a trustee *ex maleficio*.

Bosley v. National Mach. Co. supra.

The doctrine of compensation in equity had its foundation and arose out of real estate transactions.

Newham v. May, 18 Price, 749; *Hammond v. Pennock*, 61 N. Y. 145; 1 Bigelow, Fr. 433.

The courts have gone so far as to express their hesitancy and reluctance to introduce the intricacies of trusts into mercantile transactions.

New Zealand & A. Land Co. v. Watson, L. R. 7 Q. B. Div. 374; *Banque Franco-Egyptienne v. Brown*, 84 Fed. Rep. 163; *Busard v. Houston*, 119 U. S. 847, 30 L. ed. 451; *Suler v. Matthews*, 115 Mass. 253.

The doctrine of trusts *in itinere* has been extended by the courts of this state to personality and the proceeds followed in two cases only:

(1) Where the person having the possession of the property of another towards whom he sustains a fiduciary relation wrongfully disposes of it.

Garvey v. Jarvis, 46 N. Y. 810; Brett, Lead. Cas. in Eq. No. 19, p. 45; *Carpenter v. Danforth*, 52 Barb. 581; *Holmes v. Gilman*, 20 L. R. A. 566, 138 N. Y. 869; *New Zealand & A. Land Co. v. Watson, supra*; *Bank of Clarke County v. Gilman*, 81 Hun, 486; *Baker v. New York Nat. Bank*, 100 N. Y. 83, 58 Am. Rep. 150.

(2) Where there is an absence of title in the wrongdoer.

Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Doyle v. Murphy*, 22 Ill. 502, 74 Am. Dec. 165.

Equity will not turn a completed sale of chattels into a trust *ex maleficio*.

Banque Franco-Egyptienne v. Brown, *supra*.

Andrews, Ch. J., delivered the opinion of the court:

This case presents a question of considerable practical importance. It relates to the equitable jurisdiction of the court under special circumstances to follow proceeds of personal property in the hands of a fraudulent vendee or his general assignee for the benefit of creditors at the suit of a defrauded vendor, who by false pretenses was induced to part with the property upon credit, the proceeds sought to be reached being the sums due from sub-vendees of the fraudulent purchaser arising on resales by him made before the discovery by the plaintiff of the fraud. The facts upon which the question arises are substantially conceded and are free from complication. Between the 20th day of September, 1892, and the 20th day of October following, the plaintiff sold and delivered to the mercantile firm of C. Burkhalter & Co., doing business in the city of New York, sugars of various qualities on credit for the price in the aggregate of \$19,121.41, no part of which has been paid, the last sale having been made October 19, 1892. On the next day, the firm being insolvent and owing debts greatly in excess of its assets, made a general assignment to the defendant for the benefit of its creditors. Among the assigned assets were a portion of the sugars sold by the plaintiff to the firm, which he replevied from the assignee, but the firm, prior to the assignment, had sold to numerous persons, customers of the firm, in the ordinary course of trade, portions of the sugars on credit and claims held by the firm against the sub-vendees arising out of such sales, exceeding in the aggregate the sum of \$10,000, were among the assets which passed by the assignment. These claims were collected by the assignee after the assignment, and (excepting a small sum) after notice had been served by the plaintiff on the assignee that it rescinded the original sale for fraud, which notice was accompanied by a demand for the sugars then in the possession of the assignee, and for an accounting and the delivery to the plaintiff of the outstanding claims against the customers of Burkhalter & Co. in their hands for the sugars sold by the firm as above stated. The assignee declined to accede to the demand made. On the trial the parties by stipulation fixed the amount of the claims for sugars sold which had come to the hands of the assignee, and which had been collected by him. The fraud of Burkhalter & Co. was not controverted. It was shown that the sales were induced by a gross misrepresentation in writing, made by one of the members of the firm to the plaintiff as to the solvency of the firm, made on or about September 20, 1892, within thirty days before the assignment, and when the firm was owing several

hundred thousand dollars more than the value of its whole assets.

The case presented is singularly free from any uncertainty in respect to the facts upon which the equitable jurisdiction to follow the proceeds of the sugars is claimed. They are definite and ascertained, but it is insisted that the court is impotent to give relief by way of subjecting the choses in action of their proceeds, representing the sugars, to a lien in favor of the defrauded vendor, or to adjudge that they shall be applied in partial recompense and restitution for the property so wrongfully obtained, because, as is claimed, such relief is not in any such case within the scope of the powers of courts of equity as heretofore defined and exercised, and for the further reason that new rights have intervened by reason of the assignment. The fraud of Burkhalter & Co. was, as we have said, admitted. They are hopelessly insolvent, and were so at the time they took the plaintiff's goods. They disposed of a large part of the sugars before the plaintiff became cognizant of the fraud. The plaintiff was only apprised of it after the assignment was made. The remedy at law upon the contract against the fraudulent and insolvent purchaser is, under the circumstances, ineffectual. The pursuit of the property, except the small part of it which was unsold and passed to the assignee, is impracticable. If it could yet be found unconsumed and capable of identification, the multiplicity of suits which would be rendered necessary to reclaim it would make the remedy expensive, burdensome, and inadequate. The identification of the proceeds sought to be reached is complete and unquestioned. It is not claimed that the credits or the money into which they have been converted are not the very proceeds of sugars of which the plaintiff was defrauded.

The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice. The case of *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152, is an illustration of the application of this principle in a case of the larceny of negotiable bonds, sold by the thieves, in which the court subjected securities in which they invested the money, and which they had transferred with notice to third persons as security for services to be rendered, to a charge in favor of the owner of the stolen bonds. The cases upon this head are very numerous, where there has been

a misapplication of trust funds by trustees, or persons standing in a fiduciary relation, and the money or property misapplied has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of bona fide purchasers stop the pursuit, and holds it in its grasp to indemnify the innocent victim of the fraud. And even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. *Pennell v. Daffell*, 4 DeG. M. & G. 873; *Re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566.

In the cases of stolen property or of misapplication by a trustee or agent of the funds of the principal or *cestui que trust*, the title of the real owner of the property has been in most cases lost, without his consent, and the court by a species of equitable substitution repairs, as far as practicable, the wrong and prevents the wrongdoer from profiting by his fraud.

And, indeed, courts of law, borrowing the equitable principle, in cases of misappropriation by agents, vest in the principal at his election the legal title to a chattel or security in the hands of the agent, purchased exclusively by the application of the embezzled or misappropriated fund. *Taylor v. Plumer*, 8 Maule & S. 563. It is at this point that the controversy in the present case commences and the divergence arises which has led to this litigation. It is claimed, on behalf of the defendant, that courts of equity in commercial cases, where the claim of the plaintiff originates in a fraud in the sale of personal property, do not undertake to follow proceeds in the hands of the wrongdoer, but that the defrauded party having consented to part with his title, is remitted exclusively to such legal remedies as are given for the redress of the wrong. The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been and ought not to be extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency. It cannot be denied that the protection of *cestui que trusts* against frauds of the trustee is an object of peculiar solicitude in the courts of equity. They, in many cases, are incapable, by reason of age, inexperience, or other incapacity, from looking out for themselves, and the court stands in the attitude of guardian of their interests. But, as has been said, a court of equity does not restrict its remedial processes to the aid

of the helpless or the ignorant. It embraces within its view the general claims included within what are called quasi trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whoever may suffer from the violation. It goes altogether outside of trust relations in many cases to prevent fraud, or to compel a restoration of property obtained by fraud. The exercise of the jurisdiction to set aside fraudulent transfers of real or personal property made in fraud of creditors is familiar. And the jurisdiction is most beneficially invoked in cases of private fraud to rescind transfers of real estate procured by fraudulent representations, and to restore to the defrauded vendor the title of which he has been defrauded. It often happens in cases of transfers of real estate procured by fraud that, before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part, or has created liens thereon in favor of the bona fide purchasers for value. In such cases the court will mould the relief to suit the circumstances, and will, at the election of the plaintiff, rescind the contract and compel a reconveyance of the part of the land still remaining in the hands of the vendor, and compel the wrongdoer to account for the proceeds of the land sold, or award compensation in damages. The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff. This was the exact nature of the relief granted in the case of *Trevelyan v. White*, 1 Beav. 589, as appears by the recital of the decree in the opinion of the master of the rolls, where part of the estate had been sold by the fraudulent vendee. In *Cheney v. Gleason*, 117 Mass. 557, a bill was filed by the defrauded vendor of real estate to reach a mortgage taken by the vendee on the land on a resale by him, and the court sustained the bill and granted the relief. In *Hammond v. Pennock*, 61 N. Y. 145, the court rescinded, at the instance of the plaintiff, a contract for the exchange of real and personal property, owned by the plaintiff, for a farm of the defendant in Michigan, which had been consummated on the plaintiff's part by a conveyance and transfer, the contract and conveyance having been obtained by the defendant by fraudulent representations, and the defendant having, after the conveyance to him, contracted to sell part of the land conveyed to him by the plaintiff, the court adapted the relief to the circumstances and rescinded the conveyance so far as practicable, and adjudged that the defendant account for the proceeds of the personal property included in the sale.

If the jurisdiction exercised by courts of equity in respect to undoing fraudulent conveyances of real estate and following the proceeds in the hands of the fraudulent grantee, appertains in like manner and degree to sales of personality, it would seem that the plaintiff in the present case was entitled to relief. The fact that before the action was brought, Burkhalter & Co. had made a general assignment for the benefit of

creditors to the defendant is no obstacle to the relief, if, except for the assignment, the court would have interposed, on the prayer of the plaintiff, its preventive and other remedies, to have enabled the plaintiff to reach the unpaid claims against the sub-vendees. An assignee for creditors is not a purchaser for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales by Burkhalter & Co. *Goodwin v. Wertheimer*, 99 N. Y. 149; *Barnard v. Campbell*, 58 N. Y. 76, 17 Am. Rep. 208; *Ratcliffe v. Sangston*, 18 Md. 388; *Bussing v. Rice*, 2 Cush. 48. It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and Burkhalter & Co.

They, so far as appears, advanced nothing and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. If the sugars had existed *in specie* in the hands of the assignee it cannot be doubted that the plaintiff on rescinding the sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold. Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this state, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretenses is included in the statute definition of a felony, but which was not such at common law. *Barnard v. Campbell*, *supra*; *Wise v. Grant*, 140 N. Y. 593; *Benjamin, Sales*, 6th ed. § 438; *Fassett v. Smith*, 23 N. Y. 252; *Benedict v. Williams*, 48 Hun, 124.

But a purchase procured by fraud is in no sense, as between the vendor and vendee, rightful. It was wrongful, and while a transfer so induced vests a right of property in the vendee until the sale is rescinded, the means and act by which it was procured was a violation of an elemental principle of justice. But the rule is that a sale of personal property induced by fraud is not void, but is only voidable on the part of the party defrauded. "This does not mean that the contract is void until ratified; it means that the contract is valid until rescinded." When a contract of sale infected by fraud of the vendee is consummated and the property delivered, the vendor on discovering the fraud may pursue one of several courses. He may affirm the contract, and an omission to disaffirm within a reasonable time after notice of the fraud will be deemed a ratification. He may elect to rescind it, and thereby his title to the property is reinstated as against the purchaser and all persons deriving title from him, not being bona fide purchasers for

value, and a purchaser is not such who takes the property for an antecedent debt or who purchased the property on credit and has not paid the purchase money or been placed in a position where payment to a transferee of the claim cannot be resisted. *Barnard v. Campbell*, *supra*; *Dous v. Kidder*, 84 N. Y. 121; *Matson v. Melchor*, 42 Mich. 477; 1 Benjamin, Sales, p. 570, *note*.

Upon rescission, the vendor may follow and retake the property wherever he can find it, except in the case mentioned, or he may sue for conversion. When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, where there is no adequate legal remedy, either on the contract of sale or for the recovery of the property *in specie*, or by an action of tort, is the power of a court of equity so fettered that, where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits, are identified beyond question in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) that nothing will be adjudged as proceeds except what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found.

The case of *Small v. Attwood*, Youngs, 507, is a very instructive case, which involved a large amount, was argued by eminent counsel and received great consideration. It supports, we think, the equitable jurisdiction invoked in the present case. It was an action by the purchaser to rescind a contract for the sale of mines and mining property induced by fraudulent representations, and to recover the purchase money paid to the amount of about £200,000. The court found the fraud and rescinded the contract, and made a decree for an accounting. On a supplemental bill being filed, showing that the purchase money paid had been invested by the seller in public securities in his name, which he afterwards caused to be put in the name of his mother, and that the purchaser had no other means adequate to repay the purchase money, the chancellor, on an application for an injunction restraining the transfer of the securities, held that the money paid could be followed into the stock purchased, and granted the injunction. The case *Re Carin's Petition v. Gleason*, 105 N. Y. 256, was an attempt to fasten upon the estate of an insolvent a preferential lien for

money put into his hands by the plaintiff for the purchase of a mortgage for her, and which he applied, without authority, to the payment of his debts before the assignment, with the exception of a small sum (\$80.00) which went into the hands of the assignee. The court held that the money, which the insolvent had used to pay debts prior to the assignment, was not a preferred debt, but sustained her right to be paid the small sum which the assignee received belonging to the trust. This case points the distinction. The character of the debt gave

it no priority. The fund had been dissipated and could not be traced among the assigned assets. There was no equitable ground of preference except for the small sum mentioned.

Upon the whole case, we are of the opinion that the judgment on the report of the referees was correct, and the order granting a new trial should, therefore, be reversed and the judgment on the report of the referees affirmed, with costs.

All concur.

MISSISSIPPI SUPREME COURT.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO., *Appl.*,

Josephus SMITH,

(.....Mis.....)

1. The common law of England though adopted and accepted as the law of the state and though unchanged by statute is not under all circumstances and conditions to be applied as the local common law.
2. The right to erect great railroad embankments may be necessarily implied in the duty to provide suitable and safe roadways so that when done with due regard to the rights of owners of adjacent and proximate lands any necessary and consequent injury to such lands must be borne by the owners.
3. Flood waters of a large stream which in time of ordinary floods include within their course farms innumerable and railroads, villages, towns, and cities, cannot be regarded as within the strict rules of law on the subject of obstructing streams.
4. The mere fact that water on land overflowed in an extraordinary flood was somewhat deeper, remained longer, and flowed with stronger current than it would have done except for a railroad embankment does not show any injury by reason of the embankment where the crops must have been covered with water long before any water was diverted thereto by the embankment.

(March 11, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiff in an action brought to recover damages for the alleged obstruction of a watercourse to the injury of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Mr. Wallace Pratt, with *Messrs. Sykes & Bristow* and *J. W. Buchanan*, for appellant:

In the absence of proof showing an improper construction of the railroad, the presumption is that the railroad company properly con-

structed its embankments for the operation of its line of railroad.

Morrissey v. Chicago, B. & Q. R. Co. 88 Neb. 406; *Hannaher v. St. Paul, M. & M. R. Co.* 5 Dak. 1; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112; *Emery v. Raleigh & G. R. Co.* 102 N. C. 209; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448.

Is a land owner liable for constructing on his own land an embankment which interferes with the flow of surface water, thereby causing injury to the lands of adjoining proprietors?

Under the rule of the civil law this question must be answered in the affirmative.

24 Am. & Eng. Encyclop. Law, pp. 907-916.

But under the common law there is no such liability.

Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; 24 Am. & Eng. Encyclop. Law, p. 917; *Lawrence v. Great Northern R. Co.* 16 Q. B. 643; *Jean v. Pennsylvania Co.* 9 Ind. App. 56; *Cairo & V. R. Co. v. Steens*, 78 Ind. 278, 38 Am. Rep. 189.

The overflow caused by a river spreading beyond its banks in time of high water must be regarded and may be treated as surface water.

Jean v. Pennsylvania Co. supra.

The right of an owner of land to occupy and improve it as he may see fit, either by erecting structures or by changing the surface, is not restricted by the fact that such use of his own land will cause surface water to flow over adjoining lands in greater quantities or in other directions than they were accustomed to flow.

Rathke v. Gardner, 184 Mass. 14; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271; *Lamb v. Reclamation Dist. No. 108*, 78 Cal. 125; *Gray v. McWilliams*, 21 L. R. A. 593, 98 Cal. 157; 1 Dill. Mun. Corp. 4th ed. § 721; 2 Dill. Mun. Corp. 4th ed. § 1088, and *note*; *Morrissey v. Chicago, B. & Q. R. Co.* 88 Neb. 406.

It is a necessary accompaniment to the rule of the civil law that the lower owner may demand that the water be not interfered with above him. If this right does not exist, then neither does the other right of the civil law which allows the upper owner to drain water from his land onto those of his lower neighbor. In England the lower owner has no such right.

Rawstron v. Taylor, 11 Exch. 369; *Alcorn v. Sadler*, 66 Miss. 221; *Morrissey v. Chicago, B. & Q. R. Co. supra.*

Messrs. J. A. Blair and Brame & Alexander for appellees.

NOTE—As to the adoption of the common law in this country, see *note* to *McKennon v. Wlan* (Okla.) 23 L. R. A. 501.

As to the overflow of a river caused by an embankment, see *Cairo, V. & C. R. Co. v. Brevoort* (C. C. D. Ind.) 35 L. R. A. 527, and *note*. 27 L. R. A.

Cooper, Ch. J., delivered the opinion of the court:

This is an action brought by the appellee to recover against the appellant damages alleged to have resulted to his lands and crops from an overflow caused by obstructing the waters of Town creek by the roadbed of appellant's railway. It appears from the evidence that the valley through which Town creek flows is from two to three miles wide, and that the plaintiff's farm is situated adjacent to and in a bend of the creek, and the land for injury to which and the crops thereon this suit is brought is south of the creek, while the roadbed of the defendant company is on the north side, and about three fourths of a mile distant. The road runs down the valley and on a line parallel with the general course of the stream, and is upon an embankment from three to four feet high. There are, within the distance of two or three miles opposite the appellee's land, three streams, which flow from the north across the railroad and into Town creek.

Where they cross the road, bridges and trestles were put in of sufficient dimensions to permit the free flow of the water coming down these streams, but there was no outlet between these bridges. Town creek is a stream nearly twenty miles long, and empties into the Tombigbee river some three miles east of the plaintiff's farm. Its banks are about 20 feet high, and its channel 125 feet wide. It drains in its course a large section of country, and in times of heavy rains its valley is inundated to a greater or less degree annually, and in some years of excessive rains the whole valley is submerged to a depth of from two to four feet on the more elevated portions. The floods of the year 1874 and those of April and July, 1892, were the heaviest ever known by those familiar with its history. The damages for which the plaintiff sues resulted from the flood of July, 1892, and consisted in the loss of his crops and injury to a portion of his cultivated lands, the soil of which was washed away. The plaintiff's contention is that, but for the railroad embankment, the overflowing waters from Town creek would have passed further to the north, and then have returned to the channel of the creek below his farm, or would have flowed down the valley, north of the creek, to the Tombigbee river; that by reason of the roadbed, and a want of proper and sufficient opening therein, the flood water was thrown back and a cross current created, by reason of which the quantity of water south of the creek was materially increased, and that the erosion by which his land was injured resulted from the increased current. The evidence for the plaintiff tends to support his contention. For the defendant, evidence was introduced that before the building of the Mobile & Ohio Railroad, Town creek was worked as a public highway, and depended upon by the community as its means of shipping out crops and getting in supplies; that, after the Mobile & Ohio Railroad was constructed, the creek was abandoned as a highway, until in the year 1883 it was cleaned out by the United States, but, not being greatly used, was

again abandoned, and bushes and trees permitted to grow in its channel, and drift to accumulate; that early in the year 1892 a large quantity of timber growing between the creek and the roadbed had been felled by the Nettleton Hardwood Company, the laps and tops of which were left on the ground. And so the defendant contended that, if there had in fact been any increase in the quantity of the flood waters upon the valley, it was caused by the obstructions in the channel of the stream, and, if the current was changed, this could as reasonably be attributed to the act of the Nettleton Company in cutting timber and leaving the tops thereof in the valley as to the roadway of the defendant. For the plaintiff it is argued that the defendant's roadway obstructs the waters of a stream which the plaintiff was entitled to have flow according to its usual course; that, though the water, by reason of its volume, had overflowed the banks of Town creek, it was yet a part of that stream, and ought to have been permitted by the defendant to pursue its flow according to nature, unimpeded by any artificial obstruction. For the defendant it is contended that the water, having left the channel of the stream and spread over the adjacent valley, was surface water, and as such the defendant might lawfully repel it from its roadway, and for any injury resulting therefrom no right of action exists.

In England it seems to be settled that riparian owners are entitled to have streams to flow in their usual course, whether in times of low or flood water, and that flood water overflowing the banks and following the course of the stream along the valley, but without the channel, is a part of the stream, against which one owner may not protect himself to the injury of another. *Rex v. Trafford*, 1 Barn. & Ad. 874; *Atty-Gen. v. Earl of Lonsdale*, L. R. 7 Eq. 387; *Mason v. Shrewsbury & H. R. Co.* L. R. 6 Q. B. 581; *Lawrence v. Great Northern R. Co.* 16 Q. B. 648. In *Atty-Gen. v. Earl of Lonsdale*, *supra*, while the jurisdiction of the court of equity to grant the injunction prayed against an obstruction in the river was upheld only on the ground that the obstruction impeded navigation, it was said, in effect, that the extent of the injury sustained by the plaintiff, which was nominal, did not affect his right as riparian owner to object to the obstruction placed in the stream by, and which was of great value to, the defendant. There is some conflict of authority in this country, but the decided preponderance is with the English cases. *Crawford v. Rambo*, 44 Ohio St. 287; *Barden v. Portage*, 79 Wis. 126; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L. R. A. 394, in which many cases are reviewed; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212; *Currier v. East Tennessee, V. & G. R. Co.* 7 Lea, 398; *Burvell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 527, and note thereto.

But there are some authorities holding that flood water is surface water. *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 283, 38 Am. Rep. 139; *Shelbyville & B. Turnp.*

Co. v. Green, 99 Ind. 205; *Taylor v. Pickas*, 64 Ind. 167, 81 Am. Rep. 114. In *Sinai v. Louisville, N. O. & T. R. Co.*, 71 Miss. 547, we had occasion to consider the right of a railway company to obstruct by its embankment a body of water consisting of overflow and surface water, and decided that under the circumstances of that case the company was liable to an adjoining proprietor for injury caused by throwing back such water on his lands. It may well be doubted whether the radical differences sometimes asserted between the rule of the civil law and that called the common-law rule in reference to surface waters exists to the extent indicated by the general language of the text-books and expressions to be found in many decisions. In *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, Judge Campbell, in an exhaustive and able opinion, affirms that both rules rest upon substantially the same principles, and that from the time of Brocton down the common-law courts have referred to the civil-law writers as having defined the subject of rights of water in substantial agreement with the recognized rules of the common law, and concludes his opinion with the declaration that: "There seems to be no reason for attempting to draw distinctions between the civil and the common law on the subject. The authorities recognize the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice, and in disregard of the relative conditions arising from its position. Each may do with his own what is consistent with the fair interests of the other."

It is a mistake to assume that the common law of England, though adopted and accepted as the law of the state, and though unchanged by statute, is under all circumstances and conditions to be applied as the local common law. In many instances a directly opposite rule is the common law of the state. In *Vicksburg & J. R. Co. v. Patton*, 81 Miss. 156, 66 Am. Dec. 553, the rule of the common law that a man should fence in his cattle was declared to be inapplicable to our condition, and the right of free pasturage was held to exist as a part of our common law, and the duty of fencing them out was devolved upon other landowners desiring to exclude them from cultivated or other lands. See also *Green v. Weller*, 32 Miss. 650; *Crane v. French*, 88 Miss. 503. In *Sinai v. Louisville, N. O. & T. R. Co.*, *supra*, we declared that the supposed rule of the common law, under which it was then claimed that each proprietor had the absolute right of excluding surface water from his premises, regardless of any injury to an adjoining proprietor, could not be invoked (if it in fact existed) by a railroad company asserting a right to submerge hundreds of acres of adjoining land with surface water by its embankment. It is apparent that a rule intended to regulate the correlative rights of adjoining landowners whose property is devoted to agriculture or residence purposes could not be applied to the same extent either in favor of or against a railroad company owning a strip of land

100 feet wide and hundreds of miles long. The duty imposed by law upon these corporations to provide suitable and safe roadways over which ponderous engines and trains are to be driven carries with it from necessity the right to erect great embankments on which the rails are set; and when this is done with due regard to the rights of owners of adjacent and proximate lands, any necessary and consequent injury to such lands must be borne by the owner. But such companies may not, under a claim of being absolute owners of their roadways, so construct them as to unnecessarily impair the value of adjacent property.

In this view of the relative rights and duties of the parties, it is not of controlling importance to hold that the flood water from which the plaintiff claims to have suffered be dealt with as surface water, or as the water of a stream, or as a separate and distinct sort. It cannot be the law, however, in this state, that the flood waters of the large streams which are within or along the borders of this state are to be dealt with as the waters of a stream, not to be obstructed, impeded, or turned aside under any circumstances, except upon condition that the persons so doing shall respond in damages for all injury sustained by another riparian owner, and be liable for nominal damages as for the infringement of the legal rights of adjacent proprietors who in truth suffer no real injury. In *Chapman v. Copeland*, 55 Miss. 476, it was held that the diversion of a watercourse gave to the plaintiff a right of action and the recovery of nominal damages, whether any real injury had or had not resulted. If the waters of the Mississippi river, which at flood sometimes spread in width from twenty to forty miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a stream, and the whole valley is to be given up as the course way of the stream, the most fertile portion of our state may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law, and as an indisputable fact, that which is not true, and which, if put into practical operation, would relegate prosperous and fertile districts to the condition of a wilderness. There are farms innumerable, and railroads, villages, towns, and cities situated in a watercourse if the usual flow of the flood waters of the Mississippi river mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams and the obstructions thereof to such a river and to such conditions is, in the very nature of things, impracticable and impossible. Calling these overwhelming floods surface or channel water for the purpose of dealing with them under rules applicable to entirely different conditions, advances us no step in the solution of the

questions involved. We must deal with things, and not names, and conditions inherently and radically different cannot be assimilated by mere terminology.

The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. At last they depend upon the two legal maxims that one may make such use as he wills of his own, and that he must so use his own as not to impinge the legal rights of others. As to surface water and streams flowing along their channels, general rules have been formulated, which are usually applicable, and under which the relative rights and duties of parties may be adjusted; but to apply these rules to waters of a radically different class is to measure different conditions by a single standard. To say that flood waters are surface waters, and may always be dealt with as such, or that they may be fenced against as may the waters of the sea, regardless of consequences, would be to give to one riparian owner the power and right of benefiting and preserving his own property at the direct expense of another. But, on the other hand, if it be the rule that alluvial lands subject to occasional floodings are to be dealt with as comprising the bed of a stream, the beneficial ownership therein is practically destroyed in the interest and for the benefit of other riparian owners. The difficulty or impossibility of formulating an exact rule by which the rights of parties under varying circumstances may be adjusted is of but little importance in view of the fact that it is not the less difficult to determine such rights by the application of those already existing, and which were formulated for the control of somewhat analogous, but not similar, conditions. It is but the usual difficulty of applying legal principles to varying facts. Along the lines which separate what is clearly the exercise of a legal right from the commission of actionable injury, there are often found circumstances in which it cannot be said with confidence to which class the particular act should be assigned, but this difficulty is not peculiar to the class of cases now under consideration, and suggests rather the propriety of resorting to more flexible, rather than more rigid, rules. But on the clearly shown facts of the case now before us we think no right of recovery is disclosed, (1) because of failure of duty by the defendant in the construction of its roadway is established, and (2) because no causal connection is proved between the act of the defendant and the injury resulting from the flood. The roadway of the defendant company is not shown to be of sufficient height to obstruct the waters of Town creek so as to deflect them upon the land of the plaintiff at times of ordinary or periodically recurring floods. The witnesses speak of the floods of 1874, and of those of April and July, 1892, as having been the highest ever known. It is not claimed by the plaintiff that his lands would not have been submerged by the flood of July (for injury by which he sues) if no railroad had been built in the valley. His contention is that the water was somewhat deeper on his land than it would have been,

that it remained longer, and flowed with stronger current. But it must be borne in mind that all the evidence relates to an exceptional condition of affairs, to a flood equaled but twice and exceeded but once in the memory of the inhabitants; and against such contingency it would, in no event, be negligence not to provide. But we are not disposed to rest our conclusion on this ground alone, for it involves the concession that, as against the overflowing waters of alluvial streams, a riparian owner may do nothing to protect himself against periodically recurring floods, but, so long as they continue as a part of the moving mass of waters of which the stream is the thread, must give way to them as flowing in a watercourse. To so hold would, in our opinion, be to apply to bodies of water of a distinctive class rules which were formulated for entirely different conditions, and which, if followed, will lead away from the principles upon which the rules rest. Some part of the valleys of alluvial streams must be land not within a watercourse. How much, it may be difficult to determine, but surely something may be withdrawn by man from the natural condition of things for his own use. We think it may with safety be said that a valley of a mile or a mile and a half along streams of the class of Town creek goes far beyond any requirement of the law for the course of the stream. How much less than this would be sufficient we need not attempt to declare. That the embankment of the railway has not obstructed the course of the stream is demonstrated by the fact that no injury has resulted to any one during the ordinary floods, which have passed harmlessly away. It is the extraordinary, the exceptional, the unexpected, which has caused the injury for which the plaintiff sues. Upon what theory the jury proceeded in finding that the increased depth of the water caused by the embankment was an injury to the standing green crops of the plaintiff, we cannot perceive. Under all the testimony it is evident that the crops must have been covered with water long before any water deflected by the embankment of the defendant could have reached the land. Of what value a field of corn was in the green ear, and covered by water to a depth of two or three feet, or how the injury thereto was increased by piling up on it a few tons more of water, it is difficult to see. One witness, it is true, seems to say that the plaintiff's crop was worth fifty cents per bushel in the field, and that it was damaged to that extent by the water forced thereon by the defendant's embankment. But this witness evidently meant that this would have been the value of the crop but for the overflow, and it is not to be doubted that the crop would have been as completely destroyed by the flood if the railroad had never been constructed. We need not review the evidence to show the want of causal connection between the act of the defendant and the injury to the plaintiff. We dispose of the cause on the ground above indicated,—i. e. that on the facts proved no liability rests upon the defendant as for the obstruction of a watercourse.

The judgment is reversed.

PENNSYLVANIA SUPREME COURT.

PENNSYLVANIA R. CO., *Appt.*,
v.
MONTGOMERY COUNTY PASSENGER
R. CO.

(.....Pa.....)

1. **Electric railways over country roads connecting widely separated cities and towns cannot be built** without consent of the owners of the fee of such roads, notwithstanding consent of the town authorities has been given, under the General Street Railway Act of 1889 authorizing corporations for the construction of street railways "on any street or highway" on which no track is already laid or authorized, to be laid, but giving no right of eminent domain and providing that every railway must have a continuous route forming a complete circuit with its own track.
2. **An electric railway imposes an additional servitude** on the land over which public roads run outside of municipal boundaries.
3. **The consent of supervisors** to the construction of a street railway over a road must be given when they are together and acting in their official character and should appear upon the township books kept by the town clerk.
4. **A street railway company has no right** to build any part of its line until it has the right to complete it, where it has no power of eminent domain.
5. **An injunction against the construction** of an electric railway over public country roads can be had by the owner until his damages are paid or secured to his satisfaction.

(March 25, 1896.)

APPPEAL by plaintiff from a decree of the Court of Common Pleas for Montgomery County in favor of defendant in an action brought to enjoin it from constructing an electric street railway on a public highway in front of plaintiff's property without making compensation to it. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. William F. Solly, Charles H. Stinson, David W. Sellers, and C. Henry Stinson*, for appellant;

The appellee is a mere trespasser and is not empowered, not having the right of eminent domain, to construct its electric railway over the public road on the appellant's land without its consent.

Sterling's App. 111 Pa. 85, 56 Am. Rep. 246; *Miffin v. Harrisburg, P. M. & L. R. Co.* 16 Pa. 182; *Chambers v. Furry*, 1 Yeates, 167; *Lewis v. Jones*, 1 Pa. 386, 44 Am. Dec. 138; *Chess v. Manown*, 8 Watts, 219; *Phillips v. Dunkirk, W. & P. R. Co.* 78 Pa. 177; *Lance's App.* 55 Pa. 16, 93 Am. Dec. 722; *Jones v.*

NOTE.—For the effect of street railways as additional servitudes, see *note* to *Western Railway of Alabama v. Alabama Grand Trunk R. Co.* (Ala.) 17 L. R. A. 474.

It will be noticed that the present decision distinguishes between city streets and country roads in respect to the effect of street railways as additional burdens and the case is in this respect a new departure.

37 L. R. A.

Erie & W. Valley R. Co. 17 L. R. A. 753, 151 Pa. 80; *Junction R. Co. v. Boyd*, 8 Phila. 224; *Presbyterian Soc. Trustees in Waterloo v. Auburn & R. R. Co.* 8 Hill, 567; *Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Mahon v. New York Cent. R. Co.* 24 N. Y. 658; *Re Bloomfield & R. Nat. Gas-Light Co's Petition v. Culkins*, 62 N. Y. 386; *Springfield v. Connecticut River R. Co.* 4 Cush. 63.

When the Act of 1889 speaks of streets or highways, it refers to the streets or highways of a city, town, or village.

Cochran v. Washington Library Co. 6 Phila. 492.

The subject of building passenger railways on township roads is not at all expressed in the title of an act providing for the "incorporation of street passenger railways." The two things are entirely different.

Expressio unius est exclusio alterius.

Dorsey's App. 72 Pa. 193; *Union Pass. R. Co's App.* 81 Pa. 91; *Beckert v. Allegheny*, 85 Pa. 191; *Re Phanziville Road*, 109 Pa. 44; *Rogers v. Manufacturers Imp. Co.* 109 Pa. 109; *Re Carbondale & P. Turnp. & Plank Road*, 23 W. N. C. 105.

The consent of both local authorities and the land owners must be obtained.

Re King's County Elec. R. Co. 105 N. Y. 97; *Re Rochester Electric R. Co.* 123 N. Y. 361.

Messrs. James B. Holland, N. H. Lazelere, and John G. Johnson, for appellee:

The owner of lands bounding on a public highway has no right to compensation because of the construction thereon of an electric railway. The appellant had no greater right to compensation than it would have possessed had its lands been located on a street of a borough.

McDevitt v. People's Nat. Gas Co. 160 Pa. 367; *Rafferty v. Central Traction Co.* 147 Pa. 590.

The Schuylkill river road, upon which the railway of the appellee was being laid, was a street or highway within the meaning of the Act of 1889.

It is the right of a passenger railway company, organized under the Act of 1889 for the construction of a road extending through more than one municipality, borough, or township to construct such road in parts, as the same, from time to time, shall be authorized to be constructed, by the local authorities immediately concerned.

An abutting land owner has no right, where the construction of the railway is with the consent of the authorities of the locality in which it is being laid, to object to such construction because the consent of the authorities of other localities, through which the same runs, has not been obtained.

Philadelphia & Gray's Ferry Pass. R. Co's App. 102 Pa. 123; *Farmers Market Co. v. Philadelphia & R. Terminal E. Co.* 142 Pa. 593; *National Docks R. Co. v. Central R. Co.* 82 N. J. Eq. 780; *Ottaquees Woolen Co. v. Newton*, 57 Vt. 451; *Western Pennsylvania R. Co's App.* 104 Pa. 406; *Germantown Pass. R. Co. v. Citizens Pass. R. Co.* 151 Pa. 133;

Junction Pass. Railway v. Williamsport Pass. Railway, 154 Pa. 116.

Williams, J., delivered the opinion of the court:

Our system of street passenger railways had its origin in the days of special legislation. Each company then had its own act of incorporation, in which its route was described and its powers defined. These companies were confined to the cities and large towns of the state, and their cars were moved by horse power, and were a substitute for the omnibus, and other vehicles devoted to the carriage of passengers, which had been previously in common use. After the adoption of the new constitution the practice of separate legislation for each company became impracticable, and in 1876 a general law was passed providing for the organization of street-railway companies for the purpose of "constructing, maintaining, and operating a street railway for public use in the conveyance of passengers." No power of eminent domain was conferred on these companies, but the several provisions of the act show that such railways were to be constructed upon the streets, conforming to the grade of the streets, and subject to the regulation of the municipal authorities. The Act of 1876 gave to street-railway companies, in cities of the first class, the right to "use other than animal power" in the movement of their cars. The Act of May, 1878, conferred the like right upon the street-railway companies in cities of the second and third classes. The general law further provided that any company organized under its provisions should maintain an office for the transaction of its business "in the city" where its railway was located. All these provisions show that the street railways contemplated by the General Act of 1878 were intended for the accommodation of the crowded streets of cities, and for no other purpose. The present general law relating to these corporations was passed in 1889. It was intended to bring together the valuable provisions of several acts of assembly into one comprehensive statute, and to make some changes that experience had shown to be desirable. It authorized the incorporation of five or more persons for the purpose of "constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid or authorized to be laid" under existing charters, with the privilege of occupying "any street" by any power other than by locomotive. It required the route to be set out in the application for incorporation stating the streets and highways upon which it was to be built, and showing "the circuit of the route, the amount of the capital stock of the company," and other particulars. It required all companies incorporated under its provisions to maintain an office where the railroad was located. Section 15 provided that "no street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough or townships without the consent of the local authorities thereof, nor shall any street passenger railway be incorporated hereunder

which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen hereof."

From these provisions, we think it is apparent that the attempt now being made to convert these city conveniences into long lines of transportation, connecting widely separated cities and towns by electric railways traversing country roads, was not anticipated or provided for by the legislature. The failure to confer upon these companies the power of eminent domain would, if it stood alone, be sufficient to justify this conclusion. The land taken for streets in cities and boroughs is in the exclusive possession of the municipality, which may use the footway as well as the cartway for any urban servitude without further compensation to the lot owners. *Proost, Jr. v. New Chester Water Co.* 163 Pa. 275; *Reading v. Davis*, 153 Pa. 360; *McDeritt v. People's Nat. Gas Co.* 160 Pa. 367. Nor does the construction of a street passenger railway upon the surface of the street impose any additional servitude upon the property fronting on the street so occupied. *Rafferty v. Central Traction Co.* 147 Pa. 579. But the easement acquired by the public by proceedings under the road laws is an easement for passage only. The owner is entitled to the possession of his land for all other purposes. We held, therefore, in *Sterling's App.*, 111 Pa. 35, 56 Am. Rep. 246, that the occupancy of a country road by a pipe line imposed an additional servitude upon the farm owner, while in *McDeritt v. People's Nat. Gas Co.*, *supra*, we held that a pipe line laid within the limits of the street by authority of the city did not impose any additional servitude on the lot owner. The reason for the distinction is fully stated in the opinion in the latter case. The same distinction exists, and for the same reasons, between urban and suburban property, as to the right of corporations to occupy a highway for a street passenger railway. This, as will be seen by the cases cited above, is an urban servitude, to which suburban property has not been subjected by law, up to this time. The consent of township authorities justifies an entry upon the public road, so far as the public is concerned; but the supervisors of the townships have no power to bind private property, or subject it to a servitude, for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township, on their journey from one city or borough to another, by rail, is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways, is immaterial both to taxpayers and to landowners along the route traveled, except as the adoption of one or the other of these modes of transportation may affect the township roads, or the private property of citizens. When the supervisors gave their consent to the occupation of the township roads by a street railway, they speak as the

representatives of those who build and those who use the roads, but not as the representatives of the private property over which the roads pass. The street-railway companies cannot reach the property owners either through "the local authorities," or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy. The trouble is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and for which the existing legislation relating to them was not framed.

Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and, under existing laws, their control over the public roads is limited. But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township or the school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary. *Wachob v. School Dist. of Bingham*, 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session. *School Dist. of Denison Twp. v. Padden*, 89 Pa. 895. One supervisor may bind the township by an act that is ministerial in its character. *Dull v. Ridgway*, 9 Pa. 272; *Pottsville v. Norwegian Twp.* 14 Pa. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment. *Cooper v. Lampeter Twp.* 8 Watts, 125; *Union Twp. v. Gibboney*, 94 Pa. 534; *Sommeret Twp. v. Parson*, 105 Pa. 860. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken, it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions, as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the meeting, as well as the consent; and a contract that does not rest on such official action, properly taken

by the proper officers, is utterly worthless. But we know, as matter of current history, that street railways have been projected, and actually constructed, and are now in operation, over country roads, where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers, or at the instance of land owners along their routes. Where such enterprises have been allowed to proceed, and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake, under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside of municipal boundaries. At present an action at law is the only remedy within the reach of an injured person who has suffered a railway to be built across his land without objection; but equity will interpose to protect him, if he comes in proper time, by enjoining the construction until his damages have been paid or secured to his satisfaction.

The only remaining question raised in this case is over the right of a street railway to build any part of its line before it has the right to complete it. A steam railroad may enter upon any part of its line and commence building, subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain, and may enter and appropriate land regardless of the will of the owner. A street-railway company, as we have seen, does not possess the power of eminent domain. It cannot build under its charter alone. It must have the consent of the proper municipal or local authorities, or it cannot move. If the proposed line passes through a city, borough, or township intermediate the termini, and that city, borough, or township refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line before it has a right, as against any city, borough, or township into which its line extends, to begin work. It is not possible for such company to complete its line without the consent of the local authorities of the districts through which it passes; and, where this is refused in one or more of the municipal or quasi municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility. Let us suppose, for purposes of illustration, a charter to authorize the construction of a street railway from A., through certain roads in B., C., and D., to the city of E., and that consent has been obtained from the local authorities of A., and C., and of E., but refused by the local authorities of B. and D. The proposed line is thereby cut up into

three wholly unconnected pieces. It is very clear that, under a charter authorizing the building of a line of road from A. to E., the company could not lawfully build three distinct local roads, viz. one in A., another in C., and the third in E. The consent given by A. to the construction of the line of road authorized by the charter would not estop the local authorities from objecting to the construction of a local road within its own limits. When confronted with its own consent, A. could well reply, "The road to which consent was given is not the road you are now building, for the building of that road has become impossible by the action of the authorities of B. and D."

The learned judge of the court below said in the conclusion of his opinion, "Corporations of this character are multiplying rapidly, and we may assume they are demanded by the public." This is a strong reason for meeting the questions involved in this case squarely, that the legislation needed to protect property owners against this class of corporations may be had at the same time that the powers necessary to convert what was intended as an urban convenience into a gen-

eral mode of transportation are considered and conferred by the law-makers. In this case the defendant's line of so-called street railway extends through two boroughs, two townships, and over one county bridge over the Schuylkill river. The line and circuit of its road over the several highways to be occupied are fully set forth in its charter. The consent of the local authorities of West Conshohocken borough and of White Marsh township were refused. That of Upper Merion township was given. That of the borough of Conshohocken was given, and has since been withdrawn. Under such circumstances the building of the line of street railway described in and authorized by the charter is impossible, and the company has no right to proceed. The conclusions of the learned master were correctly drawn, and the decree recommended by him should have been made.

The decrees appealed from is now reversed, and the record remitted, with direction to the court below to make the decree recommended by the master, awarding the injunction prayed for. The costs of this appeal to be paid by the appellee.

MISSOURI SUPREME COURT.

S. V. SALENO, *Appt.*,

v.

City of NEOSHO, *Respt.*

(.....Mo.....)

1. **The mere lack of the mayor's signature to an ordinance** is not fatal where it is expressly provided that if he neglects or refuses to sign or return it with objections it shall become a law without his signature.
2. **Approval of an ordinance by the acting president** of the board of aldermen in the absence of the mayor is sufficient where the statute provides that in the absence of the mayor he shall perform the duties with all the rights, power, and jurisdiction of the mayor.
3. **The validity of a contract with a city in no way depends upon the execution of duplicate copies** as required by a provision that in every case of contract entered into duplicate copies shall be executed, one of which shall be filed and not taken from the office except for the purpose of evidence.
4. **A contract by a city to pay a fixed price annually** for a supply of water for a term of twenty years does not constitute a debt for the aggregate amount which may ultimately become payable within the meaning of a constitutional provision restricting the amount of city indebtedness.

(March 19, 1895.)

NOTE.—On the disputed question whether or not a contract for a period of years on which payments are to be made annually as services are performed constitutes an indebtedness for the aggregate amount, see *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402, and *note*. Also the later cases of *Carter v. Thorson* (S. Dak.) 24 L. R. A. 734, and *Linn v. Chambersburg* (Pa.) 25 L. R. A. 217.

27 L. R. A.

49

APPEAL by plaintiff from a judgment of the Circuit Court for Barton County in favor of defendants in an action brought to recover the amount alleged to be due under a contract by which the city had undertaken to pay certain rental for fire hydrants and water supply furnished by the plaintiff. *Reversed.*

Statement by Burgess, J.:

This is an action upon a contract alleged to have been entered into between plaintiff and defendant, under which plaintiff erected for defendant (a city of the fourth class) a system of waterworks, and defendant granted to plaintiff a waterworks franchise for a term of twenty years, and agreed to pay plaintiff, for the use of water for city and other purposes, \$2,000 a year for the use of fifty water hydrants for a term of twenty years, and \$30 per year for each additional hydrant which the city, by its board of aldermen, might order for the use and benefit of the city. The action is for hydrant rental due. As to the amount there is no controversy. The validity of the contract is denied by defendant, the only evidence thereof and details being included in an ordinance of said defendant (No. 113). Section 15 of said ordinance reads as follows: "This ordinance shall become binding as a contract on the said city of Neosho, in the event that said S. V. Saleno or his assigns shall, within ten days from the passage and publication thereof, file with the city clerk of said city his written acceptance of the terms, obligations, and conditions of this ordinance; and upon such acceptance, this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and of the said S. V. Saleno." On the 15th

day of October, 1890, this ordinance was submitted to a vote of the people for ratification after its passage by the board of aldermen, under authority of an ordinance (No. 114) in which was set forth the object and purpose of the election to be held for the ratification or rejection of the contract as set forth in said ordinance first named, which last-named ordinance provided for all the details for holding the election, including notice thereof, polling places, the kind of ballots to be used, manner of ascertaining and declaring the result of the election, and certifying the same. An election was held in pursuance of the provisions of this ordinance, which resulted in an almost unanimous vote in favor of ratifying the contract as set forth by Ordinance No. 113. On the day next after the election, being October 16, 1890, the city clerk, by order of the board of aldermen, notified plaintiff that the contract had been ratified by a vote of the people of Neosho, voting at an election held in said city on the day previous, at which there were more than two thirds of the legal votes polled at said election in favor of ratifying said Ordinance No. 113; there being 293 votes polled for its ratification, and 82 votes against it. On the 17th day of October, 1890, plaintiff filed with said board his written acceptance of the contract. Plaintiff then gave bond, entered upon the construction of the waterworks, which were completed, and subsequently, to wit, November 23, 1891, accepted by the board of aldermen. By the terms of the contract, the hydrant rental is made payable semiannually, on the 1st days of January and July of each year. This suit was brought for the hydrant rental which became due July 1, 1892. The trial resulted in a judgment for defendant, and from the judgment plaintiff appealed.

Messrs. Thurman & Wray and James H. Pratt for appellant.

Messrs. O. L. Cravens and George Hubbard, for respondent:

The Waterworks Ordinance 113, so called, is void, because never properly signed, approved, or published.

Presiding at the meeting when said ordinance was finally passed by the board, it became the mayor's duty to authenticate its passage by his signature as such president of the board, and unless he did so the said ordinance did not take effect.

Becker v. Washington, 94 Mo. 875; *Graham v. Carondelet*, 33 Mo. 263; *Carondelet v. Wolfert*, 39 Mo. 305; *Lewis v. St. Louis*, 69 Mo. 595; *Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153; 7 Lawson, Rights, Rem. & Pr. § 8761.

It must appear that there has been a fair compliance with all the conditions precedent, whether prescribed by charter or ordinances.

Endlich, Interpretation of Statutes, § 499; *Cole v. Skrainka*, 105 Mo. 308; *Galbreath v. Newton*, 30 Mo. App. 880; *Keane v. Cushing*, 15 Mo. App. 96; *Keane v. Klausman*, 21 Mo. App. 485; *Ex parte Bedell*, 20 Mo. App. 125.

The alleged contract was not made or subscribed in duplicate by both parties, or depos-

ited, as by law required, and is therefore void.

There being no contract in writing, dated when made and subscribed by the parties, Saleno acquired no rights and the city incurred no liabilities; nor can there be a recovery on *quantum meruit*, nor any estoppel or ratification.

Wolcott v. Lawrence County, 26 Mo. 272; *Johnson v. School Dist. No. 1*, 67 Mo. 319; *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 175; *Maupin v. Franklin County*, 67 Mo. 327; *Heidelberg v. St. Francois County*, 100 Mo. 69; *Sturgeon v. Hampton*, 88 Mo. 203; *Keating v. Kansas*, 84 Mo. 416; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Stuart v. Cambridge*, 125 Mass. 102; *Starkey v. Minneapolis*, 19 Minn. 208; *Crutchfield v. Warrensburg*, 30 Mo. App. 465; Mo. Const. art. 4, § 48; Dill. Mun. Corp. 4th ed. § 89; *Prince v. Quincy*, 123 Ill. 457; *Dixon County v. Field*, 111 U. S. 90, 23 L. ed. 362; *Hubbard v. Williamstown*, 66 Wis. 551; *Austin v. Coggeshall*, 12 R. I. 829, 34 Am. Rep. 648; *Schumm v. Seymour*, 24 N. J. Eq. 143; *State v. Jersey City Street & Water Comrs.* 55 N. J. L. 280; 1 Beach, Pub. Corp. § 627.

The etymology and definition of the word "subscribe" show that its meaning when applied to the signature to an instrument in writing is the signature or writing of one's name beneath or at the end of the instrument.

James v. Patten, 6 N. Y. 12, 55 Am. Dec. 876; *Riley v. Riley*, 36 Ala. 502; *Pridgen v. Pridgen*, 35 N. C. 260; *Coon v. Rigden*, 4 Colo. 282.

Though a written contract is executed, duly subscribed, etc., by the parties, yet, if it be not in duplicate and one copy filed with the clerk as required by section 3158, Rev. Stat. 1889, it is fatally defective and will not bind the municipality.

Globe Furniture Co. v. District No. 7, Twp. 62, Range 31, 51 Mo. App. 549.

Under the ordinance, the city incurred, if anything, an indebtedness beyond its income and revenue for the year and exceeding five per centum on its taxable property.

The current and necessary liabilities must be taken into account in reckoning the limits imposed by our constitution upon municipalities.

Book v. Earl, 87 Mo. 246; *Barnard v. Knox County*, 13 L. R. A. 244, 105 Mo. 383.

The most obvious meaning of our constitution does not allow the city to incur such obligations as is alleged to such an extent.

10 Am. & Eng. Encyclop. Law. p. 399; *Lake County Comrs. v. Rollins*, 180 U. S. 682, 32 L. ed. 1060.

In cities and towns having less than ten thousand and more than one thousand inhabitants, said rate (of tax levy) shall not exceed fifty cents on the hundred dollars valuation.

Mo. Const. art. 10, § 11.

Power to contract indebtedness with the power to tax for its payment.

Citizens Sav. & Loan Assn. of Cleveland, Ohio, v. Topeka, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Gould v. Paris*, 68 Tex. 511; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Book v. Earl*, 87 Mo. 246; *Arnold v. Hawkins*,

95 Mo. 569; *Barnard v. Knox County*, 18 L. R. A. 244, 105 Mo. 332; *Black v. McGonigle*, 103 Mo. 193; *State v. Columbia*, 111 Mo. 365; *Lamar Water & Electric Light Co. v. Lamar* (Mo.) May 28, 1894.

Constitutions the same as that of Missouri, and similar ones, are interpreted by the courts to mean what we claim for ours.

Beard v. Hopkinsville, 23 L. R. A. 402, 15 Ky. L. Rep. 756; *Spilman v. Parkersburg*, 85 W. Va. 605; *Prince v. Quincy*, 128 Ill. 443; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Law v. People*, 87 Ill. 385; *Springfield v. Edwards*, 84 Ill. 626; *Erie's App.* 91 Pa. 398; *State v. Medbery*, 7 Ohio St. 522; *Burlington Water Co. v. Woodward*, 49 Iowa, 63; *San Francisco Gas Co. v. Brickwedel*, *supra*; *People v. May*, 9 Colo. 80.

Statutory prohibitions like unto those in our constitution are construed by the courts in accordance with our view.

Davenport v. Kleinschmidt, 6 Mont. 502; *State v. Atlantic City*, 49 N. J. L. 558; *Atlantic City Water Works Co. v. Read*, 50 N. J. L. 686; *Niles Water Works v. Niles*, 59 Mich. 311; *Putnam v. Grand Rapids*, 58 Mich. 416; *Coulson v. Portland*, Deady, 481; *Johnston v. Becker County Comrs.* 27 Minn. 64.

The excess of authority by the board of aldermen, in attempting to bind the city in a forbidden manner and to excessive extent, vitiates the contract as an entirety, and appellant is without a remedy.

Hedges v. Dixon County, 37 Fed. Rep. 804; *Richardson v. McReynolds*, 114 Mo. 641; *Davis v. Harrison*, 45 N. J. L. 79; *State v. Bayonne*, 55 N. J. L. 241; *Reineman v. Covington*, O. & Black Hills R. Co. 7 Neb. 810; *Millerstown v. Frederick*, 114 Pa. 435; *People's Bank of St. Paul v. Barnes County School Dist.* No. 52, 3 N. Dak. 496; *Coffin v. Indianapolis*, 59 Fed. Rep. 221; *Manhattan Trust Co. v. Dayton*, Id. 327.

The monopoly attempted to be created by Ordinance 118 is contrary to public policy, also against the bill of rights, and therefore void.

Davenport v. Kleinschmidt, 6 Mont. 502; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Gale v. Kalamazoo*, 28 Mich. 344; *Brenham v. Brenham Water Co.* 67 Tex. 542; *St. Louis Gas-Light Co. v. St. Louis Gas, Fuel & Powder Co.* 16 Mo. App. 52; 7 Bacon, Abr. p. 22; Cooley, Const. Lim. 4th ed., authorities cited in note 2, p. 398; *State v. Post*, 55 N. J. L. 264; *Thomas v. Wabash*, St. L. & P. R. Co. 7 L. R. A. 145, 40 Fed. Rep. 126; *Re Delaware Bay & O. M. R. Co's Petition* (N. J.) Nov. 16, 1887; *Ragio v. State*, 86 Tenn. 272.

Burgess, J., delivered the opinion of the court:

The court declared the law to be: First. That the contract set forth in Ordinance No. 118, ratified by the people, and accepted by the plaintiff, as shown by the records of the city, was not sufficient to constitute a valid contract between plaintiff and defendant, and refused to declare the law to be that it was not necessary, in order to the validity of the contract, that it should be upon one paper, signed by both plaintiff and defendant, and that if the terms of the contract in 27 L. R. A.

said ordinance were ratified by the voters of defendant city, at an election lawfully held for that purpose, and plaintiff thereafter, in writing, accepted such terms, the same constituted a valid contract. Second. That if the hydrant rental could not be paid out of the levy of 50 cents on the \$100, after paying all current expenses of the city, it constituted a debt for the amount that might ultimately become due, and refused to declare the law to be that a contract to pay \$2,000 a year for hydrant rental for a term of twenty years did not constitute a debt, within the meaning of section 12, article 10, of the State Constitution, without reference to performance.

Plaintiff's first contention is that Ordinance No. 118 was signed by the acting mayor, attested by the clerk, ratified by a vote of the voters of the city of Neosho, and accepted in writing by the plaintiff, and constituted a valid contract for furnishing said city with water according to the terms and conditions as set forth in said ordinance. Defendant is a city of the fourth class. By section 1599, Rev. Stat., which pertains to such cities, it is provided that "no bill shall become an ordinance until the same is signed by the president of the board of aldermen and the mayor." By section 1616, the mayor when present is *ex officio* president of the board of aldermen. The record shows that, although the mayor was present and presiding at the meeting of the board when Ordinance No. 118 was put upon its final passage, he did not authenticate its passage by his signature as such president of the board; and, because of his failure to do so, it is insisted by defendant that the ordinance never became effective. It is difficult to see the force of this argument, when it is provided by section 1618, Rev. Stat., that, if the mayor should neglect or refuse to sign any ordinance or return the same with his objections in writing at the next meeting of the board of aldermen, the same shall become a law without his signature. By the very terms of the section last quoted, on the neglect or refusal of the mayor to sign the ordinance or to return the same to the next meeting of the board of aldermen with his objections in writing thereto, it became a law, and his failure to so return it must be regarded as equivalent to signing it. The notice of holding the election with respect to the ratification of the ordinance by the voters, and everything pertaining thereto, as well, also, as the publication of the result of the election, which was spread upon the records of defendant, seem to have been a fair and substantial compliance with the charter and ordinances of the city.

Another contention on the part of defendant is that the ordinance authorizing and calling the special election is void, for the reason that it is provided by section 9 of that ordinance that it was to take effect and be in force from and after its passage by the board of aldermen and its approval by the mayor. At the time of its passage, the mayor of the city was absent, and, in consequence thereof, it was approved by the then acting president of the board of alder-

men. By section 1616, Rev. Stat., it is provided that, in the absence of the mayor, the board shall elect one of its own members to occupy his place temporarily, who shall be styled "acting president of the board of aldermen;" while the following section provides that in case of temporary absence of the mayor, and until his return, the acting president of the board of aldermen, for the time being, shall perform the duties of mayor, with all his rights, powers, and jurisdiction. This ordinance was signed, "John Myers, Acting Pres. Board of Aldermen;" and its approval seems to have been in strict compliance with the provisions of defendant's charter, under the then existing circumstances. We are therefore of the opinion that section 9, in so far as its validity depended upon its approval by the mayor, was and is valid, and that its approval by the acting president of the board of aldermen was all that the law required.

The objections raised by defendant as to the publication of the notice of the election and the canvass of the returns thereof seem to be extremely technical, and without merit.

It is argued by counsel for defendant that as the contract sued upon was not made in duplicate, and subscribed by both parties thereto, nor deposited in such office or with such officer of defendant as may have been charged with the keeping of its contracts, it is void, under section 8158 of defendant's charter. A similar question was passed on by this court in *Lamar Water & Electric Light Co. v. Lamar* (Mo.) 26 S. W. Rep. 1025, in which Black, Ch. J., speaking for the court, said: "The ordinance could not take effect as a contract until ratified by the requisite vote; but it was competent and perfectly proper to pass the ordinance to take effect when ratified. Indeed, an ordinance setting forth the terms of the contract, and then approved by the necessary vote, and accepted in writing by the persons proposing to build the works, was all that was necessary to make a perfect and complete contract." In the case in hand the ordinance setting forth the terms of the contract was approved by the necessary vote, and accepted in writing by plaintiff, who was proposing to build the works, and clearly brings this case within the rule announced in the *Lamar Water-Works Case*. The validity of the contract in no way depends upon the provisions of said section 8158, as contended by defendant. By that section, in every case of contract entered into by any county, city, town, village, school district, or other municipal corporation, or by any officer or agent on their behalf, duplicate copies of the same are required to be executed, one of which shall be filed in such office or with such officer of the municipal corporation as may be charged with the keeping of the contracts thereof, and shall not be taken thence except for the purpose of evidence in some legal matter or cause; but the law nowhere requires, as a condition precedent to its becoming a contract, that the instruments embodying its terms shall be signed in duplicate. If such was the law, why say, "In every case of contract entered into," etc.? The object and

purpose of the statute in requiring duplicate copies to be executed and filed with the proper custodian was evidently for the purpose of preserving them as evidence to be used in any legal matter or cause, and not to make the duplicate copies constituent elements of the contract. Indeed, the statute provides that in case of variance between such copies the one on file shall control in the construction of the contract, which is very persuasive evidence, at least, that the object in requiring duplicate copies to be taken was to preserve them as evidence. In executing the contract the requirements of the statute seem to have been observed, and it is not, we think, invalid because not properly executed.

Defendant contends that under the ordinance, the city incurred, if anything, an indebtedness beyond its income and revenue for the year, and exceeding 5 per centum on its taxable property, while upon the part of plaintiff the contention is that the contract by the defendant city to pay a fixed price annually for a supply of water, for a term of twenty years, does not constitute a debt for the aggregate amount which may ultimately become payable, within the meaning of section 12, article 10, of the State Constitution. The only allegation in the answer that can possibly be construed as having any reference to the power of defendant to enter into the contract is that wherein it is alleged that "defendant says that the alleged contract between the plaintiff and defendant was not within the scope of the powers of defendant, nor expressly authorized by law." It does not allege that, under the contract, the city incurred an indebtedness beyond its income and revenues for the year, and exceeding 5 per cent upon its taxable property. So that the only question that we have to deal with is as to whether the contract created an indebtedness upon the part of defendant, as contemplated by the constitution; and upon that question the authorities are not entirely in harmony. In construing words used in that instrument, in the absence of some restriction placed upon their meaning, they must be given such meaning as is generally accorded to them. A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and, if not furnished, no payment could be required of it. That the contract did not create an indebtedness, within the meaning of the section of the constitution before mentioned, finds support in the fact that said section provides that any city incurring any indebtedness requiring the assent of the voters shall, before or at the time of doing so, "provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same." The

contract in suit provides for no interest. By its terms, there is none to fall due. Nor was the constituting a sinking fund as required by the constitution, for the payment of indebtedness, intended to apply to simple contracts that might never be performed.

A number of cases have been cited by defendant in which it has been held, under constitutions containing similar provisions to those in the constitution of this state, a contract to pay upon a contingency, as upon the happening of some event, such as the rendering service or furnishing supplies, is in a sense a debt. *Beard v. Hopkinsville*, 15 Ky. L. Rep. 756, 23 L. R. A. 403; *Spilman v. Parkersburg*, 35 W. Va. 605; *East St. Louis v. East St. Louis Gas-Light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Springfield v. Edwards*, 84 Ill. 626; *Lau v. People*, 87 Ill. 885; *Prince v. Quincy*, 105 Ill. 188, 44 Am. Rep. 785; *Erie's App.* 91 Pa. 398; *State v. Atlantic City*, 49 N. J. L. 558; *Atlantic City Water-Works Co. v. Read*, 50 N. J. L. 666; *Niles Water-Works Co. v. Niles*, 59 Mich. 811; *Putnam v. Grand Rapids*, 58 Mich. 416; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 8,275.

It is worthy of remark that in each one of the cases cited the constitutional limit of indebtedness had been reached before the contract had been made, except *Niles Water-Works Co. v. Niles*, and in that case one of the members of the court (Sherwood, J.) dissented. No such claim is made as to the city of Neosho. Among the authorities which hold to a contrary rule, and that the word "indebted," as used in state constitutions, as in section 12, article 10, of the Constitution of Missouri, does not include contracts for the annual supply of municipalities with such necessities as light and water and of a similar character, and contracts for the payment therefor do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, may be cited the following: *Dively v. Cedar Falls*, 27 Iowa, 237; *Grant v. Davenport*, 86 Iowa, 401; *Budd v. Budd*, 59 Fed. Rep. 785; *Walla Walla Water Co. v. Walla*

Walla, 60 Fed. Rep. 957; *State v. McCauley*, 15 Cal. 429; *Koppikus v. State Capitol Comrs.* 16 Cal. 248; *People v. Pucheco*, 27 Cal. 207; *East St. Louis v. East St. Louis Gas Light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Carlyle Water, Light & Power Co. v. Carlyle*, 31 Ill. App. 339; *Carlyle v. Carlyle Water, Light & Power Co.* 140 Ill. 445; *Crowder v. Sullivan*, 128 Ind. 486, 18 L. R. A. 647; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Weston v. Syracuse*, 17 N. Y. 110; *Utica Water-Works Co. v. Utica*, 31 Hun, 480; *Smith v. Dedham*, 144 Mass. 179; 2 Dill. Mun. Corp. § 88.

Our conclusion is that the weight of authority is adverse to the contention of defendant, and is in accord with the spirit and meaning of our constitution as we understand it, and as we think also comports with better reason.

Under section 1589, Rev. Stat., defendant was given the power to prevent and extinguish fires, and, for that purpose, to provide the necessary means, including water, without first taking a vote of its citizens to authorize it to do so; but no power was given it to erect a system of waterworks for the purpose of supplying the city and the inhabitants thereof with water, or to contract with any person, company, or association, giving and granting to such person, company, or association the exclusive right to furnish any system of waterworks for the use of the city for any length of time not to exceed twenty years, without being authorized by a vote by ballot of two thirds of its qualified voters voting at an election held for that purpose, provided by ordinance. As we have seen, the ordinance providing for such an election was duly passed, and the election held, which resulted in a two-thirds vote in favor of its adoption.

There are numerous other questions raised by counsel in their briefs to which we have not adverted, as from what has already been said the judgment must necessarily be reversed, and the cause remanded.

It is so ordered.

All concur.

WISCONSIN SUPREME COURT.

Mary E. VAN OSDELL et al.

v.

Ellen CHAMPION, Admr., etc., of Charles B. Champion, Deceased, et al., Appts., and Calvin R. CORBIN et al., Recpts.

(.....Wis.....)

1. A condition in a devise that the property shall in no wise ever be subject to any debt, liability, execution, or attachment against the devisee, existing at that time or at any future time, is void.

NOTE.—The subject of spendthrift trusts, which is distinguished from the case above decided, is involved in the case of *Roberts v. Stevens* (Me.) 17 L. R. A. 266, and cases cited in the footnote thereto. 27 L. R. A.

2. Attorneys' fees are taxable as equitable actions in a proceeding under Rev. Stat., § 3122, for the trial of issues on application by a creditor in a partition action, whether the trial is by court or by jury.

(March 5, 1895.)

APPEAL by defendants Ellen Champion et al. from a judgment of the Circuit Court for Lafayette County rendered in a proceeding for the partition of certain real estate which awarded the share of Charles B. Champion, deceased, to his creditors rather than to his representatives. Affirmed.

Statement by Pinney, J.:

An action was brought for the partition of

certain lands, against Charles B. Champion, who claimed an undivided fifth interest in the same, under the residuary clause of the will of his mother, Elizabeth Champion, and against various others interested in said premises, claiming under the will and as incumbrancers. The premises were sold under the judgment in the partition suit, and the proceeds of the interest of said Charles B. Champion therein paid into court, amounting to \$2,116.17; and they were claimed by divers judgment creditors of the said Champion, among others the respondents Calvin R. Corbin and Horatio May, under a judgment in their favor, and against Champion, rendered May 7, 1870, and by L. A. Clinton, under a similar judgment, and they filed petitions in the partition action, claiming said moneys. Their claims were resisted by Ellen Champion, widow and administratrix of the estate of Charles B. Champion (who had died in the meantime), on the ground that his interest in the lands was not subject to levy or sale on execution, by reason of the provisions of the will of his mother, through which he obtained his title, and also by other defendants, who held alleged incumbrances against his interest in the lands. A trial was had before the court upon issues joined on these petitions; and it was found, among other things, that the interest of Champion in the lands had been sold on execution issued October 4, 1890, upon leave granted, on the judgment in favor of Corbin and May, and that it remained unredeemed from such sale; that the entirety of the lands was devised by Elizabeth Champion to Charles B. Champion and four others, equally, share and share alike, their heirs and assigns, forever, the testatrix making in said devise "this express condition: that the share of my said son, Charles B. Champion, shall in no wise ever be subject to any debt, liability, execution, attachment, or judgment against said Charles B. Champion, existing at this time or any time hereafter;" that the judgment in favor of L. A. Clinton against Champion was rendered May 6, 1890, and was found to be the paramount lien, the lien of the Corbin and May judgment having expired; that the dower interest of Ellen Champion, the widow of the deceased, in the fund in court, was \$427.87, which she had elected to take for her dower; that the amount due on the judgment of L. A. Clinton was \$291.68; and that the remainder of the fund—\$1,396.61—belonged to, and should be paid over to, Corbin and May; and judgment was given for the payment of these sums accordingly, and for costs in favor of Corbin and May, and also in favor of L. A. Clinton, against Ellen Champion, as administratrix, etc., to be paid in course of due administration out of the estate of Charles B. Champion, deceased, and against George F. West and other defendants named, who had resisted and defended against said petitions. The costs in favor of Corbin and May were taxed by the clerk, allowing only \$25 attorney's fees to the petitioners, which, on their appeal, was increased by the court to \$67.12. From this judgment, Ellen Champion, as administratrix, etc., appealed.

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Messrs. Wilson & Martin and Calvert Spensley, for appellants:

If the provision as to existing debts would be valid if standing alone, it is still valid although as to future debts it may be void.

2 Woerner, Law of Administration, pp. 883, 884; Beach, Wills, § 815; 3 Jarman, Wills, p. 709; *Tiers v. Tiers*, 98 N. Y. 568; *Orley v. Lane*, 85 N. Y. 840; *Harrison v. Harrison*, 86 N. Y. 543; *Adams v. Perry*, 43 N. Y. 488.

Restrictions on devises contained in wills are to be regarded the same as restraints on alienation contained in deeds.

Co. Litt. 223 A; Shep. Touch. p. 129; *McWilliams v. Nisly*, 2 Serg. & R. 507, 7 Am. Dec. 654; 2 Woerner, Law of Administration, p. 955; *Doz v. Pearson*, 6 East, 173; *Gray v. Blanchard*, 8 Pick. 284; 2 Jarman, Wills, Bigelow's ed. p. 14; Beach, Wills, § 229; Schouler, Wills, § 601.

The restriction is only as to certain debts, i. e. those existing at the time the will was made.

Partial restraints on alienation are valid.

Stewart v. Barrow, 7 Bush, 368; *Langdon v. Ingram*, 23 Ind. 380; *Simonds v. Simonds*, 3 Met. 558; *McKinster v. Smith*, 27 Conn. 628; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692; *White v. Thomas*, 8 Bush, 661; *Shankland's App.* 47 Pa. 118; *Braman v. Stiles*, 2 Pick. 460, 18 Am. Dec. 445; *Perkins v. Hays*, 8 Gray, 405; *Foster v. Foster*, 133 Mass. 179.

A condition which defeats an estate on appropriation to the grantee's debts is valid.

Broadway Nat. Bank v. Adams, 193 Mass. 170, 43 Am. Rep. 504; *Overman's App.* 88 Pa. 276; *White v. Thomas*, 8 Bush, 661.

A devise of the income of property to cease on bankruptcy or insolvency is valid.

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 118; 2 Jarman, Wills, p. 25.

When the intention of the testator is clearly declared to be to bequeath the property for the sole benefit of the donee, or that his creditors shall have no part of it, the bequest will fail upon his insolvency or bankruptcy, even when it occurs during the life of the testator and a gift over will take effect.

Beach, Wills, § 281; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; 2 Redf. Wills, p. 290 (old ed. p. 663), 800 (old ed. 680); *Yarnold v. Moorhouse*, 1 Russ. & M. 864; *Blackstone Bank v. Davis*, 21 Pick. 42, 32 Am. Dec. 241.

Messrs. P. B. Simpson, J. B. Simpson, and W. E. Carter for respondents.

Pinney, J., delivered the opinion of the court:

1. It is laid down as a general rule that "a condition, annexed to a conveyance in fee or by devise, that the purchaser or devisee should not alienate, is unlawful and void. If the grant be upon the condition that the grantees shall not commit waste, or not take the profits, or his wife have her dower or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from the estate in fee. Conditions are not sustained when they are repugnant to

the estate granted, or infringe upon the essential enjoyment of the independent rights of property, and tend manifestly to public inconvenience." Kent, Com. *181; 2 Redf. Wills, 287, 290. "But it has been held that land may be conveyed to a married woman so as to exclude her husband upon her death from becoming tenant of the premises by the curtesy." *Haight v. Hall*, 74 Wis. 152. The authorities are very generally agreed that property cannot be conveyed, devised, or bequeathed with a restriction against it, or any portion of it, going to assignees in bankruptcy or in any form to creditors, although a grant may be made which shall be determinable by way of cesser, or by limitation of the estate over to another upon the occurrence of a certain event; such as insolvency, bankruptcy, or the occurrence of any other act or event arising or growing out of the conduct or neglect of the grantee or devisee. The bounty of a grantor or testator may, however, be secured to another by means of a trust,—a "spendthrift's," as it is sometimes called; so that the periodical income of the estate cannot be anticipated by the *cestui que trust*, but may be paid to him from time to time, beyond the power of creditors to intercept or reach it. Many such cases are collated and cited by appellants' counsel, some of which are referred to in *Nichols v. Eaton*, 91 U. S. 717, 727, 23 L. ed. 254, 257, and the whole subject is fully considered in *Broadway Nat. Bank v. Adams*, 188 Mass. 170, 43 Am. Rep. 504, and *Foster v. Foster*, 188 Mass. 179.

But these cases are all clearly distinguishable from the present, by reason of the absolute and unlimited condition contained in the residuary clause of Mrs. Champion's will, under which her son, Charles B. Champion, obtained his title. We have not been referred to nor are we aware of any authority that would warrant us in upholding, as against the creditors of Charles B. Champion, the provision by which the devise to him was upon the express condition that the premises should "in no wise ever be subject to any debt, liability, execution, or attachment against him, existing at this time or at any time hereafter." The condition is general, and is not limited to future events. It was intended to affect existing as well as future writs or judgments, and is unlimited in point of time, and was manifestly an attempt to secure the estate in his hands as a devisee in fee against the claims of creditors incident to such an ownership by the laws of every civilized state; and to sustain such a condition would be productive of great inconvenience to creditors and those dealing with the grantee or devisee upon the faith of apparent absolute ownership, and would be contrary to sound public policy. To give effect to such a condition would be, as to such transaction, to permit parties to abrogate and annul the law of the state by a mere private arrangement; and the contention of the appellants' counsel goes to the extent of claiming that a man may thus be the full legal, as well as the equitable, owner of property thus devised, deal with it as he pleases, and that it shall not be liable for his debts. This would be to destroy,

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in a very great degree, all faith in the apparent ownership of property, and countenance secret exemptions from liability of a debtor's property for his debts, and would tend to mischievous and fraudulent results. In *Blackstone Bank v. Davis*, 21 Pick. 41, 33 Am. Dec. 241, it was held that a provision, in a devise of land, that the land should not "be subject or liable to conveyance or attachment," was void, because contrary to law, which makes a man's property liable for the payment of his debts. In that case, as in this, the condition was unlimited in point of time; and it was declared to be "an attempt to impose a restraint upon property, which the law would not allow." In *Bramhall v. Ferris*, 14 N. Y. 44, 67 Am. Dec. 118; while sustaining the provision there in question, it was said that "any attempt to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory, . . . would clearly be repugnant to the estate in fact devised and bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law." This view is sustained in *Hahn v. Hutchinson*, 159 Pa. 183, 138-141; *Stansbury v. Hubner*, 73 Md. 238, 11 L. R. A. 204; *Steib v. Whitehead*, 111 Ill. 251; *McCormick Harvesting Mach. Co. v. Gates*, 75 Iowa, 343; *Ehrisman v. Sener*, 163 Pa. 577. We hold, therefore, that the provision in the will of Mrs. Champion, relied on to protect the property devised to Charles B. Champion from the claims of his judgment creditors, is void.

2. By section 8128, Rev. Stat., provision is made by which application may be made to the court by any creditor being a party to an action for partition, and having a lien upon any undivided share or interest in the premises sold, to order the amount due such creditor to be paid, and for a hearing upon notice to the other party; and by section 8129 the court is "to hear the proofs and allegations of the parties, and if any question of fact shall arise which, in the opinion of the court, cannot be determined without a trial by jury, the court shall direct an issue to be made which shall be tried as in other cases, and the costs of such trial shall be paid by the party failing, which payment shall be enforced as in other cases." It is objected by the appellant that the power to award costs against the party failing extends only to cases where the issue is tried by a jury; and where, as in this case, the issue was tried by the court, the power to award costs does not exist. By section 2883, Id., judgment may be given in an action "determining the ultimate rights of the parties on each side, as between themselves;" and this would include the right to award costs as between them. We think that, by a fair construction of the statute, the costs, if the issues are tried by the court, may be awarded in like manner as if there had been a trial by jury. Both the action for partition and this proceeding in it being of an equitable character, attorney's fees were rightly taxed as between the parties to these issues as in equitable actions. We find no error in the judgment appealed from.

The judgment of the Circuit Court is affirmed.

STATE of Wisconsin, *ex rel.* Michael DUNN,
Sheriff, *Plff. in Certiorari*,

v.

Francis W. NOYES.

SAME

v.

Eugene S. ELLIOTT.

(87 Wis. 340.)

1. An objection to indictments, that they were found by a grand jury impaneled for a term prior to that at which they were found, cannot be made the basis of a

habeas corpus proceeding for the release of the persons so indicted.

2. The legality of a de facto grand jury cannot be inquired into upon habeas corpus proceedings for discharge from commitments based upon indictments found by such body, under the rule that the acts of persons acting as de facto officers cannot be questioned collaterally.

(March 16, 1894.)

WRITS of certiorari to the Circuit Court for Milwaukee County to review proceedings in habeas corpus for the release from relator's custody of the defendants which resulted in orders for their discharge. *Reversed.*

NOTE.—Organization of grand jury.
For review of case of *STATE v. NOYES*, see subhead "Time and term," *infra*, V.

I. Pleading and practice generally.

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IX. Special grand jury.

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- a. Affirmance.
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- e. "Then and there."

I. Pleading and practice generally.

a. Mode.

A plea in abatement is the proper practice if the irregularity is not apparent in the record, which plea must be specific. But if the statute prescribes the mode of attack, that mode is exclusive, and a collateral attack cannot be made for irregularities. The right of the accused, as to time to object, depends somewhat on whether he is held to answer, or in custody. He must, however, be diligent and

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may act by attorney, but a party not under prosecution cannot question the organization of the grand jury.

Objection must be made before plea of not guilty, and as to making it between the time of impaneling and plea of not guilty, the statutes vary and control.

Where the objection to organization is specific the ruling on the question of practice will be found under classification of manner of organization at various subheads.

The abbreviations in parentheses will readily be understood. They indicate the mode of raising the question, as *mo. qu.* for motion to quash; *mo. ar.* for motion in arrest; *in dem.* for demurrer; *mo. new tr.* for motion for new trial; *pl. abate.* for plea in abatement; and *obj.* for objection otherwise raised.

Generally an objection to irregularities or defects in the organization of impaneling of a grand jury not appearing in the case cannot be made by demurrer, motion in arrest, motion to quash, but objection should be made by plea in abatement. *Fisher v. United States*, 1 Okla. 262 (*dem.*); *State v. Pile*, 5 Ala. 72 (*mo. ar.*); *Collier v. State*, 2 Stew. (Ala.) 888 (*mo. qu.*; *dem.*); *State v. Freeman*, 6 Blackf. 248 (*mo. qu.*); *State v. Haywood*, 73 N. C. 437 (*mo. qu.*); *Nugent v. State*, 19 Ala. 540 (*obj.*); *Cook v. Territory*, 8 Wyo. 140 (*mo. qu.*); *Wallace v. State*, 2 Lea, 22.

And a motion to quash because section 4, Ala. Act of 1887-89, p. 77, was not observed was held held unavailing as such act did not apply to the county. *Forney v. State*, 98 Ala. 19 (*mo. qu.*).

And a motion to quash because drawn under Ohio Rev. Stat., 7208, was properly overruled as such section applies to Hamilton county and was observed in drawing the jury. *McCarthy v. State*, 5 Ohio C. Ct. Rep. 627 (*mo. qu.*; *mo. ar.*).

In *Ford v. State*, 112 Ind. 373 (*mo. qu.*; *mo. ar.*), it was held that a motion to quash or in arrest reaches the indictment and nothing more, and objections to the empaneling must be made by plea in abatement.

And a party having the indictment set aside claiming the grand jury was illegally discharged, cannot thereafter claim that such objection should not have been sustained. *State v. Hart*, 67 Iowa, 143 (*mo. qu.*).

And under Cal. Penal Code, § 995, and Cal. Cr. Code, § 278, providing for setting aside the indictment when not found as prescribed, the words "not found" will not authorize an attack by motion for cause of challenge to the array. *People v. Colby*, 14 Cal. 87 (*mo. set aside*); *People v. Southwell*, 40 Cal. 141 (*mo. set aside*).

But under Cal. Wood's Dig., 284, § 279, providing for motion to set aside where the defendant has not been held to answer, the defendant who has not been held to answer may challenge the panel on arraignment. *People v. Beatty*, 14 Cal. 566 (*mo. qu.*).

A plea in abatement is the proper mode of pre-

The facts are stated in the opinion.

Mr. Leopold Hammel, Dist. Atty., with Mr. Jared Thompson, Jr., for plaintiff in certiorari:

Habeas corpus is a new and original proceeding for the enforcement of the civil right of personal liberty (*Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826); and is therefore strictly and purely a collateral proceeding, in which the question as to the validity of the judgment or other adjudication arises and is attacked collaterally and not in a direct proceeding by way of error, certiorari, or motion to quash.

People v. Kelly, 24 N. Y. 74; *Abelman v. Booth*, 62 U. S. 21 How. 506, 16 L. ed. 169; *Ex parte Wilson*, 140 U. S. 575, 35 L. ed. 513.

And it deals with radical defects only, which go to the jurisdiction in *Re Crandall's Petition*, 84 Wis. 177; *State v. Sloan*, 65 Wis. 647; *Browne*, Jurisdiction, § 110; and not with mere error, irregularity, or want of form, nor with defects which may be amended or remedied by further entry or motion.

People v. Cavanagh, 2 Park. Crim. Rep. 650; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 311; *Semler's Petition*, 41 Wis. 517; *Re Schuster*, 82 Wis. 610; *Re Graham*, 74 Wis. 450; *Re Pikulik*, 81 Wis. 158; *Re French*, Id. 597; *State v. Sloan*, 65 Wis. 651, and cases cited.

At the time of the adjournment, the said grand jury was a legally organized and constituted jury, rightfully exercising its judicial

sending irregularities in selecting or impaneling a grand jury. *Henning v. State*, 106 Ind. 393, 55 Am. Rep. 756 (mo. ar.); *Brown v. State*, 13 Ark. 96 (mo. new tr.).

But the plea in abatement must be specific in its particulars. *Newman v. State*, 14 Wis. 384 (pl. abate.); *State v. Skinner*, 34 Kan. 236 (pl. abate.); *Ward v. State*, 48 Ind. 289 (pl. abate.); *Woodward v. State*, 33 Fla. 508 (pl. abate.); *Cox v. People*, 19 Hun, 490; *Tilley v. Com.* 89 Va. 126 (mo. qu.; pl. abate.); *Baldwin v. State*, 13 Neb. 61 (pl. abate.); *Priest v. State*, 10 Neb. 393 (pl. abate.); *State v. Holcomb*, 86 Mo. 371 (pl. abate.); *Brennan v. People*, 15 Ill. 511 (pl. abate.).

And so must a motion to quash. *Warner v. State*, 54 Ark. 660 (mo. qu.).

Where a statute is specific as to the mode of objection, that manner must be followed to the exclusion of others. *Boulo's Case*, 51 Ala. 18 (pl. abate.); *Williams v. State*, 86 Ind. 400 (pl. abate.; action on bond); *People v. Hooghkerk*, 96 N. Y. 142, 67 How. Pr. 256 (obj.); *Johnson v. State*, 38 Tex. 570 (exception); *Green v. State*, 1 Tex. App. 82 (chal.; mo. qu.).

A collateral attack cannot be made for irregularities in selection of the list by proceedings in habeas corpus. *Ex parte Warriss*, 23 Fla. 371 (habeas corpus).

b. Party.

The failure to make the challenge or objection to the organization of the grand jury in the proper mode and at the proper time depends largely on the situation of the accused, and the circumstances under which he is placed sometimes largely control his privilege.

As where the defendant was bound to appear at the November term and had no opportunity to challenge the grand jury, because the indictment was at the March term, the indictment was set aside. *Territory v. Ingersoll*, 3 Mont. 454 (mo. set aside).

In *Vattier v. State*, 4 Blackf. 78 (pl. abate.), it was held that the accused on arraignment at a term subsequent to the indictment might object to the organization of the grand jury where he had been recognized to appear.

Under Cal. Wood's Dig., 284, § 279, providing for motion to set aside when the defendant has not been held to answer, a defendant who has not been held to answer may challenge the panel on arraignment. *People v. Beatty*, 14 Cal. 566 (mo. qu.).

And where he has been held to answer and has the privilege of challenging, a default cannot be entered on the bond where he is only called to object to the panel, as he must be called for arraignment, trial, or judgment. *State v. Klingman*, 14 Iowa, 404 (bond).

But where the accused was offered the privilege of moving to set aside and failed to act, the fact that he was prevented from challenging the panel will 37 L. R. A.

not be error. *State v. Larkin*, 11 Nev. 314 (mo. ar.; mo. new tr.).

And a challenge by an attorney while the accused was in jail asking that the accused might be brought in court, was properly overruled where it was not shown to have been made with the knowledge of the accused. *Ross v. State*, 1 Blackf. 390.

As to whether the attorney could waive the right of challenge to the grand jury in the absence of the accused, the error would be immaterial, if none of the grand jurors were disqualified. *State v. Felter*, 25 Iowa, 67 (mo. set aside).

And the challenge is confined to those under prosecution. *Thayer v. People*, 3 Dougl. (Mich.) 417 (mo. qu.).

So where the accused was in jail on a former indictment and his attorney claimed that the grand jury were about to investigate his conduct in regard to a certain murder, his right to challenge was properly refused as he was not under prosecution for that offense. *Hudson v. State*, 1 Blackf. 317 (chal.).

A person summoned to testify before the grand jury "de facto" cannot question its organization. *Ex parte Raymond*, 91 Cal. 643.

c. Time.

Generally the plea of not guilty is a waiver of all right to take advantage of defects in the organization of the grand jury, as objection should be interposed before a plea to the merits. *People v. Allen*, 43 N. Y. 28 (pl. abate.; mo. ar.); *Dyer v. State*, 11 Lea, 509 (pl. abate.); *People v. Stacey*, 34 Cal. 307 (mo. set aside); *State v. Borroum*, 25 Misc. 203 (pl. abate.); *State v. Miles*, 31 La. Ann. 826 (mo. ar.); *State v. Seaborn*, 15 N. C. 305 (mo. ar.); *Cooper v. State*, 120 Ind. 577 (pl. abate.); *United States v. Gale*, 109 U. S. 65, 27 L. ed. 837 (mo. ar.); *Young v. State*, 23 Ohio St. 577 (mo. for writ of error); *State v. Jackson*, 36 Ia. Ann. 96 (mo. ar.); *State v. Williams*, 3 Stew. (Ala.) 454 (pl. abate.); *State v. Watson*, 31 Ia. Ann. 879 (obj.); *Horton v. State*, 47 Ala. 55 (dem.); *Potsdammer v. State*, 17 Fla. 895 (mo. ar.); *Burroughs v. State*, Id. 643 (mo. ar.).

And must be before trial. *State v. Thompson*, 23 Ia. Ann. 187 (obj.).

And under Paschall's Dig., arts. 2830-2837, a challenge to the array should be made before the grand jurors are accepted. *Grant v. State*, 2 Tex. App. 168 (obj.).

Under the particular statutes of some states the objection to the organization must be made before the grand jury are sworn, or at the time of its organization. *Logan v. State*, 50 Miss. 299 (mo. new tr.); *State v. Ingalls*, 17 Iowa, 8 (obj.); *State v. Bolt*, 7 Blackf. 19 (mo. qu.); *Bellair v. State*, 6 Blackf. 104 (mo. set aside); *State v. Gibbs*, 39 Iowa, 318 (mo. set aside); *State v. Howard*, 10 Iowa, 101 (mo. set aside).

Even where the accused is in jail this applies. *State v. Hoyt*, 13 Minn. 128 (mo. set aside); *State v.*

functions. The municipal court had rightful jurisdiction and power to make an adjournment of the court. Having such power if the court erred in its exercise, it was error committed within the limits of its jurisdiction, error which it had jurisdiction to commit, and because thereof was not jurisdictional error however erroneous or irregular in fact, and is not assailable on habeas corpus.

Browne, Jurisdiction, § 104; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

The receipt of the indictment by the court and in its direction that it be recorded, the order of *capias*, the arraignment, the holding to bail and the precept of commitment in de-

fault of bail, severally operated in the law as an adjudication upon the legality of the indictment, however erroneous in fact such proceedings or adjudications may have been.

Wanser v. Howland, 10 Wis. 8; *State v. Sorenson*, 84 Wis. 27.

Th; indictment was legal and sufficient upon its face, and the acceptance thereof by the court in connection with its other said acts predicated upon its legal validity amounted to an adjudication that the proceedings antecedent to the indictment, and upon which it was founded, were legal and valid, and that the indictment was properly in and before the court.

Hinckley, 4 Minn. 345 (mo. set aside); *Maber v. State*, 3 Minn. 444 (mo. set aside); *Dobson v. State* (Ark.) July 8, 1891 (mo. new tr.); *Thomason v. State*, 2 Tex. App. 550 (pl. abate; mo. qu.); *Brown v. State*, 83 Tex. Crim. Rep. 119 (mo. set aside; mo. qu.).

And in Iowa an objection to the organization of a grand jury must be made before an indictment. *State v. Hinkle*, 6 Iowa, 890 (pl. abate.); *Dixon v. State*, 3 Iowa, 416 (pl. abate.).

Where the defendant was in court. *State v. Ruthven*, 53 Iowa, 121 (mo. set aside).

And under La. Act 44, of 1877, § 11, all objections to the array or venire must be made on the first day of the term. *State v. Simmons*, 43 La. Ann. 901 (mo. qu.).

So under Act of 1867. *State v. Canady*, 16 La. Ann. 141 (obj. on bond).

And under Ala. Code, § 8591, providing that objection to the drawing of grand jury must be made at the term, the court has discretion to allow it to be made at a subsequent time. *Russell v. State*, 33 Ala. 386 (Mo. ar.).

Where the organization or the array has been once questioned objection cannot afterwards be made in another form. *McClary v. State*, 76 Ind. 360 (pl. abate.); *Guykowski v. People*, 2 Ill. 476 (chal.).

And if objection is not taken to the organization of the grand jury it cannot be made in the supreme court for the first time. *Brantley v. State*, 13 Smedes & M. 468; *Fleming v. State*, 60 Miss. 424; *State v. Griffin*, 37 Mo. 608; *Wallace v. State*, 2 Lea, 29; *Sanders v. State*, 55 Ala. 188; *Tanner v. State*, 32 Ala. 1; *Bass v. State*, 37 Ala. 469.

And it will be presumed that a grand jury was legally organized. *State v. Dilworth*, 24 La. Ann. 216 (obj.); *State v. George*, Id. 261 (obj.); *State v. Taswell*, 30 La. Ann. 884 (obj.); *Wilson v. People*, 3 Colo. 325 (mo. new tr.; mo. ar.).

II. Writ; summons; officer.

a. Precept; venire.

The presumption is that a proper order for the venire was made, and the defendant must be diligent in making his objection or they will not avail. Substantial compliance with the statute is all that is necessary. There is some conflict of authorities as to the necessity of seal, but irregularities in matters of form or summons generally will not vitiate. The writ of venire must be served by a proper officer, but his qualifications need not appear on the process, and in Missouri an objection that the proper oath had not been taken by the sheriff is insufficient. The return may be amended.

The presumption will be that an order was made summoning a grand jury. *Robinson v. Com.* 88 Va. 900 (mo. qu.); *Bell v. State*, 42 Ind. 335 (mo. qu.); *State v. Standley*, 76 Iowa, 215 (mo. set aside); *State v. Cole*, 9 Humph. 625 (mo. ar.).

And objection that no order was made directing the summoning the grand jury should be made before they are sworn. *State v. Freese*, 30 Mo. App. 347 (pl. abate.).

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And before a plea of not guilty. *Curtis v. Com.* 87 Va. 559 (mo. qu.).

Want of precept is not available after plea to merits or verdict, and N. Y. Rev. Stat., 206, requiring a precept, is directory and not mandatory. *People v. Robinson*, 3 Park. Crim. Rep. 235; *People v. McCann*, 3 Park. Crim. Rep. 272 (mo. new tr.).

These cases overrule the dictum in *McGuire v. People*, 2 Park. Crim. Rep. 148, holding that the court in that case overlooked the distinction between a precept and a venire, and in the *McGuire* Case the question involved was as to petit jury.

This statute was also held merely directory in *People v. Cummings*, 3 Park. Crim. Rep. 343 (mo. new tr.).

Iowa Code 1873, § 244, requiring a precept to issue for talesmen only applies when the entire panel is absent, and does not apply where a part fails to appear. *State v. Miller*, 53 Iowa, 84, 154 (mo. qu.). *State v. Pierce*, 3 Iowa, 231 (pl. abate.).

Under Tenn Code, §§ 3933-4016, a writ of *venire facias* is not necessary where the judge directed the sheriff to summon a panel. *Boyd v. State*, 6 Coldw. 1 (obj.).

Where a verbal order for a venire was given to the clerk, the omission to issue a venire will not be allowed to prejudice the public. *United States v. Reed*, 2 Blatchf. 435-461 (mo. qu.).

And the same was said to be allowable in *White v. State*, 3 Helak. 333.

But under Neb. Code 1867, 664, providing for an order for summoning talesmen, a simple transfer from the petit jury list will invalidate. *Burley v. State*, 1 Neb. 335 (mo. qu.).

The cases of *United States v. Reed*, *supra*, and *United States v. Tallman*, 10 Blatchf. 31 (mo. qu.), hold that substantial compliance with the state statute is all that is necessary and that mere irregularities will not vitiate.

And in *Combs v. Com.* (Va.) June 23, 1898 (pl. abate.), it was held that a special grand jury may be summoned without a writ of venire, from a list furnished by the judge.

And the sheriff having copies of the jury list, which list was lost, could summon the grand jury without another order from the court. *Hudspeth v. State*, 50 Ark. 524 (mo. set aside).

But in *Chase v. State*, 30 N. J. L. 218 (mo. qu.), it was held that in the absence of statute grand jurors could only be summoned on precept issued out of court, and a grand jury summoned without such precept is invalid.

See also, as to precept, *People v. Cyphers*, 5 Park. Crim. Rep. 666; *Cyphers v. People*, 21 N. Y. 373.

b. Form.

Irregularities in matters of form of the writ of venire, precept, or summons will not invalidate the indictment under Miss. Code 1857, p. 499, providing that fraud is the only subject of challenge to array. *Nichols v. State*, 46 Miss. 224 (mo. qu.).

And the same was held where the writ was di-

Holton v. Burton, 78 Wis. 831; *State v. Benson*, *supra*.

The court at the time of the issuing of the warrant of commitment and at the time of said adjournment, had before it, and presented to it, the question of the regularity and sufficiency of the said indictment and of the grand jury proceedings antecedent thereto, and the question of adjournment, with the power, and resting under the duty, to act upon those questions. And what does it signify upon habeas corpus, whether the determination of those questions were erroneous or not?

Ex parte Wilson, 140 U. S. 595, 85 L. ed. 513, in connection with *Wanser v. Howland*,

People v. Liscomb, *Re Graham*, *Re Pfcuklik*, *Re French*, and *Re Schuster*, *supra*; *Graham v. Weeks*, 138 U. S. 461, 34 L. ed. 1051; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *People v. Martin*, 1 Park. Crim. Rep. 187; *Ex parte Springer*, 1 Utah, 314; *Ex parte Twohig*, 13 Nev. 302; *Ex parte Haymond*, 91 Cal. 545; *Re Betts*, 36 Neb. 282; *Ex parte Warris*, 28 Fla. 371; *Appendix*, 3 Hill, note 30, p. 659; *People v. Robinson*, 3 Park. Crim. Rep. 235.

Defects in the selection, organization, or constitution of the grand jury cannot be reached by habeas corpus where the indictment is regular and legally sufficient on its face.

rected to "any sheriff of the state of Alabama." *State v. Phillips*, 2 Ala. 297 (mo. ar.).

And surplusage in the writ as serving ("for the week") may be rejected. *Haves v. State*, 88 Ala. 37 (mo. qu.).

So an omission from the form of "citizens of M-county" will not invalidate. *State v. Alderson*, 10 Yerg. 523 (obj.).

Or where the writ is on the wrong blank and objection was not made before three months after they had adjourned. *Com. v. Salter*, 2 Pearson (Pa.) 461 (mo. qu.; chal.).

And one accused of crime cannot question the form of process in obtaining a jury in Texas, as the grounds to set aside the indictment are limited by the Texas Criminal Code, arta. 453-457, and this objection is not allowed. *West v. State*, 6 Tex. App. 455 (mo. ar.; mo. new tr.).

And an objection to want of official title of clerk of court will not invalidate as the court will take judicial notice of the title of its own officers. *State v. Cole*, 9 Humph. 636 (mo. ar.).

And the writ of venire may be issued under the signature of the judge without the attestation of the clerk, under Tenn. Act 1870, chap. 115, providing that the court may appoint grand jurors and cause them to be summoned. *White v. State*, 3 Heisk. 333 (mo. new tr.; mo. ar.).

But under an order to summon twenty-four persons as "trial" jurors, an indictment found by them should be set aside. *People v. Earnest*, 45 Cal. 29 (mo. set aside).

c. Seal.

There is some difference in practice as to the effect of absence of seal on the writ of venire, some states holding that want of seal will not invalidate. *Maher v. State*, 1 Port. (Ala.) 265, 26 Am. Dec. 379 (mo. qu.); *State v. Bradford*, 57 N. H. 188 (mo. qu.); *White v. Com.* 6 Binn. 179, 6 Am. Dec. 443 (exception); *Bennett v. State*, Mart. & Y. 133 (obj.).

And the Ohio supreme court has no jurisdiction to review the decision of the trial court, overruling a plea in abatement or motion to quash, made because the writ of venire was not under seal, as it is not for error of law occurring on the trial. *Wagner v. State*, 43 Ohio St. 537 (mo. qu.; pl. abate.).

Other states hold that the absence of the seal will invalidate if proper objection is made. *State v. Lightbody*, 38 Me. 200 (mo. qu.); *State v. Fleming*, 66 Me. 142, 22 Am. Rep. 553 (pl. abate.); *State v. Williams*, 1 Rich. L. 188 (mo. ar.); *State v. Dozier*, 2 Speers, L. 211 (mo. ar.).

d. Officer.

The service of the summons to impanel a grand jury by an unauthorized person will render the indictment invalid. *Bruner v. San Francisco City & County Super. Ct.* 92 Cal. 239 (writ prohibition); *Com. v. Graddy*, 4 Met. (Ky.) 223 (mo. qu.).

So where the venire was directed to the United States marshal for the "district of Louisiana" when

it should have been "eastern district of Louisiana" an exception to the array should be sustained. *United States v. Antz*, 4 Woods, C. C. 174 (mo. qu.).

e. Oath.

An objection that the proper oath had not been administered to the sheriff cannot be made in Missouri, by plea in abatement, or by motion in arrest. *State v. Welch*, 33 Mo. 33 (pl. abate.); *State v. Clifton*, 73 Mo. 430 (mo. ar.); *State v. Hart*, 66 Mo. 208 (mo. ar.).

And that the sheriff or constable did not indorse on the writ his qualification or oath of office will not invalidate. *State v. Clayton*, 11 Rich. L. 561 (mo. ar.; mo. new tr.); *Com. v. Moran*, 130 Mass. 281 (pl. abate.).

f. Summons; service; return.

Defects or irregularities in summoning the grand jurors, or appearance by them without service of the summons, will not invalidate the indictment. *Sylvester v. State*, 72 Ala. 201; *Newman v. State*, 14 Wis. 394 (pl. abate.); *State v. Mellor*, 13 R. L. 666 (pl. abate.).

And the same was held under Or. Stat., p. 184, § 179, providing that no challenge shall be made to the panel. *State v. Fitzhugh*, 2 Or. 227 (chal.).

And the same was held under Mo. Rev. Code 1845, p. 863, providing that no challenge to the array can be made unless a grand juror is a prosecuting witness, and Rev. Code 1845, title Jurors, providing for no exception for disability after the jury is sworn. *State v. Bleekley*, 18 Mo. 423 (pl. abate.).

And such objection cannot be made for the first time in the supreme court. *Shaw v. State*, 18 Ala. 549 (obj.).

But in *Nicholls v. State*, 5 N. J. L. 539 (mo. qu.), it was held that a grand jury summoned without process could not make a valid indictment.

And the same was held in *United States v. Antz*, 16 Fed. Rep. 119 (mo. qu.), under U. S. Rev. Stat., § 810, providing that no grand jury shall be summoned unless a venire was ordered to issue.

The sheriff may amend his return on the writ. *Com. v. Parker*, 2 Pick. 550 (mo. ar.); *State v. Bickey*, 9 N. J. L. 334 (mo. qu.); *Com. v. Chauncey*, 2 Astm. 30 (mo. qu.; mo. new tr.); *State v. Clough*, 49 Me. 573 (mo. qu.). See also *State v. Martin*, *infra*.

In *Gladden v. State*, 13 Fla. 623 (mo. qu.), it was held that objection to the return of grand jurors may be made in that state by a plea in abatement at any time, before pleading in bar.

But it is too late after verdict to object that a venire of forty had been returned, when the law only required thirty. *State v. McEntire*, 2 N. C. Law Repos. 237 (mo. ar.).

Where there is no return made on the precept requiring the sheriff to draw a grand jury the indictment was held invalid. *Baton v. Com.* 6 Binn. 447 (obj.).

See subhead "Drawing-Number," *infra*, IV. e.

Carpenter v. People, 64 N. Y. 433; *Dolan v. People*, Id. 435; *People v. Dolan*, 6 Hun, 233, affirmed 64 N. Y. 435; *Ex parte Springer*, *Ex parte Twotig*, *Ex parte Raymond*, *Re Betts*, and *Ex parte Warris*, *supra*.

Without the aid of the local statute, empowering the court to prolong the grand jury proceedings into the next term the court had the power to make the above stated adjournment, and so to prolong into the next term, the sittings of the grand jury and its unfinished inquests being made, and especially in the absence, as the fact is, of any existing prohibition of the statute against so doing?

State v. Leahy, 1 Wis. 258; *Wright v. North-*

western Union R. Co. 37 Wis. 391. And see *Tallman v. Truesdell*, 3 Wis. 443; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Mechanics Bank of Alexandria v. Withers*, 19 U. S. 6 Wheat. 106, 5 L. ed. 217; *Schrier v. Milwaukee, L. S. & W. R. Co.* 65 Wis. 457.

In the inferior English courts, anciently, in capital cases, if the jury did not agree before the departure of the justices into another county the sheriff was required to send them along with the justices in carts, upon their circuit, and the judge might take and record their verdict in a foreign county.

3 Bacon, Abr. 768 (G); *King v. Ledgingham*, 1 Vent. 97; 3 Bl. Com. 276.

g. Name.

A mistake in name of persons summoned as grand jurors will not invalidate their action. *McKee v. State*, 33 Ala. 33 (mo. qu.).

And the change of name of one of the grand jurors in the venire by the sheriff will not vitiate, under Ill. Crim. Code, § 411, providing that no indictment shall be quashed for disqualification of any grand juror, but it was said that it would be good grounds at common law. *McElhanon v. People*, 92 Ill. 369 (mo. qu.).

A plea in abatement should be sustained if the names of the jurors did not appear in the venire, and they had not been summoned under the original venire, or under the mode to supply deficiencies. *Rawles v. State*, 8 Medes & M. 599 (pl. abate.).

See subhead "Drawing-Name," *infra*, IV. f.

h. Time.

Some cases hold that a statute providing the limit within which a venire should be issued, or jury summoned, is directory and not mandatory. *Weeks v. State*, 31 Miss. 490 (obj.); *Johnson v. State*, 33 Miss. 368 (pl. abate.); *State v. Smith*, 67 Me. 323 (pl. abate.).

And the venire may be corrected to show the proper date. *Davis v. Com.* 39 Va. 132 (pl. abate.).

But in *Thorp v. People*, 3 Utah, 441 (chal.), it was held that the indictment by a grand jury, impaneled on a venire issued less than thirty days prior to the term was invalid where the statute was mandatory.

See subhead "Time and term," *infra*, V.

III. Excusing and completing panel.

a. Discharging and excusing from panel.

Generally the discharge of some of the grand jurors and filling their places will not invalidate, and it will be presumed that grand jurors were properly discharged. But if the grand jurors are not discharged the court cannot order others in their places, and it will be presumed that the court properly exercised the power to complete the panel. The irregularity in choosing from the class to fill the deficiency will generally not vitiate, as filling from bystanders, unless the statute is prohibitory and mandatory.

As to the number necessary or proper to act on an indictment, see *note* to *State v. Belvel*, *post*, 846.

The discharging of some of the original panel and supplying their places, or excusing some of the original panel, so long as the number is within the statutory limit, will not invalidate their action. *State v. Ward*, 60 Vt. 143 (mo. qu.; pl. abate.); *State v. Hunter*, 43 La. Ann. 157 (mo. qu.); *Epperson v. State*, 5 Lea, 291 (pl. abate.); *State v. Fee*, 19 Wis. 563 (mo. qu.); *United States v. Belvin*, 46 Fed. Rep. 381 (mo. qu.); *Blevins v. State*, 68 Ala. 62 (mo. qu.; pl. abate.); *State v. Hughes*, 58 Iowa, 165 (mo. qu.); *Beasley v. People*, 99 Ill. 571 (mo. qu.); *William v. State*, 69 Ga. 11 (pl. abate.); *People v. Colby*, 54 Cal. 87 (mo. set aside); *State v. Schieler* (Idaho) Apr. 30, 1894, (mo. set aside).

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And it will be presumed that grand jurors were discharged for proper cause. *State v. Wingate*, 4 Ind. 193 (mo. qu.); *Wallis v. State*, 54 Ark. 611 (mo. qu.).

But where the court had no power to order a drawing to fill the deficiency, the indictment was bad. *State v. Symonds*, 38 Me. 123 (mo. qu.; pl. abate.).

And where a court has no power to discharge a grand juror except to cause a grand juror to be sworn in place of one who is sick or absent, the excusing of a grand juror on account of his wife's sickness, and appointing a substitute, will invalidate the indictment. *Portis v. State*, 23 Miss. 573 (pl. abate.).

So where the judge informed the grand jury that they need not appear at the next term of court unless summoned again, and no summons was issued but talemens called to take the place of the regular panel who were absent, the indictment was invalid. *State v. Bowman*, 73 Iowa, 110 (mo. qu.).

And in *Smith v. State*, 19 Tex. App. 95 (obj.), it was held that the discharge of a member for the term being void would not affect the legal original organization; but in that case it did not appear but what the juror was discharged after the indictment was found.

b. Power to complete panel.

The power vested in court to complete the panel will be presumed to have been properly exercised. *Territory v. Barth* (Ariz.) Dec. 9, 1897 (mo. qu.); *Burrell v. State*, 129 Ind. 290 (pl. abate.); *Kessler v. State*, 50 Ind. 229 (mo. qu.).

And the proper exercise of the power given by statute to fill the vacancies will be sustained. *Wilson v. State*, 32 Tex. 112 (mo. ar.; mo. new tr.); *Com. v. Morton*, 12 Phila. 696 (mo. qu.); *Julian v. State*, 46 Ohio St. 511 (mo. for writ of error); *State v. Drogmond*, 55 Mo. 87 (pl. abate.); *Crimm v. Com.* 119 Mass. 323 (obj.); *State v. Best* (Iowa) Oct. 3, 1894 (chal.); *State v. Smith*, 83 Iowa, 178 (mo. set aside); *State v. Silvers*, 82 Iowa, 714 (mo. set aside); *State v. Gurlagh*, 78 Iowa, 141 (mo. set aside); *State v. Pierce*, 8 Iowa, 231 (pl. abate.).

And in *Denning v. State*, 23 Ark. 131 (pl. abate.), it was held that in the absence of statutory prohibition, the discharge of grand jurors and filling the vacancies will not invalidate the indictment.

So under Mississippi *Hut. & How. Statute Laws*, p. 496, § 67, providing no challenge to the array should be sustained or venire *facias* quashed except for partiality or corruption, and talemens were added to complete the grand jury, by order of the court, a plea to the venire was properly overruled. *King v. State*, 5 How. (Miss.) 730 (pl. abate.).

In Alabama, where the court can supply the deficiency when the original panel is below fifteen, under Ala. Code, § 4754, providing for such action, the court may order the panel to be filled when the

Owing to the increased demands of business, the several courts of Middlesex were empowered by statute to continue their sittings four days after the term, and by Statutes of George I., and II., to eight and fourteen days respectively, and by Statute of George IV., the sittings were, and remain, extended and unlimited during vacation after the terms.

3 Bl. Com. 57, note 22, and 78, note 11. See Sanborn & Berryman, Anno. Stat. § 2422a, p. 1898.

The twelve monthly terms of the municipal court constitute practically one continuous term, at which the continuity of the municipal court remains unbroken, and in which there is

no vacation within the express language of the organic act of that court, and in fact its business and proceedings.

See *Re Gannon*, 69 Cal. 541.

Where the grand jury has at least acted under color of lawful authority, the indictment found by them, as respects the public and third persons is legal and valid, as the act and proceeding of a *de facto* grand jury, and is as regular and valid as the presentment of a *de jure* grand jury.

Mechem, Pub. Off. § 819; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *People v. Petrea*, 92 N. Y. 128; *State v. Hughes*, 58 Iowa, 165; *State v. Beloe* (Iowa) Oct. 16, 1893, post, 846; *People v.*

number excused reduced the panel below fifteen. *Kilgore v. State*, 74 Ala. 1 (obj.).

But in that state it was held in *Peters v. State*, 96 Ala. 38 (mo. qu.), that the court cannot act unless a sufficient number are excused by the court to reduce the number below fifteen.

However in *Germolges v. State*, 99 Ala. 216 (pl. abate.), it was held that an order of court supplying vacant places without discharging those not appearing was no grounds for objection. The number appearing is not shown in the case and therefore it cannot be ascertained from that case whether it was intended to limit or distinguish *Peters v. State*, *supra*, as no reference is made to that case, but the decision was on the ground that under the statute no objection can be taken by plea or otherwise to an indictment on the ground that a grand juror is not legally qualified, drawn, or summoned, except that they were not drawn in the presence of proper officers.

If the panel is already sixteen in Alabama, the court cannot under the code add to the panel, if so the indictment will be void. *Boyd v. State*, 96 Ala. 33.

Under Alabama special statute limiting the grand jury to fifteen, if twelve were selected from the original venire and three more drawn to fill the vacancies, a motion to quash the venire should be overruled. *Roberts v. State*, 68 Ala. 156 and 515 (mo. qu.).

Under Ala. Acts 1884-85, p. 181, providing for drawing juries and supplying deficiencies in organization, not providing for subsequent deficiencies, it is held that Ala. Code, § 4754, providing the mode of supplying the deficiencies, applies. *Abernathy v. State*, 78 Ala. 411 (mo. qu.); *Donnelly v. State*, Id. 453 (mo. qu.).

And where in Alabama eighteen were summoned, fifteen appeared, seven were accepted, and the sheriff was ordered to summon twenty-two, twice the number required to complete the organization, and be only summoned twenty-one, and one of the original venire was excused, it was held that under Ala. Code, § 4899, providing that objection cannot be made to the formation of a grand jury except when they were not drawn in the presence of officers designated by law, or where there is an order of record relating to the organization contrary to law, a plea in abatement was properly overruled. *Billingslea v. State*, 68 Ala. 486 (pl. abate.); *Phillips v. State*, Id. 499 (pl. abate.).

c. Class.

An irregularity in choosing from the list or wheel to fill the deficiency instead of from the county or district, or *vice versa*, will generally not vitiate the action of the grand jury, where the statute is not prohibitory. *Jones v. State*, 15 Fla. 889 (pl. abate.); *Dukes v. State*, 14 Fla. 499 (pl. abate.); *United States v. Bagan*, 30 Fed. Rep. 608 (pl. abate.).

But in *Oliver v. State*, 66 Ala. 8 (pl. abate.), it was said that if the court erred in directing the class

from which the deficiency should be filled, it would be fatal, but if the sheriff erred it would not vitiate.

Where the talesmen have been summoned from the bystanders, or from a list made out by the sheriff, the proceedings are valid in absence of a prohibitory statute or under a permissive one. *State v. Cameron*, 2 Chand. (Wis.) 172 (chal.); *Johnston v. State*, 7 Smedes & M. 58 (mo. qu.); *Dowling v. State*, 5 Smedes & M. 664 (mo. new tr.); *Jim v. Territory*, 1 Wash. Terr. 68 (mo. qu.; mo. ar.); *Runnels v. State*, 28 Ark. 121 (mo. set aside); *Lowrance v. State*, 4 Yerg. 145 (mo. arrest); *Fletcher v. People*, 81 Ill. 116 (obj.).

Where the clerk substituted four names from the list instead of others disqualified, and the sheriff amended his return to show that they were not on the original list, a plea in abatement was properly overruled. *State v. Martin*, 38 W. Va. 568 (pl. abate.).

But where the statute is prohibitory or mandatory, and the deficiency is supplied from the bystanders, the indictment is invalid. *Couch v. State*, 68 Ala. 168 (mo. qu.); *Ulmer v. State*, 61 Ala. 206 (mo. qu.); *Finley v. State*, Id. 201 (mo. ar.).

And in *Montgomery v. State*, 3 Kan. 263 (mo. ar.), this was also said to be error in organization, but the accused must act promptly or the error will be waived.

Under Ala. Code, § 4390, providing that grand jurors may be householders or freeholders, and section 4393, providing for twice the number necessary to complete the panel, it was error to order only two householders and freeholders summoned, where two were needed. *Fowler v. State*, 100 Ala. 96 (obj.).

So an order limiting a talesman to registered voters would invalidate the indictment under such statute. *Scott v. State*, 68 Ala. 59 (mo. ar.).

But an order under such a statute to summon "eight qualified persons" would be valid. *Stewart v. State*, 98 Ala. 70 (mo. qu.).

And an order to summon a sufficient number of "good and lawful citizens possessing the qualifications specified in the statute of Alabama" is valid. *Yancy v. State*, 68 Ala. 141 (dem.).

IV. Drawing.

a. Irregularities.

Mere irregularity in drawing will generally not invalidate; and the failure to certify the lists will not render the indictment invalid; but some of the cases decide this on the question of practice and pleading.

Irregularity in the mode or manner of drawing will generally not affect the indictment unless the statute is mandatory. Some of the decisions, however, are made upon the question of time and mode of objection.

If the statute requires the notice of the drawing to be given the failure to give such notice will invalidate the grand jury.

Unless the statute is mandatory an objection that

Fitzpatrick, 66 How. Pr. 14; *Carpenter v. People*, 64 N. Y. 488; *Dolan v. People*, Id. 485; *People v. Dolan*, 6 Hun. 232; *State v. McMartin*, 42 Minn. 80; *Curtin v. Barton*, 139 N. Y. 505; *Ex parte Haymond*, 91 Cal. 545; *Re Gannon*, *supra*; *Bruner v. San Francisco City & County Super. Ct.* 92 Cal. 239; *State v. Brown*, 12 Minn. 545; *People v. Southwell*, 46 Cal. 141.

Several of the Wisconsin cases are so similar in facts to the case at bar as to render them specially in point and their doctrine applicable to and controlling in this case.

Re Boyle's Petition, 9 Wis. 264; *Re Burke*, 76 Wis. 357; *State v. Williams*, 5 Wis. 303, 63 Am. Dec. 65.

a greater or less number was drawn from which the grand jury was made is insufficient, and an objection allowed by statute must be made in the statutory way.

Clerical misprision in the names upon the list from which the grand jurors are drawn will not affect their action and objection to the change of names must be presented as required by statute.

The drawing must be made by an authorized person, and has been sanctioned in but few cases when made by deputy. The title of office of the person drawing cannot be investigated collaterally by objection to the drawing. Generally an objection that the officer had not taken the statutory oath will prevail, if made in time, and in proper manner.

There is some conflict of authority as to the effect of the absence of one of the officers, where several are to participate in the drawing, some holding that such absence is an irregularity merely. In Alabama, Indiana, and Utah the statutes are mandatory. To vitiate a drawing on account of fraud, it must be clearly shown.

The question of power to draw depends on local statutes.

Where there is a substantial compliance with the statute generally, mere irregularities in the drawing and selecting the grand jury will not invalidate their action. *Downs v. State*, 78 Md. 123 (pl. abate.); *Com. v. Brown*, 121 Mass. 69 (pl. abate.); *State v. Sandoz*, 37 La. Ann. 376 (mo. qu.); *Ex parte McCoy*, 64 Ala. 201 (mo. qu.; chal.).

But where the law is mandatory and the grand jury is not selected as required by law, an indictment is invalid. *State v. Williams*, 5 Port. (Ala.) 130 (pl. abate.).

b. Certificate.

Where there has been substantial compliance with the law, an indictment should not be set aside for failure to certify the list, or that they were not certified at the exact time. *State v. Ansaleme*, 15 Iowa, 44 (mo. set aside); *State v. Carney*, 20 Iowa, 82 (mo. set aside); *Crawford v. State*, 81 Ga. 708 (pl. abate.); *Brassfield v. State*, 55 Ark. 556 (mo. qu.; cert.); *Mikell v. State*, 62 Ga. 368 (pl. abate.).

Other cases hold the same, as a question of practice as that a motion in arrest cannot be based upon matters not in the record. *State v. Conway*, 23 Minn. 291 (mo. ar.).

So under Minn. Gen. Laws 1878, chaps. 109, 110, providing a motion to set aside must be made at the time of arraignment, such motion cannot be made after arraignment to set aside for lack of certificate in list. *State v. Schumm*, 47 Minn. 373 (mo. set aside); *State v. Dick*, Id. 375 (mo. set aside).

So under Minn. Gen. Laws 1876-78, chap. 107, providing for challenge, that the requisite number of ballots was not drawn from the grand jury box, the challenge because the list was not certified cannot be made by motion to quash. *State v. Greenman*, 23 Minn. 209 (mo. qu.).

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The following cases sustain the proposition that the grand jury was a *de facto* grand jury at least, and its acts valid.

Dean v. Gleason, 16 Wis. 1; *State v. Bloom*, 17 Wis. 522; *Laver v. McGladden*, 28 Wis. 864; *Sauerharing v. Iron Ridge & M. R. Co.* 25 Wis. 447; *State v. Barlett*, 35 Wis. 287; *State v. Goldstucker*, 40 Wis. 124; *Sprague v. Brown*, 40 Wis. 612; *Chicago & N. W. R. Co. v. Langlade County*, 56 Wis. 614; *Cole v. Black River Falls*, 57 Wis. 110; *Yorty v. Paine*, 63 Wis. 154; *Baker v. State*, 69 Wis. 32; *Baker v. State*, 80 Wis. 416; *State v. Cunningham*, 15 L. R. A. 561, 81 Wis. 440; *State v. Oates*, 86 Wis. 634.

So under Texas Code, art. 377, the time for challenge is limited to be before the grand jury is impaneled, and where the list is not certified in a plea in abatement that the accused was in jail will not allow the objection to be made at any other time than that prescribed. *Kemp v. State*, 11 Tex. App. 174 (pl. abate.).

But under a statute requiring the list to be made out and delivered to the clerk thirty days prior to the term, a plea in abatement, that the county commissioner did not deliver the attested copy of names selected was said to be a good plea. *United States v. Cropper*, 1 Morris (Iowa) 190 (pl. abate.).

See further subhead, "Time and term," *infra*, V. And the certificate is *prima facie* evidence that the board selected the grand jury as required by statute. *Manlon v. People*, 29 Ill. App. 533 (mo. qu.).

a. Manner.

1. Mode.

Where the judge selected the venire under Tenn. Code, § 4791, instead of appointing them under the provisions of the old code, the action was valid. *Turner v. State*, 89 Tenn. 547 (obj.).

The objection that the grand jury was drawn by a boy of improper age is too late, when made by a motion for new trial. *State v. Underwood*, 28 N. C. 96 (mo. new tr.; mo. ar.).

That the grand jury was not drawn by lot is insufficient as a plea in abatement where the manner of selecting is not mandatory. *Box v. State*, 34 Miss. 614 (pl. abate.).

But where they were not selected from a box from the list required by statute, the indictment will be invalid. *Stokes v. State*, 24 Miss. 621 (pl. abate.).

See further next subhead, "Machinery."

And where the jury was drawn by lot instead of being selected as required by statute, the indictment is invalid. *State v. Clarkson*, 3 Ala. 373 (pl. abate.).

The objection that the grand jury was not selected by lot may be made after the first day of the term, where the crime was committed on the first day of the term. *State v. Texada*, 19 La. Ann. 436 (dem.).

And in Nevada the mode of selecting the grand jury is not a statutory ground for setting aside an indictment, especially after a plea not guilty. *State v. Collyer*, 17 Nev. 275 (mo. qu.).

2. Machinery.

The irregularity in drawing the grand jurors from cards presented to the sheriff by the city clerk instead of from the regular box will not invalidate their action. *State v. Champeau*, 52 Vt. 313, 36 Am. Rep. 754 (pl. abate.). But see *Stokes v. State*, 24 Miss. 621 (pl. abate.).

And returning some of the names to the box and drawing others so as to apportion the jurors in the county will not invalidate, and objection must be

Mr. W. C. Williams, for defendant in error:

Jurisdiction of the person of the defendant can only be acquired by the issue and service of legal process.

The court had no jurisdiction to issue such process in this case, except upon an indictment found and returned into court by a grand jury.

There was no grand jury which could find and return this indictment, it had no legal existence, and any pretended indictment returned by it had no more force or validity "than if it had been found by the chamber of commerce of the city of Milwaukee, or any other equally respectable body of men."

Therefore, the process upon which he was arrested and detained was absolutely void and the court never acquired jurisdiction of the defendant.

It accordingly follows that there was no power in the court to arraign or try the defendant or hold him to bail or commit him for failure to give bail for his appearance for trial.

United States v. Richardson, 28 Fed. Rep. 61; *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857; *State v. Sloan*, 65 Wis. 647.

In the strongest light possible the action of the municipal court amounted to nothing more than the assumption by it, as a matter of law, that it had jurisdiction to issue its process, when in fact it had none, and "its judgment

by plea in abatement on arraignment, and not by motion to quash. *State v. Martin*, 88 N. C. 672 (mo. qu.)

And drawing from an open hat instead of the box will not vitiate unless the accused is prejudiced. *State v. Gillick*, 7 Iowa, 297 (mo. qu.)

And objection that the name of a grand jury was not in the box is insufficient where his name was on the minutes of the court records as having been drawn. *Cross v. State*, 64 Ga. 443 (obj.).

Under Tennessee Act 1779 (Car. & Nich.) 421, providing for drawing the names out of a box where more than thirteen are summoned, if less than the number required are in attendance their names need not be placed in the box and drawn out again. *Workman v. State*, 4 Sneed, 426 (pl. abate.).

The indictment is not invalid where the commissioners broke open the box on account of the key being lost. *Long v. State* (Ala.) May 14, 1894 (mo. qu.).

Where it was claimed that the wheel was not sealed as required by law and the keys in the custody of the sheriff, and the box not in the custody of the commissioners, the objection was insufficient as the wheel was in the commissioners' office in the vault, and was sealed. *Rolland v. Com.* 82 Pa. 306 (chal. array).

But if only one seal was used the indictment should be quashed under Pa. Act April 13, 1884, providing that the sheriff and commissioners shall seal the wheel. *Brown v. Com.* 78 Pa. 321, 18 Am. Rep. 740 (chal. array; mo. qu.).

d. Notice.

The failure to give notice of the drawing as required by statute will invalidate the drawing. *State v. Clough*, 49 Me. 573 (mo. qu.).

And where the selection was by the sheriff and not made publicly by the judge as required by the statute, the indictment will be void. *Avirett v. State*, 76 Md. 510 (pl. abate.).

But notice is immaterial where the proper officers are present. *People v. Gallagher*, 55 Cal. 463 (mo. set aside).

e. Number.

Objection to the grand jury because the number from which they were drawn exceeded or was less than the statutory number, must be made as provided by statute in regard to the manner of objecting, and so where a challenge was required a plea in abatement did not avail. *Huling v. State*, 17 Ohio St. 583 (pl. abate.).

Nor a motion to quash. *People v. Harriot*, 3 Park. Crim. Rep. 112 (mo. qu.).

A motion in arrest as a plea of not guilty waives objections. *Green v. State*, 23 Miss. 697 (mo. ar.).

And that the list contained more than the statutory number was not a good objection where after erasures the proper number remained. *Keech v. State*, 15 Fla. 501 (pl. abate.).

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And if the extra number was struck off before the grand jury was sworn, there is no cause for challenge. *State v. Knight*, 19 Iowa, 94 (chal.).

And N. C. Code, § 1727, providing that only thirty-six names shall be drawn, is directory. *State v. Watson*, 104 N. C. 735 (mo. qu.).

And where the statute did not require 300 names of qualified jurors that three were ineligible and three were dead did not affect the drawing. *United States v. Rondeau*, 16 Fed. Rep. 109 (pl. abate.).

And the Utah Act providing that eighteen only shall be summoned from which a grand jury of fifteen shall be made was repealed by the Poland bill. *People v. Lee*, 2 Utah, 441 (exception).

But Hutchinson Code, section 883, providing that thirty-six should be drawn, was mandatory, and drawing forty would invalidate. *Leathers v. State*, 28 Miss. 73 (pl. abate.).

See also, as to number, *State v. McEntire*, 2 N. C. Law Repos. 287; *McKee v. State*, 89 Ala. 82.

As to number acting on panel, see note to *State v. Belvel*, post, 846.

f. Name.

The variance or clerical mispision in writing a name of the grand jurors will not avoid the indictment. *State v. Mahan*, 12 Tex. 233 (pl. abate.); *Ramsey v. State*, 83 Ala. 31 (pl. abate.); *Boles v. State*, 56 Ark. 35 (mo. set aside); *Hayes v. State*, 56 Ga. 35 (mo. qu.); *Turner v. State*, 78 Ga. 174 (pl. abate.); *State v. Norton*, 23 N. J. L. 83 (mo. qu.); *State v. Mahan*, 12 Tex. 233 (pl. abate.).

And Texas Paschall's Dig., art. 2831, providing for challenge when the list was not selected by the county court and for corruption controls as to challenge. *Green v. State*, 1 Tex. App. 82 (chal. to array).

And that the name did not appear by any list prepared by the county court is not a good plea in abatement. *Sayle v. State*, 8 Tex. 120 (pl. abate.).

And the use of some of the names which had been dropped from the list is not ground for any objection, where they were competent persons. *Williams v. State*, 55 Ga. 391 (mo. qu.).

And a motion to set aside an indictment because one of the names was not on the list should be overruled as objection should be made by challenge and it does not appear but what the error was corrected. *State v. Hart*, 29 Iowa, 268 (mo. set aside).

And the presumption is that only names taken from the lists were used. *State v. De Bord*, 88 Iowa, 103 (mo. qu.).

And that the names were not written in full before drawn cannot be reached by motion in arrest in Alabama, but must be by plea in abatement. *State v. Stedman*, 7 Port. (Ala.) 495 (mo. ar.).

g. Officers.

Where the statute is mandatory and specific, the act of drawing cannot be made by any other person than those specified, or in such a case cannot

may be questioned anywhere for want of jurisdiction."

This we do in this case by habeas corpus. Spelling, Extraordinary Relief, §§ 1202, 1208, 1209, 1213, 1216.

If there was any question as to whether this was a *de facto* grand jury or not, it was a question which could properly be inquired into upon habeas corpus.

Re Boyle's Petition, 9 Wis. 267.

An indictment found by a grand jury at a term of court not authorized by law is void.

Davis v. State, 46 Ala. 80; *Com. v. Bannon*, 97 Mass. 218; *Finnegan v. State*, 57 Ga. 427. See also *State v. McNamara*, 3 Nev. 70; *O'Byrnes v. State*, 51 Ala. 25; *Miller v. State*, 33 Miss. 856, 69 Am. Dec. 351.

Mr. Hugh Ryan also for defendant in error.

Orton, Ch. J., delivered the opinion of the court:

The same questions being in both these two cases, they will be considered and disposed of together. They are brought before this court by a common-law writ of certiorari, to review the proceedings in habeas corpus of the judge of the circuit court of Milwaukee county, by which the defendants in error were discharged from imprisonment. The pleadings in the habeas corpus and the certiorari proceedings show the following facts: On the last day of the October term of the municipal court of Milwaukee county, 1893, the grand jury of said court found and returned true bills of indictment against the defendants and four other persons, under section 4541, Rev. Stat., for having fraudulently received deposits as directors of the Plankinton Bank of Milwaukee,

be by deputy. *State v. McNamara*, 3 Nev. 70 (mo. set aside); *Dutell v. State*, 41 G. Greene, 126 (mo. qu.); *State v. Hale*, 44 Iowa, 96 (mo. set aside; mo. arrest); ——— v. ———, 3 N. J. L. J. 153 (Somerset Oyer & Terminer Ct.) (obj.; mo. qu.); *Clare v. State*, 30 Md. 164 (pl. abate.); *State v. Brandt*, 41 Iowa, 593 (mo. set aside); *Cochran v. State*, 39 Ala. 40 (mo. qu.); *State v. Williams*, 5 Port. (Ala.) 130 (pl. abate.); *Stokes v. State*, 24 Miss. 621 (pl. abate.).

And where one not a jury commissioner interfered and wrote the name of one of the jury, it will avoid the indictment. *State v. Clavery*, 43 La. Ann. 1138 (mo. qu.); *State v. Taylor*, 43 La. Ann. 1131 (mo. qu.).

And where the sheriff was ordered to summon certain named persons and the statute required the sheriff to select, the indictment was invalid. *Pruit v. People*, 5 Neb. 377 (mo. qu.).

But an objection is invalid made on the ground that the drawing was by deputy, where he had the power of his principal. *Willingham v. State*, 21 Fla. 761 (pl. abate.).

But 21 U. S. Stat. at L. 43, as to politics of the commissioner, is directory and not mandatory. *United States v. Chaires*, 40 Fed. Rep. 330 (pl. abate.).

And in a similar case it was held that the evidence did not sustain such an objection. *United States v. Paxton*, 40 Fed. Rep. 136 (chal.; mo. qu.).

And the federal courts could have the state authorities summon the grand jury. *United States v. Hanson*, 23 Fed. Rep. 74 (pl. abate.); *United States v. Richardson*, Id. 61 (pl. abate.).

And a plea in abatement that the names were not drawn by a clerk is insufficient under U. S. Rev. Stat., § 1035, providing that defects in form not prejudicial shall not affect an indictment. *United States v. Tuska*, 14 Blatchf. 5 (pl. abate.).

And a challenge to the array on the ground that the commissioners were not elective officers as those appointed by the state but were government officials and were partial, cannot be made after the grand jury is organized. *United States v. Butler*, 1 Hughes, C. C. 512 (chal.; mo. qu.).

An objection cannot be made to the supervisors after the grand jury is charged, under a statute making the impanelling conclusive evidence of competency. *Durrah v. State*, 44 Miss. 789 (pl. abate.).

An objection to the sheriff must be made before trial. *State v. Douglass*, 63 N. C. 500 (mo. ar.; mo. new tr.).

So a plea in abatement that one of the grand jurors was not drawn by councilmen is bad where they should be drawn by aldermen. *State v. Dugan*, 15 B. L. 412 (pl. abate.).

So an objection to the qualification of the jury commissioners is too late when made on motion

for a new trial. *State v. Washington*, 33 La. Ann. 336 (mo. new tr.).

And an objection to the relationship of one of the commissioners and the murdered man in a homicide case will not affect the drawing. *State v. McNinch*, 13 S. C. 89 (mo. qu.). See *State v. McQuaige*, 58 C. N. 8. 429 (chal.).

The right of office, or constitutionality of act giving authority to the officer, cannot be collaterally attacked by objecting to the drawing of the grand jurors. *People v. Roberts*, 6 Cal. 214 (chal.); *Dolan v. People*, 6 Hun, 433, 64 N. Y. 435 (pl. abate.); *Carpenter v. People*, 64 N. Y. 433 (chal.).

And Louisiana Act 44 of 1877, § 11, providing that objections shall be made on the first day of the term, is mandatory, unless good reason is given for delay in objecting to the qualification of commissioners. *State v. Sterling*, 41 La. Ann. 679 (mo. qu.).

b. Oath to officer.

If the accused does not wait too long, and is not in fault in delaying, an objection that the statutory oath was not administered to the jury commissioner, will invalidate their action. *State v. Strickland*, 41 La. Ann. 513 (mo. qu.); *State v. Thompson*, 32 La. Ann. 379 (mo. set aside); *State v. Williams*, 30 La. Ann. 1023 (mo. new tr.); *State v. Bradley*, 33 La. Ann. 403 (mo. qu.); *State v. Hinson*, 42 La. Ann. 941 (mo. qu.); *State v. Oliver*, Id. 943 (mo. qu.); *State v. Mima*, Id. 944 (mo. qu.).

If the officer qualifies after the drawing and then acts over again and then uses the same names it will not validate. *State v. Vance*, 31 La. Ann. 336 (mo. qu.).

But in *Kendall v. Com.* 14 Ky. L. Rep. 15 (mo. qu.), an indictment was sustained against the same objection on the ground that Ky. Crim. Code, § 231, prevents a review of motions of this kind.

And in Louisiana the clerk of the court need not take the jury commissioner's oath but once. *State v. McRevels*, 31 La. Ann. 337 (mo. set aside; other indictments).

And the Louisiana Act of 1877 does not require the commissioner's oath to be recorded. *State v. Stewart*, 45 La. Ann. 1164 (mo. qu.).

Or appointments to be on the minute book in the court where it is on record at the clerk's office. *State v. Hall*, 44 La. Ann. 976 (mo. new tr.).

And the motion for a new trial for want of commissioner's oath is not a proper objection. *State v. Tiedale*, 41 La. Ann. 338 (mo. new tr.).

1. Officers' presence.

Courts of some states hold that the absence of one of the officers required to take part in the drawing, will be only an irregularity which will not vitiate the drawing. *Blair v. State*, 5 Ohio C. Ct.

knowing at the time said bank to be insolvent. The defendants were detained by virtue of commitments on failure to enter into recognizance, issued out of said municipal court, after their arraignment and pleas of not guilty. There was no grand jury summoned, selected, or impaneled for the said October term of said court, but the grand jury acting for said term, and which found said indictments, was the same grand jury duly impaneled for said court, at and for the previous September term thereof. No order was made by said court directing a grand jury for said October term, and no grand jury was summoned for said term. The said grand jury was ordered, summoned, and impaneled for said September term by an order dated August 8, 1893; and the said grand jury convened at the September term, on September 12, 1893, and entered upon the investi-

gation leading to said indictments, but the same was not concluded during the said September term, and for such reason they continued their sittings over and into the said October term, and until the last day of said term, when the said indictments were found, and duly returned. On the last day of the September term the said court adjourned to October 2, 1893, which was the first day of the October term. The same grand jury found and returned several other indictments and against other persons during said October term. On these facts the learned judge of the circuit court discharged the defendants, holding that said indictments were void, and that the said municipal court had no jurisdiction, therefore, to issue the writs for the arrest or the commitments for the detention of the defendants. I say that this was the ground upon

Rep. 496 (pl. abate.); *People v. Rodriguez*, 10 Cal. 60 (chal.); *Stevenson v. State*, 69 Ga. 68 (mo. ar.; but should be pleaded in abatement).

And in *Levy v. Wilson*, 69 Cal. 105 (prohibition), where the presiding judge was not present when his order for the drawing was changed, but was present at the drawing, the indictment was sustained.

Under Louisiana Act 44 of 1877, requiring objections for defects in drawing to be made on the first day of the term, an objection on account of the absence of a person required to be present at the drawing will be too late. *State v. Leftwich*, 46 La. Ann. 1194 (mo. qu.).

And in Alabama an objection for absence of officers must be by plea in abatement. *Preston v. State*, 63 Ala. 127 (obj.).

But in the same state it was held that on such an objection oral evidence could not contradict the record. *State v. Allen*, 1 Ala. 443 (pl. abate.).

But under Louisiana Act 44 of 1877, requiring a drawing of the jury, the clerk of the commissioners must be present or the indictment will be invalid. *State v. Conway*, 35 La. Ann. 360 (mo. qu.).

And under Utah Act, Jan. 21, 1889, providing for the drawing, the statute must be complied with and a plea in abatement that the officer did not, in connection with the clerk, draw the jury from the box as required by law, but that six were taken as talesmen from the bystanders, is a good plea. *Brannigan v. People*, 8 Utah, 488 (pl. abate.).

And under Ind. Const., art. 5, § 2, providing that the associate judges shall not hold the court in capital cases, and under a provision requiring the presence of the president of the circuit court, an indictment cannot be found by the grand jury, impaneled in the absence of the president. *Cook v. State*, 7 Blackf. 165 (mo. ar.; mo. new tr.).

And under Ala. Code, section 4890, requiring the jurors to be drawn in the presence of officers, the false impersonation of a juror by another is fatal to an indictment. *Nixon v. State*, 68 Ala. 536 (mo. qu.; pl. abate.).

J. Fraud.

Where one of the grand jurors requested the deputy sheriff to place him on the jury, but no corruption is shown, the indictment will not be invalid. *Com. v. Thompson*, 4 Leigh, 667, 26 Am. Dec. 339 (pl. abate.).

And where the grand jury asked for another drawing in order that they might have a stenographer, and the second person drawn out of one hundred and three names is the only man wanted who was a stenographer, and had been employed to prosecute another man who was indicted and no prejudice is shown to the accused, the indictment

was valid. *People v. Lauder*, 83 Mich. 109 (pl. abate.).

And a plea in abatement that one of the grand jurors was placed on the jury by reason of having persuaded others not to attend, is insufficient in not showing that those who did not attend were legally drawn. *State v. Mead*, 15 R. I. 416 (pl. abate.).

And a motion to set aside the indictment because two jury commissioners procured themselves to be made members of the grand jury, is not decided, as it does not appear but that such facts did not exist, nor does it appear to have been prejudicial. *Williams v. State* (Ark.) June 27, 1891 (mo. set aside).

And while malicious misconduct on the part of the sheriff in selecting the jury would be sufficient to quash the indictment, in New Jersey it would not be a good plea in abatement. *Gibbs v. State*, 45 N. J. L. 379, 46 Am. Rep. 728 (pl. abate.).

K. Power to draw.

Where the drawing took place under the old statute before the new act took effect, it was held that the old law controlled. *Re Tillery*, 43 Kan. 128 (hab. corp.).

And an objection on the ground of unconstitutionality of the act as being local is a challenge to the array and N. Y. Code Crim. Proc., § 238, forbids any challenge to the panel or the array. *People v. Fitzpatrick*, 1 N. Y. Crim. Rep. 425, 30 Hun, 499 (mo. set aside).

And under N. Y. Crim. Code, § 235, providing that objections to the matters of form in the indictment that are not prejudicial shall be disregarded, and section 323, prohibiting a challenge to the panel, a plea that the grand jurors were drawn under an act unconstitutional because local, is insufficient and the motion to set aside or quash is not given for any other causes in section 313. *People v. Petrea*, 22 N. Y. 122, 65 How. Pr. 69 (pl. abate.).

This case in effect overrules *People v. Duff*, 65 How. Pr. 365, 1 N. Y. Crim. Rep. 307, but does not refer to the same.

And Ohio Rev. Stat., § 5171, controls as to the impaneling of grand jurors, and section 5167 applies only to petit jurors. *Julian v. State*, 46 Ohio St. 511 (mo. writ error).

And where the United States courts in Indian Territory had no power to impanel the grand jury a prisoner should be discharged on habeas corpus. *Ex parte Farley*, 40 Fed. Rep. 66.

For "time," see subhead, "*Time and term*," *infra*.

V.

V. Time and term.

a. Adjournment.

The case of *STATE v. NOYES* was a collateral at-

which the defendants were discharged, because the want of jurisdiction in the municipal court was the only ground upon which the defendants could have been discharged on habeas corpus. Although this is made a question on this hearing, it is no longer an open question in this court. It has been repeatedly decided by this court that nothing less than jurisdictional defects in the proceedings can be considered, or justify a discharge of the prisoner on habeas corpus, for errors and irregularities which do not go to the jurisdiction of the court may be inquired of on motion, appeal, or writ of error. The last paragraph of section 3428, Rev. Stat., provides:

"But no such court or officer on the return

of any such writ [habeas corpus] shall have the power to inquire into the legality or justice of any judgment, order, or execution," etc. This is a limitation on the power of a judge or court to inquire of nothing less than jurisdictional defects in the proceedings on which the imprisonment is based. *Mr. Justice Taylor*, in *State v. Sloan*, 65 Wis. 647, so held after an examination of the previous cases in this court, and cited *People v. Liscomb*, 60 N. Y. 571-604, 19 Am. Rep. 211; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *Ex parte Gibson*, 31 Cal. 628, 91 Am. Dec. 546; *Hurd, Habeas Corpus*, 327; *Re Perry*, 30 Wis. 268; *Re Orandall's Petition*, 34 Wis. 177; *Re Semler's Petition*, 41 Wis. 517; *Hauser v. State*, 33

tack by habeas corpus on an indictment found by a grand jury convened for the September term, but which acted at the October term to which the court had adjourned. Although the court discusses *de facto* grand juries, the decision is on the ground of collateral attack by habeas corpus, and the indictment was sustained as against such an attack. Irregularities in organization will not invalidate on a collateral attack. See subhead, L., "*Pleading and practice generally*;" also rulings as to mode of attack for specific objections throughout the note.

Indictments found by grand juries at adjourned terms have been uniformly sustained.

The time during the term at which the grand jury shall be organized is not considered mandatory, but is otherwise in Arkansas. The term, however, must be a legal term, and objections to the action of grand juries, on account of time of convening, must be specific and according to statute. Under some statutes providing limited periods to act, as certain week or so many days in a month, they may act during different months. And if the statute is not mandatory limiting the time within which they shall be selected, an objection for that cause will not prevail.

See further as to "time," subhead "*Writ; time*," *supra*, II., h., and *United States v. Cropper*, 1 Morris (Iowa) 190 (pl. abate.).

See also next subheads, "*Reconvening*;" "*Special term*;" "*Special grand jury*."

That the grand jury was adjourned with the court to the adjourned term or was convened and impealed at an adjourned term in the absence of prohibitory statute will not invalidate their action. *Ulmer v. State*, 14 Ind. 52 (mo. qu.); *Com. v. Read*, Thacher Crim. Cas. 180 (mo. ar.); *State v. Davis*, 23 Minn. 423 (dem.); *State v. Sweeney*, 68 Mo. 86 (mo. ar. does not show adj. gr. jur. at adjourned term); *People v. Sheriff of Chautauqua*, 11 N. Y. Civ. Proc. Rep. 172 (ha. corp.); *Travis v. Com.* 106 Pa. 567 (mo. qu.; mo. ar.).

See also for adjournment, *Sharp v. State*, 2 Iowa, 454, *infra*, V., c.; *Harper v. State*, 42 Ind. 405, *infra*, V., d.

b. First day; first week; first term.

If the statute is not mandatory that the grand jury shall be organized on the first day of the term it may be organized on a subsequent day of the term. *Jackson v. State* (Ala.) Apr. 11, 1894 (obj.); *State v. Dillard*, 85 La. Ann. 1049 (mo. qu.); *State v. Pate*, 40 La. Ann. 748 (mo. qu.).

And the same applies in regard to the first week of the term. *Perkins v. State*, 92 Ala. 68 (mo. qu.).

But under Ark. Dig., 98, providing that the county court shall at the first term select a grand jury, a plea in abatement that the same was selected at another term should be sustained. *Wilburn v. State*, 21 Ark. 198 (pl. abate.).

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c. Legal term.

If the term at which the grand jury was organized is not a legal term as required by statute the indictment is invalid. *Finnegan v. State* 57 Ga. 423 (pl. abate.); *Davis v. State*, 46 Ala. 80 (mo. qu.).

But on an objection that the indictment was not found at a legal term the question whether it was an adjournment or special term is immaterial after verdict. *Sharp v. State*, 2 Iowa, 454 (mo. ar.).

A plea that the grand jury was selected on the 6th of May, which plea did not negative the fact that this was not in the May term, is insufficient. *State v. Newer*, 7 Blackf. 307 (pl. abate.).

d. Time limited.

Under Indiana Act 1865, S.S. 156, providing that a grand jury should not sit more than ten days in each month, a plea in abatement which fails to allege that the grand jury had been in session in the month of the indictment more than ten days prior thereto, is bad. *Clem v. State*, 33 Ind. 418. (pl. abate.).

And under such a statute the grand jury may sit in different months at an adjournment session. *Harper v. State*, 42 Ind. 405 (mo. qu.; pl. abate.).

And the objection that a different grand jury was required for separate weeks is not sufficient under Louisiana Act 44 of 1877, § 5, 6, providing that the grand jury shall serve until discharged. *State v. Bennett*, 45 La. Ann. 54 (mo. qu.; mo. ar.).

e. Prior to term.

Where the statute is not mandatory as to the grand jury being selected prior to the term, or mandatory limiting the time prior to the term in which it shall be selected, the action of a grand jury selected during the term or prior thereto will be valid. *Mackey v. People*, 2 Colo. 13; (chal.); *State v. Smith*, 38 S. C. 27 (mo. qu.); *Mesmer v. Com.* 26 Gratt. 976 (mo. qu.); *Vanhook v. State*, 12 Tex. 252 (pl. abate.); *State v. Lawry*, 4 Nev. 161 (chal.).

And to sustain their action it will be presumed that the December term continued in January. *State v. Winnebrenner*, 67 Iowa, 230 (mo. ar.).

And under Indiana 2 Rev. Stat. 1876, p. 417, providing for selection of grand jury for the next ensuing two terms, a grand jury selected after the term of indictment is good as against a plea in abatement. *Kelley v. State*, 53 Ind. 311 (pl. abate.).

But under Nev. Crim. Code, § 669, and § 584, providing that they shall be selected prior to the term and that they shall not be drawn unless the judges so directs, an indictment by a grand jury selected at the same term is invalid. *State v. Lauer*, 41 Neb. 223 (pl. abate.).

And under Oregon New Const., art. 7, § 18, providing that grand jurors should be chosen from jurors in attendance at the court, an act providing for drawing prior to the term is unconstitutional and their indictment invalid. *State v. Lawrence*, 12 Or. 297.

Wis. 678. To these may be added *Re Schuster*, 82 Wis. 610; *Re Graham*, 74 Wis. 450; *Re French*, 81 Wis. 597.

We take it for granted that the learned judge of the court below held that the municipal court had no jurisdiction to issue the writs and commitments on which the defendants were arrested and imprisoned, on the ground that the indictments on which they were based were void, and that the indictments were void, because not found by a lawful grand jury. The decision of the court below depended, then, on the legality of the grand jury that found the indictments. That question is supposed to be before us on this certiorari. But, as we understand the law, the court below had

no right in this collateral proceeding to inquire into the legality of that grand jury, and decide it to have been an illegal body, without authority to find the indictments; nor has this court the right to so inquire and decide. We are precluded from inquiring and determining whether the body of men that acted as a grand jury in finding the indictments was a grand jury *de jure* by the barrier the law sets up to protect the acts of that body in the interest of the public and public justice as a grand jury *de facto*. "The *de facto* doctrine, which was introduced into the law as a matter of policy and necessity to protect the interests of the public where those interests were involved in the official acts of persons exercising the du-

I. Time designated.

Under North Carolina Act 1887, chap. 559, not prohibiting the revision of grand jury lists more frequently than four years, a challenge for having been drawn at a time other than that prescribed was not good. *State v. Durham Fertilizer Co.* 111 N. C. 668 (mo. qu.).

Under N. Y. Laws 1861, chap. 444, providing that the county judge shall designate the term at which the grand jury shall be required, an indictment was valid although the judge omitted to order the grand jury to attend. *People v. Cyphers*, 5 Park. Crim. Rep. 665, 81 N. Y. 873 (pl. abate.).

Under N. Y. Code Crim. Proc., § 45, which was a similar statute, it was held that the grand jury was organized properly under the statute. *People v. Bugg*, 98 N. Y. 537 (mo. qu.).

A change of time for the court does not make the grand jury an illegal one, and under S. C. Gen. Stat., § 2266, providing that no irregularity in organizing shall be sufficient to set aside the verdict, unless party is prejudiced, an objection should be made before verdict. *State v. Jeffcoat*, 26 S. C. 114 (mo. ar.).

A clerical misprision as to the date of organization may be corrected. *Aaron v. State*, 37 Ala. 106 (obj.).

VI. Reconvening.

Indictments found where grand jury is reconvened by the court in session, are valid. *State v. McEvoy*, 9 S. C. 208 (mo. qu.); *Blanton v. State*, 1 Wash. 265 (mo. qu.); *Reg. v. Holloway*, 9 Car. & P. 43; *Long v. State*, 46 Ind. 582 (mo. qu.); *State v. Reid*, 20 Iowa, 413 (mo. new tr.).

Even if some of those not reconvened had not acted before, the same will be valid. *Findley v. People*, 1 Mich. 234 (pl. abate.).

VII. Court.

The provisional court of North Carolina had power to indict by grand jury. *State v. Jarvis*, 68 N. C. 556 (mo. ar.).

And under the New York statute authorizing the court of oyer and terminer to be held twice annually, and as often as the judge shall appoint, and an extra court to be appointed by the governor, an objection that there were two grand juries in the same county at the same time, is insufficient. *Allen v. People*, 57 Barb. 838 (pl. abate.).

Under Mass. Stat. 1859, chap. 199, substituting superior court for the court of common pleas, the grand jury properly belongs to the superior court. *Com. v. Rich*, 14 Gray, 335 (protest.).

VIII. Special term.

Under the peculiar statutory provisions of some states an indictment may be found by a grand jury convened at a special term. *State v. Barnes*, 20 Mo. 413 (mo. ar.; adj. term); *State v. Cardozo*, 11 S. C. 195 (mo. ar.); *State v. Nash*, 7 Iowa, 347; *People v. Carabin*, 14 Cal. 438 (obj.); *Young v. State*, 3 How. (Miss.) 885 (obj.).

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And after a plea to the indictment it is too late to object that the grand jury for a special term was not properly organized. *Brown v. State*, 9 Neb. 157.

But where the authority for the special session does not warrant the indictment by a grand jury at that time their action is invalid. *Wilson v. State*, 1 Blackf. 423; *Bales v. State*, 63 Ala. 80.

And in *Dunn v. State*, 2 Ark. 249, 35 Am. Dec. 54 (obj.), it was held that where a grand jury is convened at a special term the order for the term must be complete and follow the statute.

See subhead: "Special grand jury," *infra*.

IX. Special grand jury.

Under the statutory provisions of most states, the court is authorized to order a special grand jury to be summoned, where there has been a failure to draw or summon a regular grand jury. *Newton v. State*, 21 Fla. 53 (pl. abate.); *Heater v. State* (Ala.) June 14, 1894 (mo. qu.); *Kemp v. State*, 89 Ala. 53 (obj.); *Robertson v. Com. (Va.)* Nov. 3, 1894 (pl. abate.); *State v. McCarty*, 17 Minn. 76 (chal.; mo. qu.).

In Arkansas the court has the implied constitutional power to direct such a one to be summoned. *Straughan v. State*, 16 Ark. 37 (mo. new tr.; mo. ar.).

Under Minn. Gen. Stat., 637, providing challenge to the panel for certain causes, a challenge for other causes cannot be made to a special venire. *State v. Gut*, 13 Minn. 341 (chal.).

The objection that the special venire was issued to make up the original thirty-six, instead of drawing from the original venire of those that appeared, must be made by challenge and not by plea in abatement or motion to quash. *State v. White*, 17 Tex. 242 (pl. abate.).

A special grand jury may be ordered in vacation. *Holman v. State*, 79 Ga. 155 (pl. abate.); *Snodgrass v. Com.* 89 Va. 679 (mo. qu.); *State v. Marsh*, 13 Kan. 586 (mo. qu.; pl. abate.; mo. arrest.).

On the discharge of the grand jury a special grand jury may be impeached under the statutory provisions of the several states. *Shinn v. Com.* 32 Gratt. 359 (pl. abate.); *Drake v. State*, 14 Neb. 535 (obj.); *Freel v. State*, 21 Ark. 212; *Empeon v. People*, 73 Ill. 245 (obj.); *White v. People*, 81 Ill. 333 (obj.); *Charta v. Territory (Ariz.)* Jan. 22, 1893 (chal.); *Edmonds v. State*, 34 Ark. 720 (mo. qu.).

Under the common-law power of the court to order a special grand jury the same has been held legal. *Stone v. People*, 3 Ill. 323 (mo. new tr.).

And the defendant having the grand jury set aside and obtaining a special venire, cannot then complain that his objection to the original grand jury should not have been sustained. *State v. Grimes*, 60 Minn. 123 (chal.).

But under Miss. Hutchinson Code, 888, art. 10, § 2, providing that a special venire is confined to cases where none of the regular venires are present, a plea in abatement that the original venire was

ties of an officer without being a lawful officer," has its most salutary application to the acts of a grand jury, and of other official instruments of the courts which constitute judicial proceedings. The courts are supposed to select and determine the qualifications of their subordinate official instruments necessary to the administration of justice. Their acts cannot be questioned without seriously affecting the proceedings of the courts, and the conclusiveness of their judgments. The grand jury in question was summoned, selected, impaneled and sworn for the September term of the court, and held its session and did business during that term. There is no question but that it was a legal grand jury throughout the

September term. On the last day of that term this same body adjourned, with the court, to the first day of the October term, and continued its unfinished business. It is contended that this body became *functus officio* as a grand jury on and after the last day of the September term. It was recognized by the court as a lawful grand jury, and the court received the indictments found by it, and finally discharged it from further service, and ordered the payment of its fees. The legal grand jury of the September term simply held over its term. There cannot be a more appropriate application of the *de facto* doctrine than to such a body as a grand jury *de facto* while thus holding over and doing business in the

present, and that the court improperly set aside the whole panel, is a good plea. *Baker v. State*, 28 Miss. 248 (pl. abate.).

In Texas, although the court cannot order a new venire after the grand jury for the term has been discharged, the motion to set aside the indictment must be on two grounds one of which is that it was not found by at least twelve grand jurors, and this objection does not appear to be sustained in this case. *Newman v. State*, 43 Tex. 525 (mo. qu.).

And the fact that three of the grand jurors were disqualified would not authorize the court to set aside the whole panel and order another. *State v. Jacobs*, 6 Tex. 99 (mo. qu.).

The presumption is that the special grand jury was valid. *Mackin v. People*, 115 Ill. 812 (mo. new tr.); *State v. Connell*, 49 Mo. 282 (obj.); *Dixon v. State*, 20 Ark. 165 (mo. ar.); *State v. Dusenberry*, 112 Mo. 277 (mo. new tr.).

The number of grand jurors required in a special grand jury is not less than six under Virginia Code, section 3977, and this is held not to violate the Federal Constitution. The provision as to due process of law is held not to require a greater number of grand jurors, and the provision requiring a presentment or indictment by a grand jury for infamous crimes leaves the number of grand jurors to be determined by state law. *Hausenfluok v. Com.* 65 Va. 702 (mo. qu.).

It should be observed that the Fifth Amendment of the Federal Constitution has been held by numerous decisions of the federal courts to have no application to procedure in state courts.

An indictment found by such a special grand jury of six was held valid in *Mesmer v. Com.*, 28 Gratt. 776 (mo. qu.).

And the same was held as to an indictment found by a special grand jury of seven. *Lyles v. Com.* 88 Va. 896 (mo. qu.).

A presumption that an indictment was found by a special grand jury under common law was held proper in *Wilson v. People*, 3 Colo. 325 (mo. ar.), where nineteen jurors were summoned while the constitution limited the grand jury to twelve. The court sustained the indictment on the presumption that only twelve acted or else it was a special grand jury.

X. Oath.

a. Affirmance.

For oath to officer, see *supra*, IV., h.

In Massachusetts it is not necessary to show that those affirming had conscientious scruples about taking the oath. *Com. v. Fisher*, 7 Gray, 492 (mo. ar.); *Com. v. Smith*, 9 Mass. 107 (pl. abate.).

But in New Jersey it was originally held that it was necessary to show this or the indictment would be invalid. *State v. Rockafellow*, 6 N. J. L. 406 (mo. ar.); *State v. Sharp*, cited in *State v. Rockafellow*, *supra*; *State v. Fox*, 9 N. J. L. 306 (mo. qu.); *State v. Harris*, 7 N. J. L. 428 (mo. qu.).

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But in *Engeman v. State*, 54 N. J. L. 247 (obj.), it was held that these two latter cases were removed to the supreme court by certiorari and motion to quash was made before trial. Since then N. J. Crim. Code, § 53, provides that objection to the indictment for form or substance shall be by demurrer or motion to quash before the jury are sworn and not after, and an objection to affirmance not made as so provided will not avail.

In 9 Car. & P. 78, before Alderson, B., when the grand jury was called and a Quaker affirmed, the court directed that all indictments should commence: "The jury for our Lady the Queen upon their oath and affirmance" present.

Three and Four Wm. chap. 49, § 1, provides that Quakers and Moravians may affirm where an oath is required.

b. Form.

Where it is shown that the grand jury was duly sworn it will be presumed that the proper oath was administered. *Williams v. People*, 54 Ill. 422 (mo. ar.; mo. new tr.); *Potsdamer v. State*, 17 Fla. 385 (mo. new tr.); *Brown v. State*, 10 Ark. 607 (mo. new tr.); *Lumpkin v. State*, 68 Ala. 56 (mo. qu.); *Thomason v. State*, 2 Tex. App. 550 (pl. abate.); *State v. Weaver*, 104 N. C. 758 (mo. ar.).

And the same was held in *Parker v. People*, 4 L. R. A. 303, 13 Colo. 155 (obj.) on the ground that objections cannot be made in the supreme court for the first time.

And the same was held in *Battle v. State*, 54 Ala. 98 (mo. ar.) and in *State v. Watson*, 31 La. Ann. 379 (obj.), on the ground that such objection must be made before a plea of not guilty.

And the same was held in *Chase v. State*, 46 Miss. 683 (pl. abate.) under Miss. Code 1857, art. 121, p. 493, providing that no objection, except to the array for fraud, is now available.

And that the form of oath is not shown by the record, cannot be questioned by motion to quash. *Stout v. State*, 68 Ind. 150 (mo. qu.).

Or by a plea in abatement. *Smith v. State*, 28 Miss. 723 (pl. abate.).

So it will be presumed that the proper oath was administered when the record is "who were—," and charged by the court as directed by law. *Com. v. Pullan*, 8 Bush, 47 (mo. set aside).

The form of oath was changed by Indiana Acts 1865, p. 155, and objection thereafter that the former oath was not administered is without force. *Bond v. State*, 53 Ind. 457 (mo. ar.).

Under Texas Crim. Code, art. 483, providing two grounds only for setting aside an indictment, and article 487, providing three grounds for substance, one accused of crime cannot question the form of oath, as it is not so provided. *West v. State*, 6 Tex. App. 425 (mo. qu.).

The indictment need not state when and where the oath was administered. *Vaughn v. State*, 40 Mo. 590 (mo. new tr.).

October term of the court. This doctrine, in its application to public officers and their acts, is well understood. Its history, object, and uses are exhaustively treated in the leading case of *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. In *People v. Petrea*, 92 N. Y. 128, an indictment for grand larceny was found by a grand jury drawn under a void statute. It was insisted, on behalf of the defendant, that the grand jury was not a lawful one, or within the requirement of the constitution. On behalf of the people it was contended "that it is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments, valid in their nature, that the body acted under the

color of lawful authority." The following cases are cited to this principle: *People v. Dolan*, 6 Hun, 282; *Dolan v. People*, Id. 498, 64 N. Y. 485; *Carpenter v. People*, 64 N. Y. 488; *Thompson v. People*, 6 Hun, 185; *People v. Jewett*, 8 Wend. 814; *Oca v. People*, 80 N. Y. 500; *Friery v. People*, 2 Keyes, 450; *Ferris v. People*, 81 How. Pr. 145. The court said: "The objection to the constitution of the grand jury which found the indictment lies solely in the fact that they were drawn under the provisions of a void statute, etc. In all other respects the proceedings were regular. The jurors were drawn by the proper officer; they were regularly summoned and retained by the sheriff; they were recognized.

And that the grand jury was not sworn to inquire of offenses in the county attached for judicial purposes, will not invalidate. *Wau-kon-chaw-neek-haw v. United States*, 1 Morris (Iowa) 32 (obj.).

That an indictment was made on "their oath" and not on their several oaths will not invalidate. *Com. v. Johnson*, Thacher, Crim. Cas. 384 (dem.).

So an objection that it was upon the oaths and not upon the oath of the grand jurors will not avoid the indictment. *State v. Norton*, 23 N. J. L. 38 (mo. qu.); *Com. v. Sholes*, 18 Allen, 554 (mo. qu.).

So an indictment reciting "sworn" instead of "upon their oaths" is sufficient. *Byam v. State*, 17 Wis. 145 (mo. ar.).

But if the record purports to state the oath, it must conform substantially to the statute. *Davis v. State*, 54 Ala. 86 (obj.).

The oath in *King v. Earl of Shaftesbury*, 8 How. St. Tr. 759, was substantially that they should inquire and present matters given them in charge touching this present service, and that they should keep their doings secret, and act without fear or favor, and present the truth.

c. Objection that the grand jury was not sworn.

The fact that the grand jurors were sworn must affirmatively appear from the record or the indictment will be invalid. *Foster v. State*, 31 Miss. 421 (obj.); *Abram v. State*, 25 Miss. 589 (mo. new tr.); *Cody v. State*, 3 How. (Miss.) 27 (obj.); *State v. McAllister*, 26 Me. 374 (mo. ar.); *Roe v. State* (Ala.) June 12, 1887 (obj.); *Clyncard's Case*, Cro. Eliz. 634 (obj.).

The want of the words "*onerati & furati*" was held not fatal on motion to quash, in *King v. Gakes*, 1 Keb. 101, on the ground that those words were "intended at Tryals at Nisi prius not in indictments."

But in *King v. Cullye*, 2 Keb. 367, the decision was just the contrary. See also *infra*, heading "*Then and there*."

And where the indictment does not show they were chosen, impaneled, and sworn for the county although it says "on their oath do present" it was insufficient. *Territory v. Seavalle*, 1 N. M. 119 (mo. ar.).

And in *Pennsylvania v. Bell*, Add. Rep. 156, 1 Am. Dec. 293, it was said that indictments have been quashed for not stating that the grand jury inquired on their oath.

In *State v. Creight*, 1 Brev. 169, 2 Am. Dec. 656 (mo. ar.) it was held that the indictment might be amended in the caption at any time to show that it was "upon their oaths" if the minutes showed that fact.

And in *Kneeland v. State*, 63 Ga. 641 (pl. abate.), it was said that the failure to show the grand jury was sworn in record, transmitted from one court to another, might be amended if possible.

But in *State v. Fields*, Peck (Tenn.) 140 (obj.), it was held that the judge cannot from memory, six 27 L. R. A.

months after his term has ended, amend the record to show that the grand jury was sworn.

However in *State v. Long*, 1 Humph. 386 (mo. ar.; mo. new tr.), it was held that an indictment is sufficient if it appears in the body thereof that the grand jury was duly sworn although it does not so appear in the caption.

And in *State v. Davidson*, 3 Coldw. 184, where the record did not show that the grand jury were sworn and had other defects which rendered it invalid, the court under Tenn. Code, § 842, providing that a new trial or a motion in arrest shall not be granted for any of the following causes, construed it to read for any one of the following causes, and if more than one exists a motion in arrest would be allowed.

If the record shows that the grand jurors were sworn it will be sufficient. *Beavers v. State*, 58 Ind. 530 (mo. ar.); *State v. Peterson*, 3 La. Ann. 321 (mo. ar.; mo. new tr.; mo. qu.); *Bailey v. State*, 39 Ind. 438 (mo. new tr.; mo. ar.); *Walter v. State*, 105 Ind. 569 (mo. qu.); *Stone v. State*, 30 Ind. 115 (mo. qu.); *State v. Loving*, 18 Tex. 558; *Jeffries v. Cone*, 12 Allen, 145 (mo. ar.); *Lambert v. People*, 24 Ill. App. 687 (mo. ar.; mo. new tr.).

And it will be presumed that the statute was observed when the record recites that they were duly sworn and the grand jury were present in court and the oath was read to them and no objection was made. *People v. Rose*, 52 Hun. 33 (mo. set aside).

And the record of each term need not show the swearing of the jury at a prior term, to serve during the year. *Turns v. Cone*, 6 Met. 224 (obj.).

In *Long v. State*, 46 Ind. 532 (mo. qu.; mo. ar.), it was held that it will be presumed that the grand jury was sworn after an indictment and nothing to the contrary appears from the record.

And in *Bird v. State*, 53 Ga. 602 (pl. abate.), where the record showed duly "impaneled," it is imported that they were sworn.

And an indictment showing that the grand jurors were duly sworn, upon their oaths present, or sworn in and for the county, will be sufficient. *Cornelius v. State*, 12 Ark. 732 (mo. new tr.); *Lowell v. State*, 45 Ind. 550 (mo. qu.); *Byrd v. State*, 1 How. (Miss.) 168 (dem.); *McClure v. State*, 1 Yerg. 206 (mo. new tr.).

But in *Lyman v. People*, 7 Ill. App. 345 (obj.), it was held that the recitals in the indictment could not supply the omission from the record.

Under N. Y. Penal Code, § 276, requiring only the statement in the indictment that the grand jury of that county, accuse the defendant of the crime alleged therein, the indictment need not show that the grand jury was sworn. *People v. Beavey*, 38 Hun. 418 (obj.).

And under Ala. Code 1876, § 4393, providing that no objection can be taken to an indictment in the formation of the grand jury except that the jurors were not drawn in the presence of the officer, an

impaneled and sworn as grand jurors by the court, and as grand jurors they found the indictment; and, moreover, they were good and lawful men, duly qualified to sit as grand jurors. . . . The grand jury, although not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. . . . An indictment was found by a body drawn, summoned, and sworn as a grand jury, before a competent court, and composed of good and lawful men. The jury which found the indictment was a *de facto* jury, selected and organized under the forms of law." I cite largely from *Judge Andrews'* opinion, because it is in every respect applicable to the present case. In *People v. Fitzpatrick*,

66 How. Pr. 14, the indictment was found under a law void because unconstitutional. The above language in the *Petrea Case* was approved by the two judges, and the indictment was held good and valid, because found by a grand jury *de facto*. "The grand jurors are public officers" (Jacob's Law Dict.; Tomlins' Law Dict.; 7 Bacon, Abr. title *Office and Officers*), and they are therefore within the common doctrine, and their acts should be held valid, as those of any other officer *de facto*. In *People v. Dolan*, *supra*, it was not known how or by whom the names of the persons summoned, sworn, and acting as grand jurors were drawn. The court said: "It is sufficient to maintain the authority of the grand

objection that the record does not show that the grand jurors were sworn cannot avail. *Harrington v. State*, 88 Ala. 9 (mo. ar.).

d. Time and person administering.

The recital in the record that the grand jury was sworn imports that the oath was administered by the proper officer. *Brown v. State*, 74 Ala. 478.

And an objection to negative this fact must be specific. *Allen v. People*, 77 Ill. 484 (mo. qu.).

And in *State v. Chandler*, 45 La. Ann. 49 (mo. qu.), it was held that the court erred in quashing an indictment where the oath was administered by the clerk of the court, and not in the presence of the judge.

The same was held in *Com. v. Sanborn*, 116 Mass. 61 (pl. abate.), on the ground that the statute was directory. The objection was also based on omission to charge a part of the jury.

Where the jurors are not all sworn at the same time it will not invalidate. *Com. v. Sanborn*, *supra*; *Wadlin's Case*, 11 Mass. 148 (obj.); *Prioe v. State*, 12 Tex. 210 (mo. qu.).

And in *Findley v. People*, 1 Mich. 284 (pl. abate.), the same was said to be the rule, but was not the question involved.

So under Ala. Code, § 8691, an objection on the ground that they were not sworn, cannot be made in the supreme court for the first time. *Floyd v. State*, 80 Ala. 511 (obj.).

And to the same effect, *Holloway v. State*, 58 Ind. 554 (mo. new tr.; mo. ar.; mo. qu.); *Alley v. State*, 82 Ind. 476 (mo. qu.).

And after a plea of not guilty it is too late to object that the grand jurors were not sworn. *People v. Griffin*, 3 Barb. 427 (obj. ev.); *State v. Smallwood*, 68 Mo. 198; *State v. Clifton*, 78 Mo. 490.

And in *State v. Lassley*, 7 Port. (Ala.) 526 (mo. ar.), it was held that objection that the grand jurors were not sworn, must be made by plea and not by motion in arrest, where the record shows that they were sworn.

e. Then and there.

The omission of the words "then and there" in stating that the grand jurors were sworn will not invalidate the indictment or record, unless it be an indictment by an inferior court, and trial by a superior court. *Woodside v. State*, 3 How. (Miss.) 655 (obj.); *Beauchamp v. State*, 6 Blackf. 290 (obj.); *State v. Price*, 11 N. J. L. 169 (obj.); *Greenson v. State*, 5 How. (Miss.) 33 (obj.).

But in *People v. Guernsey*, 3 Johns. Cas. 265 (mo. ar.), which was a case at oyer and terminer of C. county on an indictment found at the general sessions of the peace, it was held that the omission of the words "then and there" was fatal.

This case was based on *King v. Turnith*, 1 Mod. 26; *King v. French*, 2 Keb. 568, and *Anonymous*, 1 Vent. 60, and *Rex v. Morris*, 2 Strange, 901, and refers to *Anonymous*, 12 Mod. 60, and 502, 27 L. R. A.

But *King v. Turnith*, 1 Mod. 26, Mich. Term, 21 Car. II. B. R. quashed the indictment because it did not contain "*ad tunc et ibidem onerati et jurati*." This was an indictment for carrying on a trade at Hereford.

2 Kebble, 588, is called *King v. French*, Mich. Term, 21 Car. II. B. R. and the indictment was agreed ill and was quashed because it said "*onerati & jurati*" but not "*ad tunc & ibidem*." The indictment was for carrying on trade at Hereford.

And "*Anonymous*," 1 Vent. 60, was at Hill, 21 & 22 Car. II. B. R. and the indictment was quashed because it was "*per sacramentum duodecim, etc.*" and not "*jurati & onerati*." The clerk of the crown office informed the court that it must be also "*ad tunc & ibidem jurati*."

This may have been the case (it certainly was similar to the case) of *King v. Greenway*, 2 Keb. 610, Hill, 21 & 22 Car. II. B. R. which reports the indictment quashed because it said "*onerati & jurati*" and not "*ad tunc & ibidem*."

King v. Turnith is supposed to be "*Anonymous*," 1 Vent. 51, Mich. 21 Car. II. B. R., where the indictment was held insufficient because it was "*super sacramentum suum*" and not "*ad tunc & ibidem jurati*."

It will be thus seen that while the reports and the reasons given in the above cases relied upon are somewhat conflicting and impair their authority, that the words "*ad tunc & ibidem*" are held necessary in each case.

People v. Guernsey, *supra*, also relies upon *King v. Morris*, Fitzg. 266, also reported 2 Strange, 901, where the caption was "*jurati pro, etc.*" omitting "*ad tunc and ibid.*"

But in England the caption was the record and if made out in inferior courts was transmitted with the indictment to the superior court and was an important record.

In "*Anonymous*," 12 Mod. 502, no attention was paid to a motion to quash because of the omission of "*jurati and onerati ad tunc and ibidem*." The remark was made that in case of nuisance, riot, etc., it was not useful to quash on motion.

But in *Anonymous*, 12 Mod. 80, the want of the words "*ad tunc et ibid impanellati*" was held fatal. The indictment was quashed *not* with the statement that "*returnati*" will not supply the omission.

In this note matters in regard to "Presentments" by grand juries: "Qualification of grand jurors;" "Class from which they are taken;" except in subhead "Excusing and Completing;" "Record," except as to "Oath" of grand jurors,—are not intended to be included, and presumptions arising from indorsements of "true bill" are also omitted.

As to the number of jurors required or allowed to act in making an indictment, see note to *State v. Belvel* (Iowa) post, 848.

I. T.

jury to investigate criminal charges and find indictments valid in their nature, and that the body acted under color of lawful authority." In *Re Gannon*, 69 Cal. 541, the grand jury organized in July, 1885, held over, and was not dissolved by the court, until March, 1886, notwithstanding a new grand jury had been selected and returned in January, 1886. A witness refused to testify before this old grand jury, on the ground that it was not a legal grand jury. He was imprisoned for contempt, and was seeking his discharge by habeas corpus. The court said: "As an organized grand jury, it would be competent to act under color of active authority. Having been appointed to office, and having taken the oath of office, the individual members are officers of the court, not only *de jure*, but *de facto*; and their acts are valid so far as the public rights are concerned, although the title under which they performed those acts may be questionable. An indictment found by a *de facto* grand jury is as regular as one found by a *de jure* grand jury." In *Ex parte Haymond*, 91 Cal. 545, a witness refused to testify before the grand jury on the ground that it was not a legal grand jury, and sought to be discharged from imprisonment on habeas corpus. The court said: "Without passing upon the question whether the grand jury before whom the petitioner was summoned to appear was impeached in accordance with the provisions of the law relating to the subject, it is sufficient for us to say that such body has certainly a *de facto* existence." In *Dolan v. People*, 64 N. Y. 485, and in *Carpenter v. People*, Id. 483, the legality of the jury was challenged because illegally drawn by a commission under an unconstitutional statute, and the proceedings were sustained on the ground of *de facto* officers. In *State v. Belvel* (Iowa) 56 N. W. Rep. 545, post, 846, it is held that a grand jury composed of an improper number may find a valid indictment. In *Ex parte Springer*, 1 Utah, 314, the indictment was for a capital offense, and the court said: "The fact that the grand jury

which found the indictment was illegal will not be considered upon the hearing of habeas corpus, as we conceive that we should stand upon the indictment. In reason and by analogy a person under an indictment seeking his discharge on habeas corpus has the same right to allege that the judge or the clerk of the court is not lawfully judge or clerk as that the grand jury is not a legal grand jury. The several members of the grand jury are officers of the court, as we have seen, and their acts should be protected by the same principle that they are *de facto* jurors." In *Re Burke*, 76 Wis. 357, it was alleged that there was no office of judge to be filled by the incumbent, but it was held that the incumbent was judge *de facto*. It would put an end to judicial proceedings if the legal title and qualifications of all judicial officers could be contested in collateral proceedings at the instance of aggrieved parties. This is a very important question, and a new one in this court. We have cited all the cases at hand, and from the high character of the courts they ought to be considered not only satisfactory, but sufficient, especially when based upon such cogent and conclusive reasons. We hold, therefore, that the indictments found against the defendants are not void, but good and valid indictments, so far as this collateral proceeding is concerned, because found by a grand jury acting under color of lawful authority, and a good and sufficient grand jury *de facto*. It follows, also, that the municipal court of Milwaukee had jurisdiction to issue the writ by which the defendants were arrested, and the commitments upon which they were imprisoned, and therefore the judge of the circuit court had no cognizance of the cases to discharge the defendants.

The orders of the judge of the Circuit Court discharging the defendants are reversed, and the cause remanded, with direction to remand the defendants to the custody of the sheriff of Milwaukee county.

ILLINOIS SUPREME COURT.

William LONG *et al.*, *Appls.*,

v.

George HESS *et al.*

(184 Ill. 482.)

1. An assignment of cross-errors is essential to the review on plaintiff's appeal of a denial of defendant's motion to suppress a deposition.
2. A provision of an antenuptial contract that, as regards the worldly success and substance of the parties, the bride agrees to receive the groom to live at her house, does not make the contract applicable to the future acquisitions of the parties, especially those after

emigrating from their then residence and making their permanent domicile in a foreign country.

3. An antenuptial contract made in a foreign country, by which the children of a former marriage of the wife are adopted by the husband and the property settled upon them and the children of the marriage, approved by the courts, is not applicable to real property acquired by the husband in Illinois after his emigration to this country, so as to prevent his disposition thereof by deed or will.
4. An antenuptial contract made in a foreign country, by which children of a former marriage of the wife were adopted as heirs of the husband, will not prevent disposition of real property subsequently acquired in Illinois after his emigration thereto, although such children are infants at the time of such emigration incapable of consenting to a change of domicile, or waiving any rights, as, if they acquire the status of heirs, their inheritance must be in accordance with the laws of Illinois, by which the husband has an ab-

NOTE.—For the extraterritorial effect of the adoption of children on the right to inherit property, see note on the legal status of adopted children with the case of *Warren v. Prescott* (Me.) 17 N. R. A. 488.

27 L. R. A.

solite right to dispose of his property by will to the exclusion of natural or adopted children.

(January 15, 1895.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for La Salle County in favor of defendants in an action brought to set aside the will of Jacob Hess, deceased, and to establish an interest in his estate. *Affirmed.*

Statement by Bailey, J.:

This was a bill in chancery, brought by William Long and Catherine Gleim against George Hess, Louis Hess, Henry Hess, and Mary Kopf, the children, Christina Hess, the widow, and Louis Hess, the executor of Jacob Hess, deceased, to set aside the will of Jacob Hess, and to declare a trust in favor of the complainants in two sixths of the estate of the testator. Jacob Hess died March 29, 1891, in LaSalle county, where he had lived for many years, leaving an estate consisting almost exclusively of lands situate in that county, and leaving a last will by which he gave his entire estate to his widow for life, and after providing for the payment of \$100 each to the complainants divided the remainder among his four children above named.

Jacob Hess and Christina, his wife, were both natives of the Grand Duchy of Hesse, now a part of the German empire. Prior to their marriage in 1846, Christina Hess was the widow of Bernhardt Lang, then lately deceased, and the complainants are her children by her former marriage. She was then the owner of a small amount of property, consisting of a dwelling house and certain small tracts of land, but the amount and value of her property are not clearly shown by the evidence. Jacob Hess was at the same time the owner of a tract of land of the value of 350 florins, and of 150 florins in cash. Jacob Hess and Christina Lang being about to be married, the following ante-nuptial contract, as is claimed, was executed between them:

"Know all men by these presents, that, on the day hereinafter written, a true and irrevocable marriage contract has been agreed upon and concluded between Jakob Hess, single, lawful son of Adam Hess, citizen and baker of Beerfelden, deceased, as bridegroom, party of the first part, and Christina Lang, widow, of Beerfelden, as bride, party of the second part, as follows, to wit: The said parties have resolved to take one another as husband and wife, to remain in joy and sorrow until death shall separate them, and to have their marriage solemnized in the near future by a priest. As regards their worldly success and subsistence, the bride agrees to receive the groom to live at her house. The groom brings into the marriage that piece of land situated at Unter Beerfelden (district of Hetzbach), described at page 86. 144, N. 876. 4 1815 Klfr., and valued at 350 florins, also in cash 150 florins, in words one hundred and fifty florins. It is further agreed that the two children of the bride of her first marriage shall have an advancement of 100 florins, in words one hundred florins, with the

understanding that in case of the death of one of the said children the surviving child is to inherit the whole of the said advancement. As to everything else the said two children of the first marriage and those to be begotten in this marriage shall inherit equally, share and share alike. In all other cases, not especially enumerated herein, the contracting parties subject themselves to the general laws of Germany, especially the rules and customs of the country.

"Beerfelden, May 11, 1846.

"Jakob Hess, Groom.

"Anna Christina Lang, Bride.

"Eva Christina Hess, Widow.

"Andreas Schmahl.

"Authenticated, Newer, Mayor."

It is further claimed that, for the purpose of obtaining a more full confirmation and validation of this contract, it was presented to a local court having jurisdiction of matters concerning matrimonial contracts, the rights of children, matters of probate, etc., and that the following is a transcript of the record of the proceedings of that court in relation thereto:

"Brf., July 3, 1846.

"Upon inspection of the files 1-5, and the production of the marriage certificate, it is, upon application of Jakob Hess, adjudged and decreed that the agreement of this date be made a part of the contract of marriage and agreement of the equal heirship of the children of the different marriages, and also that the certificate of the competent appellate court be hereto attached. Published the same date.

"Braun (Judge).

"Done in the Appellate Court of Freieustein, Beerfelden, June 26, 1846."

"In the matter of the re-marriage of Christina, *née* Schmahl, widow of Bernhard Lang, of Beerfelden, Andreas Schmahl, blacksmith, and Oswald Lang, cloth-manufacturer, appointed as guardians of the children of the first marriage, were duly obligated and bound, and being informed of the contents of the marriage contract and agreement as to the equal rights (heirships) of the children of the different marriages, they were duly examined and declared, as follows: "Concerning the property affairs in question, we will first make inquiry and therefore request that another hearing be set at which we will report. Read and approved, and decreed that both guardians be summoned to appear on Friday, the 8d of next month, at 8 A. M. Published the same date.

"Braun.

"Beerfelden, July 8, 1846."

At this hearing there appeared Andreas Schmahl, guardian, who declared that he was instrumental in making the said marriage contract, and agreement as to the equal heirship of the children; that in so doing he exerted himself to protect the interests of said wards therein, that he considered the advancement of 100 florins as ample, and he therefore entered his consent to make said contract and agreement on behalf of his wards. Read and approved.

There also appeared the said Oswald Lang, who stated that in his opinion the advance-

ment of 100 florins was too low, and he insisted on an increase of the same; that in case the contracting parties would not consent to an increase, he would insist on a further investigation of their financial circumstances. Read and approved.

The matter was thereupon taken under further advisement, both guardians consulted with the other relatives of their wards, and with them appeared the groom, Jacob Hess, for himself and on behalf of his bride, and after all circumstances had been once more fully considered, the following settlement was agreed upon, to wit:

"1. The groom, Jakob Hess, assumed the parentage of the two children.

"2. The said children are to receive together an advancement of 200 florins, that is, each child 100 florins.

"3. The advancement is to be paid when the children are twenty-five years of age. In case one of the children should marry before that age, it may demand payment of its advancement at that time and the money shall be paid at the marriage.

4. In case the son should become subject to conscription (military duty), and the father be not willing to ransom him and pay the ransom costs, the father upon the demand of the son shall be held to pay him the advancement at once.

"5. In all other respects the stipulations of the contract of marriage and agreement as to the equal heirship of the children, dated May 11th of this year, shall remain in force. Read, approved and subscribed.

"Jakob Hess.

"Oswald Lang.

"Andreas Schmahl."

"The court being fully advised in the premises entered the necessary order of alienation (transfer). Published the same date.

"Braun.

"A correct copy.

"Schnellbacher,

"[Seal] Clerk of the Grandducal Court of Beerfelden.

"The foregoing copy of marriage contract and court proceedings is hereby executed for Wilhelm Lang, of Hetzbach, on behalf of Wilhelm Lang, of Ottawa. (Signature).

"[Seal] Beerfelden, May 21st, 1891. Grandducal District Court Beerfelden."

Shortly after these proceedings, Jacob Hess and Christina Lang were married, and as the fruit of such marriage, their four children, now defendants to this suit, were afterwards born. After their marriage, Hess and wife lived in the house belonging to the wife, the complainants, then young children, being members of the family. There seems to have been a small bakery on the premises, and Hess, during the time he continued to live in Germany, carried on the business of a baker.

In May, 1851, Hess and wife sold the property they owned in Germany, the amount realized therefrom being a little over one thousand florins, or about \$400, and they then came to this country bringing the complainants with them. They first settled at Buffalo, New York, where Hess seems to have carried on the business of a baker in a small way. About the year 1858, he re-

moved with his family to LaSalle county, in this state, where he resided up to the time of his death, and where he accumulated the estate which he attempted to dispose of by will. There is no evidence, nor does it seem to be claimed, that any portion of the avails of the property sold in Germany went into or formed a part of the estate which he owned at his death.

The complainants insist that the antenuptial contract above set forth is to be construed and enforced according to the rules of law in force in the grand duchy of Hesse at the time it was entered into; that by that law the complainants were adopted by Jacob Hess, and became heirs of his estate jointly with the children born of the marriage then about to be solemnized; that their right to succeed to the estate of Hess at his death was a vested right, and one which, under the law where the contract was made, was incapable of being divested by will, and therefore that the will is void as to them, or, at least, that the devisees should be held to have taken the lands devised to them subject to the complainants' rights, and that the devisees should be charged as trustees for their benefit.

The deposition of an attorney residing in Hesse, and learned in the laws in force in that grand duchy at that time, was taken on behalf of the complainants, and it is claimed that the local law in force there at that time was substantially as above stated. A motion to suppress his deposition upon the ground, among other things, that it was not taken in conformity with the statute was made by the defendants and overruled by the court. The cause afterward coming on to be heard on pleadings and proofs, the court found the equities of the case to be with the defendants, and entered a decree dismissing the bill at the costs of the complainants. From that decree the complainants have now appealed to this court.

Messrs. Richolson & Seeley and Brewer & Strawn, for appellants.

Foreign unwritten laws, customs, and usages may be proved, and are generally proved, by parol evidence, and when such evidence is objected to, on the ground that the law in question is a written law, the party objecting must show that fact.

Dougherty v. Snyder, 15 Serg. & R. 87; *Newson v. Adams*, 2 La. 154, 22 Am. Dec. 156; *Bouvier*, Dict.

Foreign law is presumed to be common law in the absence of rebutting evidence.

Chase v. Alliance Ins. Co. 91 Mass. 811; *National Bank of Michigan v. Green*, 38 Iowa, 140; *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536; *Storr v. Peck*, 1 Hill, 270; *Throop v. Hatch*, 3 Abb. Fr. 28; *Cheney v. Arnold*, 15 N. Y. 845, 69 Am. Dec. 609.

The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs, and usages, under oath.

1 Greenl. Ev. §§ 486-488; Rice, Ev. p. 65; *Le Prince v. Guillemot*, 1 Rich. Eq. 187; 2 Saunders, Pl. & Ev. p. 54; Story, Conf. L. 366, 367; *Dougherty v. Snyder*, 15 Serg. & R.

84; *Brush v. Wilkins*, 4 Johns. Ch. 520, 1 L. ed. 922; *Church v. Hubbard*, 6 U. S. 2 Cranch, 237, 2 L. ed. 265; *Conseguia v. Willings*, 1 Pet. C. C. 225; *Seton v. Delawars Ins. Co.* 2 Wash. C. C. 175; *Owen v. Boyle*, 15 Me. 147, 82 Am. Dec. 143; *United States v. Jennings*, 4 Cranch, C. C. 118; *Warner v. Daniels*, 1 Woodb. & M. 90; *Brown v. United States*, 5 Ct. Cl. 571.

The foreign law by which the contract or relation was created becomes an indispensable element, in order to translate such contract relation or duty into the vernacular language of the forum where the remedy is sought.

Story, Conf. L. § 88.

Under the law as it existed where the contract is made, and where the rights of said infants were made the subject of a judicial inquiry and determined by the decree of a court of competent jurisdiction, to which all the parties in interest voluntarily submitted themselves, Jacob Hess was absolutely foreclosed by his said undertaking and the said decree, and rendered incapable of disposing of the property which should remain at his death, so as to cut off or prevent said infants from taking an equal share of said property with the children of his own blood.

Van Matre v. Sankey, 23 L. R. A. 665, 148 Ill. 559.

Marriage contracts are governed by the same general law as other contracts, *i. e.*, the intention of the parties as shown by the contract must prevail.

Wallace v. Wallace, 82 Ill. 580.

Where the rights of children are in controversy all the presumptions are in their favor.

Ibid.; *Gorin v. Gordon*, 38 Miss. 205; *Gale v. Gale*, L. R. 6 Ch. Div. 144; *Michael v. Morey*, 26 Md. 289, 90 Am. Dec. 106; *Merritt v. Scott*, 6 Ga. 563, 50 Am. Dec. 865; *Cole v. American Baptist Home Mission Soc.* 64 N. H. 445.

Our courts enforce marriage contracts made abroad.

Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 625; *Dunlap v. Buckingham*, 16 Ill. 109; *Scheffeling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281; *Decouche v. Savetier*, 3 Johns. Ch. 190, 1 L. ed. 587, 8 Am. Dec. 478; *Crosby v. Berger*, 8 Edw. Ch. 538, 6 L. ed. 754; *Le Prince v. Guillelot*, 1 Rich. Eq. 187; *Lott v. Bertrand*, 26 Tex. 654; *Murphy v. Murphy*, 5 Mart. (La.) 83, 12 Am. Dec. 475; *Le Breton v. Miles*, 3 Paige, 261, 4 L. ed. 423.

A contract to make a will is valid.

Emery v. Darling, 60 Ohio St. 160; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Schutt v. Missionary Soc. of M. E. Church*, 41 N. J. Eq. 115; *Roehl v. Haumesser*, 114 Ind. 311; *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Rivers v. Rivers*, 8 Desaus. Eq. 190, 4 Am. Dec. 609; *Newton v. Newton*, 46 Minn. 38; *Carmichael v. Carmichael*, 1 L. R. A. 596, 72 Mich. 76; *Jones v. Martin*, 3 Anstr. 882; *Fortescue v. Hennah*, 19 Ves. Jr. 66; *Barkworth v. Young*, 4 Drew. 1; *McLeod v. Board*, 30 Tex. 246, 94 Am. Dec. 301.

A minor cannot of his own accord change his domicile.

Jacob, Domicil, § 229; *Freeport v. Stephenson County Supra*, 41 Ill. 495.

A guardian cannot be permitted to remove his ward to another jurisdiction to the detriment L. R. A.

ment of the ward and to the advantage of the guardian.

Wheeler v. Hollis, 19 Tex. 522, 70 Am. Dec. 363; *Westchester School Directors v. James*, 2 Watts & S. 572; Jacob, Domicil, § 242; *Mears v. Sinclair*, 1 W. Va. 185; *Daniel v. Hill*, 52 Ala. 430.

A marriage contract is irrevocable as to issue.

Yeaton v. Yeaton, 4 Ill. App. 579; *Wallace v. Wallace*, 82 Ill. 580; *Michael v. Morey*, 26 Md. 289, 90 Am. Dec. 106; *Tabb v. Archer*, 3 Hen. & M. 397, 3 Am. Dec. 657; *Gorin v. Gordon*, 38 Miss. 205; *Lott v. Bertrand*, 26 Tex. 654.

A wife does not waive her rights by emigrating with her husband.

Crosby v. Berger, 8 Edw. Ch. 538, 6 L. ed. 754; *Decouche v. Savetier*, 3 Johns. Ch. 190, 1 L. ed. 537, 8 Am. Dec. 478; *Bonati v. Welch*, 24 N. Y. 157.

Mears v. F. P. Snyder and W. H. Stead for appellees.

Bailey, J., delivered the opinion of the court:

The defendants, in whose favor the decree was rendered, now urge, with a considerable degree of earnestness, that the court below erred in refusing to suppress the deposition taken in Germany, on the ground that the manner in which it was taken was a clear departure from that prescribed by the statute for taking the depositions of foreign witnesses. All we need say upon that point is, that the question thus raised is not before us for decision. The court below refused to suppress the deposition and considered it as evidence on the final hearing, but upon all the evidence as thus presented, the decision of the court was in the defendants' favor and the complainants have appealed. The defendants have assigned no cross-errors, and they must therefore be deemed to be content with the decision of their motion to suppress, and so, for all the purposes of this appeal, the deposition, however irregularly it may have been taken, must be regarded as having been rightfully retained and considered as evidence at the hearing.

The only question presented by the records is, as to the legal effect upon the property acquired by Jacob Hess in this state, of the ante-nuptial contract entered into in Germany between him and his then intended wife. It is claimed that the contract, when considered in connection with the judicial proceedings had thereon, constituted in legal effect an adoption of the complainants by Hess, so as to place them upon the same footing, so far as succession to his property and estate was concerned, with the children afterwards born of the marriage then in contemplation.

And it is further contended that, by the rules of law in force where the contract was made, and which entered into and formed a part of it, the property then owned by Hess and by his intended wife as well as that afterward acquired by them, became communal property, in which the children of the family, both natural and adopted, acquired a vested right, and that Hess could not by will divest their right to succeed to such estate as he might leave at his death.

After considering all the evidence, we are left in very grave doubt whether the laws of the grand duchy of Hesse upon which reliance is placed are sufficiently proved. But waiving that point and assuming that the proof is sufficient, and that the rules of law prevailing in Hesse at the date of the contract were as the complainants contend, the question remains whether the ante-nuptial contract should be enforced in this state, as to property, and especially real property, subsequently acquired by Hess in this state.

It should be remembered that at the date of the contract the parties were living at Beerfelden, in the grand duchy of Hesse, and so far as appears, were intending to remain there permanently. There is nothing either in the contract itself or in the evidence having the least tendency to show that their removal to any other place was then contemplated. The evidence furnished by the contract is all in the direction of showing that their intention was to make Beerfelden their permanent home. The agreement on the part of the bride was, "to receive the groom to live at her house," and the contract, after certain stipulations as to the property brought into the marriage by the groom, and as to the rights of the children of the bride by her former marriage, concludes with the provision that, "in all other cases not especially enumerated herein, the contracting parties subject themselves to the general laws of Germany, especially the rules and customs of the country." In point of fact, Jacob Hess, after his marriage, took up his residence at his wife's house, and made that his domicile, and thereupon engaged at that place in the business of a baker, which he carried on for five years. He then sold out his property there and emigrated to the United States.

It should also be observed that there is a total absence of any express provision in the contract making it applicable to the future acquisitions of the contracting parties. It deals with the property they then possessed, but makes no reference to such as they might afterwards gain. The only language in the contract on which any reliance is placed as having reference to future acquisitions is the following: "As regards their worldly success and subsistence, the bride agrees to receive the groom to live at her house." If these words are correctly translated from the original German in which the contract was written—and we have heard no suggestion that they are not—they are, to say the least, extremely ambiguous, and we are able to put upon them no rational construction which would make out of them an agreement to subject the future acquisitions of the parties to the provisions of the contract. The most probable and natural interpretation of the words would seem to be, that, with a view to providing for the worldly success and the subsistence of the family, the bride agreed to receive the groom to live at her house. They cannot, without importing into them a meaning which does not appear upon their face, be held to have any direct reference to the future acquisitions of the contracting parties, and especially their acquisitions

after emigrating from their then residence, and making their permanent domicile in a foreign country.

The property rights of husband and wife, as affected by the marriage contract itself, or by an ante-nuptial agreement, where the marriage or the ante-nuptial agreement have been entered into in a foreign country, have always presented questions of no little perplexity and difficulty. Mr. Story, in his *Treatise on the Conflict of Laws*, § 143, says: "The principal difficulty is not so much to ascertain what rule ought to govern in cases of express nuptial contract, at least, where there is no change of domicile, as what rule ought to govern in cases where there is no such contract, or no contract which provides for the emergency. Where there is an express nuptial contract, that, if it speaks fully to the very point, will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place, under the same limitations and restrictions as apply to other cases of contract. But where there is no express nuptial contract at all, or none speaking to the very point, the question, what rule ought to govern, is surrounded with more difficulty." The learned author then, after an extended examination of the opinions of the leading law-writers in this country and in Europe, and also of the decisions of the supreme court of Louisiana, the only court which at that time seems to have given these questions elaborate and careful consideration, lays down the following propositions which as he says, although not universally established or recognized in America, have much domestic authority for their support, and have none in opposition to them:

"(1) Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will at most confer only a right of action to be enforced according to the jurisprudence *rei sitæ*.

"(2) Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions.

"(3) Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or rather that they accompany the person everywhere. As to immovable property, the law *rei sitæ* will prevail.

"(4) Where there is no change of domicile, the same rule will apply to future acquisitions as to present property.

"(5) But where there is a change of domi-

cil, the law of the actual domicil, and not the matrimonial domicil, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law *rei sitæ*." Story, Conf. L. §§ 184 *et seq.*

The propositions thus laid down by Judge Story seem to have received the general approval of the courts of this country, so far as there has been occasion to consider them since he wrote. Thus, in *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180, parties domiciled in Prussia were married there, and afterward entered into a post-nuptial contract, whereby each granted and transferred to the other all real and personal property which should belong to the donor on the day of his death. The wife, at the time, owned real estate in Prussia, over which, by the laws of that country, she had full control and right of disposal. Several years afterward the property was sold, the husband taking the money and investing it in land in Wisconsin, to which the parties removed, and on which they resided until the husband's death. He also during his lifetime acquired other property both real and personal, situate in Wisconsin, which he owned on the day of his death. By his last will the husband devised and bequeathed all his property, both real and personal, to his widow for life, with remainder to the brothers and sisters of the testator. On bill filed by the widow claiming that, by force of the post-nuptial contract, she was entitled to an estate in fee in the lands, and to the absolute ownership of the personal property left by her husband, it was held that there was nothing in the contract which spoke to the very point, that it contained nothing which manifested any intention in the parties to regulate or control by it, according to the law of their matrimonial domicil, the future acquisitions and gains of property in any foreign state or territory, or any property which should be held by the husband in such state or territory, and consequently, that the property acquired and owned by the husband in Wisconsin in his own name was subject to be disposed of by him by will or otherwise, according to the laws of that state, and that the widow's rights therein were not determined by the contract.

In *Castro v. Illies*, 22 Tex. 479, 78 Am. Dec. 277, substantially the same doctrine was laid down, although as that case arose out of a controversy between a wife claiming under an ante-nuptial contract and execution creditors of the husband, the decision is not in all respects so directly in point as the one last cited. There parties domiciled in Paris, France, executed an ante-nuptial contract and married in Paris. Some years afterward they immigrated to this country and became domiciled in Texas, where the husband subsequently acquired certain real property. It was claimed that, by the rules of the French law, the contract vested in the wife a certain interest in the property acquired by her husband, which was not subject to seizure for her husband's debts, but it was held that, as there were in the contract no words "speaking to the very point," that is, no words making the contract specifically ap-

plicable to property subsequently acquired by the husband in a state or country foreign to that in which the contract was made, it had no operation upon lands subsequently acquired by the husband in Texas.

In *Besse v. Pellochoux*, 78 Ill. 285, 24 Am. Rep. 242, an ante-nuptial contract was made between parties domiciled in Switzerland, in regard to property to be occupied during the marriage, it appearing that the contract contemplated no change of domicil, but was to be performed in the place where it was made, and it was held that the contract did not affect real estate acquired in this state by the husband after their immigration to this country. In the opinion, the doctrine laid down by Judge Story was cited with approval, and it was said that, in that case, there was nothing in the contract "speaking to the very point," that manifested any intention that all future acquisitions of property in foreign countries should be controlled by it. See also *Lyon v. Knott*, 26 Miss. 548; *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *LeBreton v. Miles*, 8 Paige, 261, 4 L. ed. 422; *Gale v. Davis*, 4 Mart. (La.) 645.

The case of *Decouche v. Savetier*, 3 Johns. Ch. 190, 1 L. ed. 587, 8 Am. Dec. 478, is one where an ante-nuptial contract entered into by the parties in Paris was enforced in this country in favor of the wife, to the exclusion of the husband's relatives. But there the contract expressly provided:

"That there shall be a community of property between them, according to the custom of Paris, which is to govern the disposition of the property, though the parties should hereafter settle in countries where the laws and usages are different or contrary." There the intention to make the contract applicable to property afterwards acquired in foreign countries was expressly made to appear, by "words speaking to the very point."

Considerable reliance is placed by the complainants upon the case of *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281, where an ante-nuptial contract entered into by the parties in Germany, in which it was agreed that all the property of the intended wife, which she then owned, or which should be mutually acquired by the parties during coverture, should be the property of the wife, was sustained and enforced, and held to apply to the property acquired by them in the state of Ohio after their immigration to this country. It will be noticed, however, that in that case the contract by its express terms was made applicable not only to the property then owned by the intended wife, but also to all property acquired during the continuance of the marriage. It is therefore clearly distinguishable from the present case where no express provision is made applicable to property acquired in this state, after the parties became domiciled here.

We are therefore of the opinion that the ante-nuptial contract in this case is not applicable to real property acquired by Hess in this state, after his immigration to this country, but that such property was subject to disposition by him by deed or will, ac-

cording to the laws of this state. His will therefore must be held to be valid, so as to vest in his devisees a title which must prevail over any rights derived by the complainants from the ante-nuptial contract.

We are unable to see that any peculiar force is to be given to the fact that the complainants, at the time Jacob Hess and wife immigrated to this country, were infants, and therefore incapable of consenting to a change of their domicile, or of waiving any rights which were secured to them by the contract. As the contract cannot be held to have any application to the property sought to be reached in this case, no rights of theirs were affected by their being brought to this country, and they had nothing to waive. Even if it be admitted that, by reason of their legal adoption by Jacob Hess, they would have been entitled to succeed to his estate at his death as his heirs-at-law, the

ante-nuptial contract furnished no obstacle to the exercise by Hess of his right to dispose of his estate by will, and he having done so, nothing was left to descend to the complainants as his heirs-at-law.

Although the complainants may have acquired the status of adopted children and heirs-at-law by the contract and judicial proceedings had in Germany, their inheritance of after-acquired real estate situated in this state must be in accordance with our laws, and by our laws a testator has an absolute right to dispose of his property by will, even to the exclusion alike of his natural or his adopted children.

We are of the opinion that *the decree of the Circuit Court is justified by the evidence, and it will accordingly be affirmed.*

Rehearing denied.

MONTANA SUPREME COURT

M. L. HOLLAND, *Appt.*,

v.

COMMISSIONERS OF SILVER BOW COUNTY, *Respt.*

(.....Mont.....)

A real-estate mortgage owned and controlled by a nonresident of the state is not subject to taxation as "property in the state."

[(March 11, 1895.)]

APPEAL by plaintiff from a judgment of the District Court for Silver Bow County in favor of defendant in a proceeding brought to compel payment of compensation alleged to be due to plaintiff as county assessor. *Affirmed.*

Statement by Hunt, J.:

The plaintiff and appellant, Holland, was, in 1891, the assessor of Silver Bow county. As such assessor, in the year 1891, he returned his assessment, amounting to \$32,048,606, including the assessment on all mortgages, deeds of trust, contracts, and other obligations by which any debt was secured, and which remained unsatisfied on the records of the recorder's office of Silver Bow county, and which was not barred by the statute of limitations at 12 o'clock M. on the first Monday in March, 1891. On October 6, 1891, the board of county commissioners struck from the assessment roll the sum of \$11,788,007, on the ground that the assessment list included mortgages for that amount which belonged to nonresidents of the state, and for that reason were improperly assessed. The assessor claimed his compensation on the total assessment made by him. The commissioners disallowed the sum of \$2,945.75 of his account, that sum being the commission charged on the mortgages held by nonresidents, which the commissioners struck from the roll. The plaintiff ap-

pealed to the district court. There was a trial without a jury. The court found that \$11,788,007 of the assessment was upon mortgages owned by nonresidents, and that by the law the plaintiff could not recover compensation upon such assessment. There was some correction made by the court, so that plaintiff recovered a judgment for \$10.37. A motion for new trial was overruled, and plaintiff appeals.

Mr. S. De Wolfe, for appellant:

The board of equalization at no time made any reductions on the returns of the assessor, and the board of county commissioners never had the right or authority to do so.

People v. McCreery, 84 Cal. 445.

The authority of a state is supreme over the question of taxation for all purposes of the state, and the mode in which the power is exercised, and the property which shall be subject to this burden, is a matter resting entirely in the discretion of the state.

The government of the United States has no more right or authority to interfere with this right of a state than the latter has to interfere with the agencies of the former in the exercise of the constitutional powers delegated to it.

Cooley, Const. Lim. 479, 483; *Lane County v. Oregon*, 74 U. S. 7 Wall. 77, 19 L. ed. 104; *Kirtland v. Hotchkiss*, 100 U. S. 498, 25 L. ed. 558; *Tappan v. Merchants Nat. Bank of Chicago*, 86 U. S. 19 Wall. 499, 22 L. ed. 198; *State Treasurer v. Wright*, 28 Ill. 509.

The law of Oregon taxing mortgages was held to be legal and constitutional.

Dundas Mortg. Trust Investment Co. v. Multnomah County School Dist. No. 1, 19 Fed. Rep. 369.

Messrs. Charles Mattison and M. L. Wines, for respondent:

The state has no jurisdiction to assess a tax as a personal charge against nonresidents.

Cooley, Taxn. pp. 21, 22, notes.

The indebtedness between the mortgagor and the nonresident mortgagee is the property which has grown out of the transaction be-

NOTE.—As to the power to tax mortgages, see *Detroit v. Rents* (Mich.) 16 L. R. A. 59, and note 27 L. R. A.

tween them and not the mortgage which is given to secure this indebtedness, and the mortgagee being a nonresident this indebtedness to him or credit in him is the property which is taxed, and upon every legal principle must be taxed with him at the place of his residence.

Murray v. Charleston, 96 U. S. 482, 24 L. ed. 760; *State v. Earl*, 1 Nev. 397; *Myers v. Seaberger*, 45 Ohio St. 252; *Territory v. Delinquent Tax-List* (Ariz.) April 18, 1890; *Arapahoe County Comrs. v. Cutter*, 8 Colo. 850; *People v. Eastman*, 25 Cal. 602.

A debt for purposes of taxation is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another state.

Ex parte Clark, 100 U. S. 401, 25 L. ed. 715; *Baltimore v. Hussey*, 67 Md. 112; *State v. Vansyckle*, 49 N. J. L. 386; *State v. Darcy*, 2 L. R. A. 850, 51 N. J. L. 140; *Worthington v. Sebastian*, 25 Ohio St. 8; *Bradley v. Bauder*, 86 Ohio St. 28, 88 Am. Rep. 547; *Grant v. Jones*, 89 Ohio St. 606; *Cooley*, Taxn. pp. 21, 22, notes.

Hunt, J., delivered the opinion of the court:

The principal question for decision is: Under the Revenue Law of 1891, was a tax imposed on mortgages, deeds of trust, and other instruments for the security of debts, when such securities were owned and held by non-residents of the state? It is well settled in this state that under section 871 of the Code of Civil Procedure, which declares that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale, the character of the instrument is restricted to purposes of security, and is, in this state, subject to the doctrines of equity. *Fee v. Svingly*, 6 Mont. 596; *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.* 8 Mont. 82; 2 Jones, Mortg. §§ 20, 39. In *Gallatin County v. Beattie*, 8 Mont. 173, the assessor of Gallatin county assessed certain mortgages in that county to a resident of another county. Justice Knowles says: "A mortgage is a security for a debt. It creates no estate in real property. The equity doctrine is that the mortgage is a mere security for the debt, and only a chattel interest. In regard to mortgages, we have followed the decisions of the courts of California, from which state we borrowed our statutes upon that subject. The rule established by the courts of that state upon this subject is an equity rule. . . . The record of a mortgage is not the mortgage itself, or any more than any other copy." *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655. Regarding a mortgage, therefore, for the purpose of taxation, as nothing more than a collateral security, depending upon some outside obligation to secure which it is given, it is established by the great weight of authority that the mortgage belongs to the owner of the debt, and passes with the debt to any lawful holder thereof. *Taggart v. Sanilac County* *Supra*, 71 Mich. 81. The debt, therefore, if owned and controlled by one not a resident of the state, is not "property in the state, subject

to taxation," as provided by the Revenue Act of 1891, but can be assessed only at the domicile or place of residence of the creditor; without regard to the domicile of the debtor. *Cooley*, Taxn. 63; *Kells v. Holder*, 2 McCrary, 622, 13 Fed. Rep. 668; *Grant v. Jones*, 39 Ohio St. 514; *State v. Vansyckle*, 49 N. J. L. 386; *Baltimore v. Hussey*, 67 Md. 112; *San Francisco City & County v. Mackey*, 22 Fed. Rep. 602; *State v. Darcy*, 51 N. J. L. 140, 2 L. R. A. 350; *St. Paul v. Merritt*, 7 Minn. 258 (Gil. 198); *Arapahoe County Comrs. v. Cutter*, 3 Colo. 349; *Worthington v. Sebastian*, 25 Ohio St. 1; *Liverpool & L. & Globe Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56; *Goldgart v. People*, 106 Ill. 25; *Foreman v. Byrns*, 68 Ind. 247; 1 Deady, Taxn. pp. 62, 330; *People v. Eastman*, 25 Cal. 602; *State Tax on Foreign-held Bonds*, 82 U. S. 15 Wall. 300, 21 L. ed. 179; *People v. Smith*, 88 N. Y. 577; *Territory v. Delinquent Tax-List* (Ariz.) 24 Pac. Rep. 182; *De Vignier v. New Orleans*, 4 Woods, C. C. 206, 16 Fed. Rep. 11; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344.

The appellant seeks to distinguish the *State Tax on Foreign-held Bonds Case*, *supra*, from the doctrine fully supported by the authorities listed above; but nearly every case which we have read by our original examination of this question, or which has been called to our attention by the briefs of counsel, regards the opinion of Justice Field in that case as upholding the general principle that personal property, consisting of mortgages and debts generally, owned by a nonresident of the state endeavoring to tax such property, "has no situs independent of the domicile of the owner." And until the same court which rendered that opinion declines to regard it as maintaining such a principle, we accept the general interpretation given to the language of Judge Field as the correct one, restricting its application, however, to mortgages in the possession of the owner. The case of *Detroit v. Detroit Board of Assessors*, 91 Mich. 78, 16 L. R. A. 59, cited by appellant, decided that the law of Michigan taxing mortgages owned by nonresidents was not unconstitutional. The statute of that state, however, expressly provided that any "mortgage by which a debt is secured, when land within this state is pledged . . . shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the land so pledged." The court held that the legislature could give a situs to mortgages where the land was situated, treating them as interests in realty, though held by nonresidents. In distinguishing the case from the state tax decision, *supra*, the court says that the statute of Michigan "imposes a tax upon an interest in real estate as such," while the decision of the Supreme Court of the United States was that a tax could not be imposed upon the bond itself, which had a situs at the domicile of its owner. A careful examination, therefore, of the Michigan case, demonstrates that the legislature, in the opinion of the court, had the power "to fix the situs for the purpose of taxation at the place of the location of the property mortgaged," and that real-estate mortgages, for the purpose of taxation, could be treated as interests in lands. The Oregon cases cited recognize a statute of that state

similar to that of Michigan, and uphold its constitutionality. But until the legislature passes such a law in Montana it is unnecessary to inquire into its validity, for we are of opinion that in the Revenue Law of 1891 there is no provision giving a situs to mortgages owned by nonresidents as property within the state. The general rule must, therefore, control, and the case be determined adversely to plaintiff. See above authorities. It may be that if, as a fact, notes and mortgages owned by nonresidents are actually within the state, and are controlled by the agents therein, who retain them, and make the investments for the owners, such securities, under the present revenue laws, are subject to taxation, in the hands of such agents, as property in the state. That

question is not before us. But, as said before, the case at bar is not excepted from the general rule that "securities, such as mortgages and the like, are deemed to have no situs except that of the domicil of the owner," hence are not subject to taxation in this state if the domicil of the owner is without the state. From the foregoing views it logically follows that the assessor, having assessed property not within the state, and therefore not taxable, cannot recover his fees for such assessment. *Herriman v. Stowers*, 43 Me. 499; *Berry v. Missoula County Comrs.* 6 Mont. 121.

The order overruling a motion for a new trial and the judgment are affirmed.

De Witt, J., concurs.

NEW HAMPSHIRE SUPREME COURT.

Lorinda WALKER

v.

James P. WALKER *et al.*

(.....N. H.)

1. A wife's distributive share of the personal estate of her husband at his death cannot be defeated by a transfer or change of title as a mere device for that purpose, while he keeps absolute dominion and enjoyment of the property during his own life.
2. A wife is within the class of "creditors and others" in a statute against fraudulent conveyances in respect to her distributive share in her husband's property at his death.
3. A complete gift *inter vivos* of stocks to the donor's sons is not made by taking the shares in their names and leaving them with a third person subject to donor's control.
4. A fraud on the wife of the purchaser is not made by taking a deed of their homestead in his name as trustee for his sons by a former wife, where the amount invested therein is but a small part of his estate and a reasonable provision for the sons.

(March 13, 1891.)

EXCEPTIONS by defendants to rulings of the Merrimack County Court made during the trial of a proceeding to establish a right to a share in the estate of plaintiff's deceased husband, Nathaniel B. Walker. *Overruled.*

Nathaniel B. Walker died in 1889, leaving a will in which he gave one third of his estate to plaintiff and the remainder to his two sons, by a former wife. Defendant Mellen holds in trust for such sons a large amount of corporate stocks which had been delivered to him by Nathaniel B. in his lifetime to be kept for the sons. In May, 1877, Walker purchased a house in Concord, taking the deed in his name as trustee for his two sons. This house was

occupied as a homestead until his death. Plaintiff did not know the state of the title to this house and dower and homestead were consigned to her out of it. Upon learning the state of the title she moved to amend her bill so as to claim a share in that property. This claim was denied. The sons did not know the amount and kind of the securities which had been delivered to the trustee for them, until after the father's death; no part of which was ever delivered to them in the lifetime of the father. The trustee acted always in managing the estate under the father's directions. The gift was not intended to take effect until after the father's death.

The presiding justice ruled that the sons should pay to plaintiff one third of the value of the property in the trustee's hands, or that the trustee should deliver the property to the executor to be administered as part of defendant's estate.

Further facts appear in the opinion.

Mr. William L. Foster, for defendants:

In cases of gifts in trust, of this nature, the donor may provide that the trustee shall retain possession of the property during the life of the donor, and at his death deliver it to the donee. And the donor may lawfully provide that the income from the property may be paid to the donor during his life.

Stone v. Hackett, 12 Gray, 227; *Love v. Francis*, 63 Mich. 181; *Bostwick v. Mahaffy*, 48 Mich. 343; *Ex parte Pye*, 18 Ves. Jr. 140.

The plaintiff, having waived the provisions of the will and released her right of dower and homestead, takes her share in the estate as heir of her husband.

Hunkins v. Hunkins, 65 N. H. 95.

Mrs. Walker is not a creditor.

Sandborn v. Goodhue, 28 N. H. 48, 59 Am. Dec. 398; *Stone v. Hackett*, *supra*; *Seawall v. Roberts*, 115 Mass. 272; *Viney v. Abbott*, 109 Mass. 300; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272; *Perry v. Cross*, 182 Mass. 454; *Stone v. Stone*, 18 Mo. 889; *Straat v. O'Neil*, 84 Mo. 68; *Davis v. Davis*, 5 Mo. 183, *McLaughlin v. McLaughlin*, 16 Mo. 246, *Pond v. Sweetser*, 85 Ind. 144; *Padfield v. Padfield*, 78 Ill. 16; *Chase v. Redding*, 13 Gray, 418; *Blasdel v. Locke*, 52 N. H. 238; *Spaulding v.*

NOTE.—As to conveyance on eve of marriage to defraud wife, see *Murray v. Murray* (Ky.) 8 L. R. A. 85.

For claim of dower in case of deed to third person for husband's benefit, see *Phelps v. Phelps* (N. Y.) 25 L. R. A. 625.

For trust to defeat dower, see *Stroup v. Stroup* (Iad.) ante, p. 522.

27 L. R. A.

Andover, 54 N. H. 88; *Kimball v. Norton*, 59 N. H. 1; *Smith v. Ossipee Valley Ten Cents Sav. Bank*, 64 N. H. 228; *Frazier v. Perkins*, 62 N. H. 69.

Messrs. Chase & Streeter, for plaintiff:
The so-called gifts were incomplete.

2 Bl. Com. 30; *Cummings v. Bramhall*, 120 Mass. 552; *Shurtleff v. Francis*, 118 Mass. 154; *Miller v. LePiere*, 186 Mass. 20; *Reed v. Spaulding*, 42 N. H. 119; *Craig v. Kittredge*, 46 N. H. 58; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500; *Sanborn v. Goodhus*, 28 N. H. 56, 59 Am. Dec. 898; *Toule v. Wood*, 60 N. H. 484, 49 Am. Rep. 826; *Bartlett v. Remington*, 59 N. H. 866; *Cutting v. Gilman*, 41 N. H. 150.

A husband has no power to dispose of his personal estate for the express purpose of depriving his widow of her distributive share therein.

2 Bl. Com. 515, 516; Statute of Distributions, 22 & 23 Car. II.; McQueen's Law of Husband & Wife (1885) p. 110; 2 Roper, Husb. & W. p. 14; *Smith v. Fellows*, 2 Atk. 61; *Turner v. Jennings*, 2 Vern. 612; *Hall v. Hall*, Id. 277; *Coomes v. Elling*, 8 Atk. 676; *Fairebeard v. Bowers*, 2 Vern. 202; *Edmundson v. Cox*, 7 Vin. Abr. 202, pl. 11; *Stons v. Stone*, 18 Mo. 389; *Straat v. O'Neil*, 84 Mo. 68; *Tucker v. Tucker*, 29 Mo. 850; *Tucker v. Tucker*, 32 Mo. 484; *Davis v. Davis*, 5 Mo. 183; *Hays v. Henry*, 1 Md. Ch. 387; *Sanborn v. Lang*, 41 Md. 107; *Rabbitt v. Gaither*, 67 Md. 95.

As to the homestead, the retention of the property by the fictitious trustee, the use of it by him for twelve years without disclosing to his wife or sons the real facts, are badges of fraud, upon which the court must set aside the trust as a fraud in law.

Feigley v. Feigley, 7 Md. 587, 61 Am. Dec. 375.

Blodgett, J., delivered the opinion of the court:

Upon the facts found at the hearing, the bill can be maintained. The attempt of the plaintiff's husband to dispose of nearly all of his personal estate so that he should have the enjoyment and control of it for life, and the plaintiff be deprived of any portion of it at his decease, cannot be sanctioned. It is settled law that conveyances of real estate made by the husband, during coverture, for the purpose of defeating the wife's rights, are, as to her, fraudulent and void. Whether the same rule obtains in transfers of personal property for the like purpose, when the husband reserves therein no right to himself, is a question upon which the authorities are somewhat at variance; but where the transfer is a mere device or contrivance by which the husband, not parting with absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share, there is no substantial conflict of authority that the rule applicable to conveyances of realty prevails. *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Hays v. Henry*, 1 Md. Ch. 387; *Rabbitt v. Gaither*, 67 Md. 95, 100, 105; *Littleton v. Littleton*, 18 N. C. 327; *McGee v. McGee*, 26 N. C. 105; *Davis v. Davis*, 5 Mo. 183; *Stons v. Stone*, 18 Mo. 389; *Tucker v. Tucker*, 29 Mo. 850; *Smith v. Smith*, 12 Cal. 216, 225, 78 Am. Dec. 538; 27 L. R. A.

Lord v. Hough, 48 Cal. 581; *Oranson v. Oranson*, 4 Mich. 280, 66 Am. Dec. 534; *Holmes v. Holmes*, 8 Paige, 863, 8 L. ed. 186; *Richards v. Richards*, 11 Humph. 429; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501. Such, also, were the decisions under the ancient customs of London, from which our statute of distributions is said to have been borrowed. Thus, in *Hall v. Hall*, 2 Vern. 277, it was held that if a freeman gives away goods in his lifetime, and yet retains the deed of gift in his own power, or retains the possession of the goods, or any part of them, it is a fraud upon the custom, and will not conclude the widow; and in *Fairebeard v. Bowers*, Id. 202, a voluntary judgment by a freeman, payable after his death, was postponed to the widow's claim for her customary share. So, in *City v. City*, 2 Lev. 130, where the deceased had, by deed, assigned a term to his son, and the son had gone into possession, it was held that this did not bar the widow of her customary share, the assignment being without consideration; and it was said, "The same is the law as to goods." And *Edmundson v. Cox*, 7 Vin. Abr. 203, is of the like general purport. That case was a bill by the widow of a freeman of London for her customary share. The husband had made his will, and devised to the wife certain real and personal estate. There was sealed up in the will the bond of the testator, executed before the date of the will, conditioned to pay the defendant a given sum of money, or transfer to him a given amount of bank stock. The obligee was the testator's nephew, and the bond without valuable consideration. It was held by the master of the rolls that the widow, on first disclaiming all benefit under the will, could have a decree for her customary share, and that the bond should not stand in her way; and he adds, "Such sort of contrivances to evade the custom have always been set aside in this court." See also *Smith v. Fellows*, 2 Atk. 62, and *Coomes v. Elling*, 8 Atk. 676. These decisions well illustrate what should be the course of decision under our statute. The widow's claim for her share under the statute being strictly analogous to the claim of the widow of a freeman under the custom of London, if a contrivance to evade the rights of the widow under that custom was never tolerated there is no reason why it should meet with more favor under the statute. By the declaratory Statute of 18 Eliz., chap. 5, made perpetual by 29 Eliz., chap. 5, and adopted as part of the common law in this state, for avoiding feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands, tenements, and hereditaments as of goods, chattels, wares, and merchandise, which feoffments, etc., have been devised of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, it was declared and enacted, in the second

section, "that all and every feoffment, gift, grant, alienation and conveyance, and all and every bond, suit, judgment and execution, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken," as against such creditors and others, and their representatives, "to be utterly void and of none effect."

There is no ground to claim, and none is made by the defendants, that the act of the plaintiff's husband in relation to the stocks and bonds comes within the proviso in the sixth section exempting from the operation of the act transactions upon a good consideration and bona fide; but it is contended that the plaintiff is not within the act, as a creditor, and therefore is not within its protection. Technically, and in a strict legal sense, she may not, perhaps, be a creditor; but "the statute, by the words 'creditors and others,' embraces others than those who are strictly and technically creditors. Even the word 'creditor' does not receive a strict definition, for a party who is not, strictly speaking, a creditor, may stand in the equity of a creditor, and have an interest that may be defrauded. . . . The character of the claim, if it is just and lawful, is immaterial, . . . and a contingent claim is as fully protected as one that is absolute." Bump, Fraud. Conv. 2d ed. 491, 492. Under this construction of the statute, which is fully supported by the decisions, it is not open to reasonable doubt that the plaintiff comes within its protection. The character of her claim is just and lawful, in the highest degree; she stands in the equity, if not in the attitude, of a creditor; she is as much injured as any creditor can be; and the fact that, at the time the securities were transferred, her distributive right therein was contingent, entitles it none the less to protection than if it had been absolute. And this should be so. Marriage is equivalent to a pecuniary consideration; that is to say, it is a valuable consideration. The plaintiff's right to her distributive share of her husband's large estate, and which is quite likely to have been one of the inducements to her marriage with him, is therefore in the nature of an actual purchase of that right, and may well be given the same effect, under the liberal and beneficial construction which the statute is entitled to receive for the suppression of fraud, the advancement of justice, and the promotion of the public good. But however this may be, inasmuch as the design of the statute, obviously, was to embrace others than those who are creditors, in a strict and technical sense, we think that under its designation of "creditors and others" the plaintiff is fairly included; "and if" in the language of Mason, J., in *Feigley v. Feigley*, 7 Md. 587, 61 Am. Dec. 875; "under such a comprehensive clause as 'creditors and others,' a wife who has been made the victim of her husband's fraud is not to be included, we are at a loss to ascertain to whom it was designed to relate." The same or equivalent statutory language is also held to apply to and include the defrauded wife in *Tyler v. Tyler*, 126 Ill. 525; *Green v. Adams*, 59 Vt. 603, 59 Am. Rep. 761; *Jiggitts v. Jiggitts*, 40

Miss. 718; *Reynolds v. Vance*, 1 Heisk. 844; *Boile v. Boile*, 1 Coldw. 287; *Brewer v. Connell*, 11 Humph. 500; *Killinger v. Reidenhauer*, 6 Serg. & R. 531; *Bouslough v. Bouslough*, 68 Pa. 495, 499; and *Johnson v. Johnson*, 12 Bush. 485. And if it were even held that the statute does not include the plaintiff, either as a creditor, or as one to whom the conveyancer owes a lawful duty in respect of his property, which he fraudulently attempts to avoid, it would not leave her remediless under the common law, which is still in force. "As the act is merely declaratory, resort may always be had to the principles of the common law whenever the statute fails to reach a case of fraud. The act itself is not affected by this doctrine, and will in general be received as true declaration of what the law was; but wherever the statute is ineffective, either through a change of custom, or the introduction of a new kind of property, or the concoction of some new device, there the common law intervenes, with its pure and elevated principles of morality and justice, and enforces the dictates of common honesty and common sense." Bump, Fraud. Conv. 11. But, irrespective of the statute and the common law, the obligations and duties of husbands and wives to each other disable each of them, alike, to successfully defraud the other by such a disproportionate, unreasonable, and fraudulent transfer of property as appears in this case (*Laton v. Balcom*, 64 N. H. 92, 94-96); and upon general principles of equity, alone, the plaintiff's bill may be supported. It is an established rule that a husband will, upon a proper case being made out, be restrained by injunction from transferring property in fraud of the legal or equitable rights of the wife. 2 Story, Eq. Jur. 12th ed. § 955; *Kerr, Inj.* 2d ed. 534, and cases cited; *Eden, Inj.* 295, 296. And, if such transfers are made, equity puts her on the same footing with a creditor who finds himself hindered, delayed, or defrauded by his debtor. With these views of transaction, the plaintiff is entitled to her distributive share of the stock and bonds as if no transfer of them had been made or attempted. If, however, the transfer were not fraudulent as against her, the same conclusion follows. The gift was not perfected. It was not valid as a gift *inter vivos*, for that goes into absolute and immediate effect,—the donor parting not only with the possession, but with the dominion of the property; nor as a *donatio causa mortis*, for the securities were not delivered by the deceased in his last sickness, nor when in any particular peril of death, or under any special apprehension of such peril. *Craig v. Kittredge*, 46 N. H. 57, and authorities cited.

As to the house occupied by the plaintiff and her husband as a homestead, a different case is presented. At the hearing the plaintiff moved to amend her bill so as to claim one-third part of the homestead premises; but the claim was denied on the ground that, at the time her husband took the homestead deed as trustee for his sons, he had ample means remaining for a suitable provision for the plaintiff, to which denial she excepted. If the purpose which prompted the husband's

act was not to defraud the plaintiff, but a desire to make a reasonable provision for his minor children, whose interests it was his duty to guard and protect, it would be a misnomer to call the transaction fraudulent, and it must be allowed to stand. In such cases the facts are always open to inquiry, "and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means." Schouler, Dom. Rel. 270. And this is right and reasonable. Marriage does not debar a man from all right to dispose of his property during his life according to his will and pleasure. On the contrary, "nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all *post mortem* claims thereon by his widow." *Dickerson's App.* 115 Pa. 198. It simply debars him from making gifts and conveyances with the view of defeating his wife's marital rights, and to this extent only is his power of disposal clogged and fettered. When his object is not to defraud her, he may therefore lawfully sell or convey, and he may even make a gift of his property for any lawful purpose. If possessed of large estate, the voluntary con-

veyance of a small portion of it to a stranger would scarcely be deemed fraudulent as against her; and if the conveyance is to his children by a former marriage, and he retained that which would, in the ordinary course of events, be ample provision for himself and wife and family, there surely would be no fraud upon her marital rights cognizable in equity. See *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441, and authorities generally. Taking into consideration Mr. Walker's pecuniary circumstances, the comparatively small amount invested in the homestead trust estate with reference to the entire amount of his property, the meritorious claims of his children, as such, upon him, and the pregnant fact that this trust was created long before his estrangement from the plaintiff, we are of opinion that the provision made by him for his children was, under the existing circumstances, a just and reasonable one, that on fraud upon the plaintiff was intended, and that her claim for a share of the homestead estate was properly denied.

Exceptions overruled.

Doe, Ch. J., and Allen, J., did not sit.
The others concurred.

PENNSYLVANIA SUPREME COURT.

A. Lincoln FRAME

George H. FELIX *et al.*, *App'ts.*

(187 Pa. 47.)

1. A citizen, taxpayer, and property owner in a city may invoke equity jurisdiction to restrain the execution of an illegal contract for public work involving an expenditure of public money.
2. A city cannot evade a requirement that contracts must be let to the lowest responsible bidder by acting indirectly through the agency of the water board which is only a department of the city government.
3. Proposals for bids for public work cannot fix the price to be paid for labor, where the statute requires all contracts for public work to be let to the lowest responsible bidder.

(March 18, 1895.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Berks County in favor of plaintiff in an action brought to enjoin the execution of a contract for the construction of certain public work. *Affirmed.*

The facts are stated in the opinion of the court below which was delivered by ENDLICH, J., as follows:

"The bill filed December 20, 1894, in this case avers (1) that plaintiff is a citizen and

tax-payer of the city of Reading owning real estate within the same taxable for municipal purposes; (2) that the said city is subject to the Acts of May 23, 1874 (Pub. Laws, 280), and May 23, 1889 (Pub. Laws, 277); (3) that Felix and others named as defendants are commissioners of the water department of said city, under the provisions of said acts; (4) that, having resolved to construct a new inlet at the Malden creek pumping station, they prepared plans and specifications, and invited proposals on the basis thereof, the same stipulating that none but citizens of the United States shall be employed by the contractor upon said work, and that the minimum wages to be paid by him to such employees shall be \$1.50 per day; (5) that the contract was on December 18, 1894, awarded to the defendant Ahrens, upon his proposal made on the basis of said specifications, and that an agreement is about to be executed with him accordingly; (6) that the prevailing market price of labor in Reading is from \$1 to \$1.25 per day; (7) that the stipulation as to the minimum wages to be paid is illegal, unconstitutional, and void; and (8) that the said agreement, if executed, will do plaintiff irreparable injury. The prayers are (a) that the proceedings in awarding the contract be declared void; (b) that defendant be restrained from executing the proposed agreement; and (c) general relief. A preliminary injunction was granted. The answer (which it was agreed by counsel should stand as the answer of all the defendants) admits all the averments except the third, which is qualified by the statement that the commissioners of the water depart-

NOTE.—For note on rights of lowest bidders on public contracts, see *Anderson v. St. Louis Public School Board* (Mo.) 26 L. R. A. 707.
27 L. R. A.

See also 33 L. R. A. 827; 37 L. R. A. 630.

ment are governed by the Act of March 21, 1865 (Pub. Laws, 458), and the sixth, seventh, and eighth, which are denied. The cause was tried and argued before the court on January 8, 1895.

"Upon the basis of the admissions in the pleadings, of the testimony taken, and of such matters as the court, under rule 27, § 5, takes judicial notice of, I make the following findings of fact:

"(1) The plaintiff, A. Lincoln Frame, is a citizen and tax-payer of the city of Reading, and the owner of real estate in the said city taxable for municipal purposes. (Plaintiff's request for findings of fact No. 1 granted.)

"(2) The city of Reading is a municipal corporation, having accepted and being subject to the provisions of the act of the legislature entitled 'An act dividing the cities of the state into three classes,' etc., approved May 28, 1874, being a city of the third class, and is also subject to the provisions of the act of legislature entitled 'An act to provide for the incorporation and regulation of cities of the third class,' approved May 28, 1889. (Plaintiff's request for findings of fact No. 2 granted.)

"(3) George H. Felix, Matthan Harbster, Frank A. Tyson, and Frederick P. Heller, four of the defendants, are commissioners of the water department of the city of Reading, which department is governed by the provisions of the Act of March 21, 1865 (Pub. Laws, 458), and the supplements thereto; the former providing, in section 4, that said commissioners shall have power 'to purchase such materials as shall be requisite for keeping said waterworks in good repair, but not for the construction of new works, without the consent and direction of councils;' and that 'no new work of construction . . . shall be undertaken by said commissioners, without the consent of councils being first had and obtained.' (Plaintiff's request for findings of fact No. 3 modified.)

"(4) In pursuance of an ordinance of the councils of the city of Reading of March 28, 1894, providing as follows:

"Section 1. Be it ordained, etc., that the sum of \$35,000 be and the same is hereby appropriated to the department of water for the fiscal year of 1894, to purchase an additional pumping engine for use at Maiden-creek pumping station, and to make such alterations to the present pumping station as shall be necessary for the accommodation of said engine.

"Sec. 2. That the board of water commissioners be and are hereby authorized and directed, immediately after the approval of this ordinance, to advertise for proposals for said pumping engine and alterations to building, and award contracts for the same to such party or parties as they may deem proper for the best interest of the city.

"—The said commissioners of the water department, having resolved to construct a new inlet at the Maiden-creek pumping station of the said city, prepared plans and specifications therefor, and invited proposals for the said work, on the basis of the said plans and specifications; and that in

the said specifications it was stipulated that the person to whom the contract should be awarded should not employ any laborer, artisan, or mechanic upon the said work who was not a citizen of the United States, and that said contractor should not pay less for labor on the said work than \$1.50 per day for every person employed. (Plaintiff's request for findings of fact No. 4 granted, with the addition of the ordinance under which the commissioners were acting.)

"(5) A number of proposals were made for the said work upon the basis of the said specifications, and the said commissioners of the water department, on the 18th day of December, A. D. 1894, awarded the contract for the said work to Howard E. Ahrens, one of the defendants, who had made one of the proposals on the basis of the said specifications, and, unless restrained, will execute an agreement with the said Howard E. Ahrens for the performance of the said work in accordance with the terms of the said plans and specifications. (Plaintiff's request for findings of fact No. 5 granted.)

"Under these findings of fact, and as applicable to them, I make the following findings of law:

"(a) In the inviting, awarding, and conclusion of contracts for new work of construction under authority of the councils of the city of Reading, the board of water commissioners is bound to act in conformity with the provisions of Act May 28, 1889, article 4, section 6; and the authority given it by the Ordinance of March 28, 1894, respecting the construction or alteration at the Maiden-creek pumping station, must be understood as having been given and as exercisable by said board subject to said provisions.

"(b) The fixing by the board of water commissioners, in the specifications for the work to be done at the Maiden-creek pumping station, of a minimum price to be paid for labor, and the inviting of proposals and the awarding of the contract upon the basis of such specification, are a violation of the statutory requirement in Act May 28, 1889, article 4, section 6, that such work be awarded to the lowest responsible bidder, and therefore void. (Plaintiff's request for findings of law No. 1 substantially granted.)

"(c) The plaintiff, as a citizen, tax-payer, and property owner in the city of Reading, has a right to invoke the equity jurisdiction of this court to set aside the action of the board of water commissioners in the premises, and to restrain the execution of the proposed agreement between it and the defendant Ahrens in pursuance of said action.

"(d) The plaintiff is entitled to a decree in accordance with the first and second prayers of his bill, with costs. (Plaintiff's request for findings of law No. 4 substantially granted.)

"The reasons which seem to compel the decision I have just indicated are (without regard to the order of the findings) the following:

"1. The present bill falls clearly within the category of bills *quia timet*.—'a well-settled branch of equity jurisdiction.' *Wheeler v. Philadelphia*, 77 Pa. 388, 348; *Wells v.*

Bain, 75 Pa. 39, 15 Am. Rep. 563; *Baird v. Rice*, 63 Pa. 489; *Page v. Allen*, 58 Pa. 388, 98 Am. Dec. 272. Nor can the standing of a citizen and a taxpayer, when money is to be raised by taxation or expended by the municipal treasury, to proceed in equity to test the validity of the proposed action claimed by him to be illegal, be questioned at this day (*Wheeler v. Philadelphia*, *supra*; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Rep. 759; *Moers v. Reading*, 21 Pa. 188; *Mott v. Pennsylvania R. Co.* 80 Pa. 9, 72 Am. Dec. 664; *Page v. Allen*, *supra*; *Maset v. Pittsburgh*, 187 Pa. 548), the recognized grounds of such standing being special injury to his interests as a taxpayer, and want of a common-law remedy. See *Bispham*, Eq. § 424; 1 *Spelling*, Extraordinary Relief, §§ 614, 717; *Mott v. Pennsylvania R. Co.* *supra*. It is therefore unnecessary for him to show any injury likely to result to him from the alleged illegal action, different in kind from that common to all other citizens and taxpayers, and inferable, as a matter of law, from the illegality of the proposed expenditure of the public money. The fact of a threatened injury entitling him to a relief is necessarily involved in the establishment of the illegality of the intended municipal action. Hence I have deemed it needless to make any special finding, as a finding of fact, that the contract here in question, if executed, will do irreparable injury to plaintiff. (Plaintiff's request for findings of fact No. 7 refused, etc.)

"2. It was decided in *Reading v. Shepp*, 2 Pa. Dist. Rep. 187, upon careful consideration of all the pertinent statutes, that the Special Act of 1865, creating and governing the water department of the city of Reading, is not repealed by the provisions of the Act of 1874, providing a system by which cities of the third class may purchase the franchises, etc., of existing water companies, nor by those of the Act of 1889, empowering such cities, having become the owners of water-works, to establish water departments; and that, therefore, the water department of the city of Reading is governed by the Act of 1865 and its supplements, and not by the General Laws of 1874 and 1889. The question then arises whether, in inviting proposals and awarding contracts, the board is required to conform to the provisions of article 4, section 6, of the last-named enactment, which is as follows: 'All work and materials required by the city shall be furnished, and the printing, advertising and all other kinds of work to be done for the city, shall be performed under contract, to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance.' It was decided in *Bork v. Buffalo*, 127 N. Y. 64, that a provision in the charter of the city of Buffalo prohibiting the same from entering into a contract for any work or improvement exceeding certain prices, and with certain exceptions, 'until the assessment therefor has been confirmed,' did not apply to the board of park commissioners of said city, or to the contracts made by them; but that the provisions mentioned had reference to contracts made by the regu-

lar officers of the municipal government, and not those made by a separate department possessing independent corporate powers. It appears from the opinion of *Mr. Justice Vann* in that case that the park commission was organized by a special statute passed 1869, subsequently to the enactment of the charter of the city, forming no part of it, and in no way dependent upon it; creating an independent department of the city government, and clothing it with power to locate parks, lay out approaches thereto, appropriate and condemn lands for these purposes, make rules for the regulation, government, and protection of the parks, etc., all powers which were to be exercised by the commission independently and without the consent or approval of any other body or officers. In 1885 the provisions of the Statute of 1869 were incorporated in a revision of the city charter as one of the titles of the same, with the apparent object of having all the laws relating to the city government in its various departments embraced in a single statute, for the sake of convenience. The park commissioners were not, however, in terms, made city officers, but were still given 'sole and exclusive power by contract or otherwise to open, grade, construct, repair and maintain the roadways,' etc., without leave or license from the council or other agency of the city. Of the cost of improvements determined upon by the commission (not exceeding the limitation of the statute as to amount), it was made the duty of the city council to raise one half by local assessment. The contract in question was executed in form by 'the city of Buffalo by the park commissioners.' Between the relation of the statute creating the Buffalo park commission to the charter of the city of Buffalo, and that of the Act of 1865 to the previously enacted charter of the city of Reading and the Act of 1889, which is its present charter, as well as between the relation of the park commissioners to the city government of Buffalo and that of the Reading water board to the city government of Reading, there are certain points of resemblance, so obvious that they need not be pointed out. But the points of distinction are no less striking though created by special statutes, separate from and forming no part of the charter of the city of Reading, with certain powers and duties defined by the legislature beyond the control of the city councils, and unaffected (as far as its composition, rights, methods, and privileges, and the resulting liabilities of property holders are concerned) by subsequent general legislation. The Reading water board is, nevertheless, not a separate body, possessing powers independent of the city councils in the management of the water department, or the construction of or contracting for new work within the same. By section 4, Act 1865, it is required to perform all such duties relating to the management of the department as the city councils may, consistently with the act, impose upon it; to submit, whenever called upon, estimates of the expense of new works, alterations, etc., contemplated by councils in the water-works; to carry out, with the aid of the city

police, the regulations of councils as to the use of water by the residents of the city; and, while permitted to purchase such materials as may be requisite for keeping the works in repair, it is denied the right to do so for the construction of new works without the consent and direction of councils, and forbidden to undertake any such new work except with their consent. Without going any further, therefore, it seems very clear that the water board, existing and acting under the Statute of 1865 and its supplements, is, nevertheless, at least in all matters in which it is made subject to the direction of councils, but a department of the city government,—an established agency of the city for carrying on one branch of the municipal affairs. If it were needful, this conclusion might be fortified by a comparison between the relations of the Reading water board, under the statutes here governing, and the relation of the Sewickley water commissioners to that borough, under the enactments applicable to it, passed upon in *Sewickley Water Works Comrs. v. Sewickley*, 159 Pa. 194, where it is said by Mr. Justice Green, at page 198, 159 Pa.: 'They are mere officers, through whose agency the works were constructed, maintained, and operated.' If, however, the Reading water board is not a separate body, possessing independent corporate powers, but a mere department or agency of the city government, in the construction of new waterworks, then it is too plain for argument that the inviting and awarding of a contract for that purpose by the board at the direction of councils is the act of the city, through the agency of the board; and so are the execution of the contract and the work of construction. But, the city being required to do all such work by contract to be given to the lowest responsible bidder, it cannot be pretended that it may evade that requirement by acting indirectly through the agency of the water board. It was held in *Re Emigrant Industrial Sav. Bank*, 75 N. Y. 888, that the city of New York, being required to do all public work exceeding a certain amount by contract to be awarded to the lowest bidder, could not escape that requirement as to a particular part of such work by delegating the doing of it to the park commissioners in such manner as they might 'deem expedient and for the best interests of the city and property owners.' It follows that when the city councils, by the Ordinance of March 28, 1894, authorized the water board to engage in the work of constructing a new inlet at the Maidencreek pumping station, and for that purpose to advertise for proposals and award contracts, it must be conclusively held to have intended a compliance on the part of the water board with Act 1889, article 4, section 6; and what is implied in a law or ordinance is just as much a part of it as what is expressed. *United States v. Babbitt*, 66 U. S. 1 Black, 61, 17 L. ed. 96, *Hunchett v. Weber*, 17 Ill. App. 114; *Segel v. Lauer*, 148 Pa. 286. In a word, in inviting proposals and awarding a contract in this case, the water board was bound by the requirement that municipal work is to be given to and

done by the lowest responsible bidder, and to make its specifications accordingly. Has it complied with that requirement? If not, then, as was said by Denio, J., in *Brady v. New York*, 20 N. Y. 812 (a case arising under a similar enactment), it does not require any argument to show that the proceeding was null and void and conferred no rights upon the person to whom the contract was awarded.

"3. The provision that contracts for municipal work shall be given to the lowest responsible bidder does not have sole reference to the more pecuniary ability of the contractor, but involves a discretion on the part of the municipal authorities in the selection of the agency best fitted for the performance of the work, etc., required. *Com. v. Mitchell*, 83 Pa. 843; *Findley v. Pittsburgh*, Id. 351; *Douglas v. Com.* 108 Pa. 559; *Interstate Vitrified Brick & Paving Co. v. Philadelphia*, 104 Pa. 477. But, that discretion being granted, the purpose of the provision, which 'was based upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed (*Brady v. New York*, *supra*, per Denio, J., at page 816), clearly was 'to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms (*Mazel v. Pittsburgh*, 187 Pa. 548, per Sterret, J., at pages 561, 563, 187 Pa.), and to insure 'the accomplishment of the work at the lowest price by subjecting the contract for it to public competition.' *Re Mahan*, 20 Hun, 801, per Brady, J., at page 802. In order to effectuate this purpose, it is manifest that, where something is to be done that is required to be submitted to competition, every essential part of it that goes to make up the whole of it must be submitted to such competition. *Re Paine*, 26 Hun, 481. If any one essential part can be withdrawn from competition, so may others; and in the end it will be found that contracts will be let to the lowest bidder on some single trifling element, while as to all important items there has been no competition at all. Such was, indeed, the case in *Brady v. New York*, *supra*. Upon items making up seven eighths of the expense of the work to be done no bids were asked; but a pretense of compliance with the statute was made by awarding the contract to the lowest bidder, upon the items making up the remaining one eighth of the entire expense. This was held clearly a violation of the law. Nor can it make any difference in principle whether items be withdrawn from competition by permitting (as in *Brady v. New York*, *supra*) the contractor to charge for them as he pleased, or by stating in advance what will be allowed for the same. Thus, in *Re Mahan*, *supra*, it was held that when the statute requires a public officer to advertise for bids for work to be performed, with a view to awarding the contract to the lowest bidder, he cannot lawfully, in such advertisement, fix an arbitrary price to be paid for certain specified kinds of work, included

in that for which the bids are asked; *e. g.*, in advertising for bids for the construction of a sewer, he cannot fix \$4 per cubic yard as the price to be paid by the municipality for all rock excavation. 'If,' says Brady, J., 'the items of rock excavation may be omitted from the contract to be made by arbitrarily stating an allowance for it, the same course may be pursued as to the other items, and the advertisement made, therefore, to cover a few only of the items constituting the whole work to be done.' Accordingly, a contract made upon the basis of such an advertisement, and embodying its objectionable feature, was declared to be illegal. The principle of this decision, affirmed on appeal in 81 N. Y. 621, was followed under similar conditions in *Re Mauger*, 23 Hun, 658; *Re Manhattan Sav. Inst.* 83 N. Y. 142; *Re Merriam*, 84 N. Y. 596; *Re Metropolitan Gas-Light Co's Petition*, 85 N. Y. 528; *Re Paine*, 26 Hun, 481. The fact that the assessments laid to pay the amounts accruing to the contractor upon such contracts were in the earlier cases vacated, in the later simply reduced, is irrelevant here; the reason for the adoption of the latter rule, obviously justified where the work had been done, and the application was to avoid contribution on the part of property holders benefited to its expense being together with the rule itself inapplicable here. It seems, therefore, to be beyond question that, under a provision requiring the submission of contracts for municipal work to competitive bidding and the awarding of them to the lowest responsible bidder, it is not lawful to fix, in the specifications, on the basis of which the proposals are invited, any arbitrary sum to be paid for any part or item of the work to be done; and that the fixing of such a sum for any part or item of such work renders illegal the entire proceeding and the contract to which it may lead. Nor is it material whether the sum so fixed be or be not, in point of fact, in excess of what it is likely that the competition among the bidders would have made it. Says Brady, J., in *Re Mahan*, *supra*: 'In the consideration of this case it was thought that, inasmuch as it did not appear that the price allowed for rock excavation by the commissioner of public works was in excess of what would have been demanded by any contractor, the petitioner did not sustain any injury by the omission mentioned, and was not aggrieved, therefore, by any substantial error. But reflection upon that theory has led to the conviction that that is not enough to override the plain terms of the statute.' Manifestly this must be so. If not, the requirement to submit public work to competitive bidding could be practically disregarded by municipal officers whenever they might feel disposed to take the chance of being stopped by the taxpayers, and, in case they should be, of finding the ways and means of proving that the expenditure was not in excess of what it would probably have been had they obeyed the statute. Such a condition of the law would be simply intolerable, and cannot for one moment be thought of as a possible thing.

"Now, the difficulty with the specifica-

tions and proposed contract in this case is that the former undertake to fix arbitrarily and in advance the price of one of the important elements entering into the expense of the work to be done thereunder, by the stipulation that the contractor shall pay to the persons employed by him in the performance of the contract not less than \$1.50 per day as wages. I am not going to decide, because, as I have shown, it is unnecessary to decide, whether or how much that is in excess of average wages paid to persons employed in the kind of work contemplated in these specifications and this proposed contract. The evidence offered by plaintiff upon this subject might, when objected to, have been excluded, which would have prevented any counter evidence by defendants on the subject. For that reason I have marked as refused the plaintiff's sixth request for findings of fact and his second request for findings of law. All that I am bound to say or that is proper for me to say is that, by attempting to fix in the specifications, on the basis of which proposals were invited, the minimum rate of wages to be paid by the contractor, the water board has withdrawn from possible competition one of the essential elements of the work, every part of which it was required to submit to competition, and that thereby its invitation of proposals for the remainder of the work, its award of the contract therefor, and the proposed execution of said contract have been rendered illegal as in contravention of the mandate of the statute.

"It may, in view of prevailing conditions, be unfortunate that the case before me had arisen at this time, and it may be, as urged at the hearing, that the plaintiff's motives for bringing it here, beyond these disclosed by the record, were not the most commendable. But, the case being here, every question necessarily to be passed upon in its decision is, of course, to be determined upon recognized legal principles, and upon no other consideration; and with the plaintiff's hidden motives the court has nothing to do. *Mazel v. Pittsburgh*, 187 Pa. 548. It is, moreover, to say the least, extremely doubtful, and from what was said upon the argument it would hardly seem to be supposed by any one, that the fixing of a minimum rate of wages to be paid to laboring men in the performance of municipal contracts ever does put into the pockets of a single one of them employed by the contractors one penny more than what his labor would at the time command in the community. The wages of labor are not controllable in that way. If the average wages paid for labor of the kind required are equal to the rate thus prescribed, such a stipulation is an entirely nugatory one. If the average is less, the contractor, whoever he may be, will ordinarily pay just what the average is, and nothing more. In either event the laboring man will be none the better off because of such a stipulation, unless it be enforceable under a valid contract. But I am not now deciding, because it is not before me, that every contract between a municipality and a contractor containing a stipulation as to the minimum rate

of wages to be paid by the latter is necessarily void, or that such a stipulation in any such contract is unenforceable. Nor, for the same reason, am I deciding anything as to the right of the city or any department to fix the wages to be paid to laboring men employed directly by it. I am dealing here only with the question of its right to prescribe in its specifications and invitation for bids the rate of wages to be paid by others in the performance of such works as it is required by law to throw open to competitive bidding and to award to the lowest bidder, and with the question of the legality of a contract to be made, in the face of such a requirement, upon the basis of specifications so framed and conditioned in advance of the bidding and awarding of the contract. Neither am I passing upon the city's right, in such work and such contract, to require the employment of American citizens only, and to insist upon the same,—a question which is not material to the decision of this case, and I repeat that I am not deciding that the average rate of wages in this city is or is not \$1.50 per day, or that the labor required in the performance of the work contemplated by the proposed contract could or ought to be obtained at a less rate of wages. I am simply deciding that in asking for proposals as to that work, and in framing its specifications therefor as the basis of such proposals, the water board had no right to fix, in advance, any rate of wages to be paid by the contractor, whether it be too high or too low, and that, therefore, its past and intended action in the premises cannot be sustained.

"Counsel may prepare and submit the proper decree to be entered in this case in accordance with the foregoing decisions."

Mr. William J. Bourke, for appellants:

The commissioners of the water department of the city of Reading, are organized under and governed by the Act of March 21, 1865 (Pub. Laws, 455-460), and are not subject to any of the general laws governing the city of Reading (proper), and as a consequence they are not subject to section 6, of the Acts of 1874 or 1889 in the awarding of their contracts.

Reading v. Shepp, 2 Pa. Dist. Rep. 187.

It has not been proven that \$1.50 per day is in excess of the market price of labor, and until that is clearly shown it cannot be argued that the constitution has been invaded against.

Wheeler v. Philadelphia, 77 Pa. 388; *Re Northern Home for Friendless Children*, 2 W. N. C. 849; *Wilkesbarre City Hospital v. Luzerne County*, 84 Pa. 55.

When specifications are first of all presented, fixing a minimum rate of wages, thus having

all persons who bid upon the work put upon a common basis and plane, competition is not averted or done away with, and the proposals based upon such specifications are, therefore, not illegal; nor does it in any way affect the responsibility of bidders.

Com. v. Mitchell, 82 Pa. 348; *Findley v. Pittsburgh*, 82 Pa. 351; *Douglass v. Com.* 108 Pa. 559.

Meurs. Stevens & Stevens and Cyrus G. Derr, for appellee:

The inviting of proposals for municipal work upon the basis of a minimum price to be paid for labor, and upon the basis of the employment only of persons of a certain nationality as workmen, offends against the statutory provision, that contracts for city work shall be awarded to the lowest responsible bidder.

Brady v. New York, 20 N. Y. 816; *Mazet v. Pittsburgh*, 137 Pa. 561; *Re Mahan*, 20 Hun, 801; *Re Mauger*, 28 Hun, 658.

Contracts such as that in question virtually appropriate out of the city treasury, when the current prices paid for labor are less than \$1.50 per day, a sum equal to the difference between such current prices and such sum of \$1.50 per day, gratuitously giving the said difference to the individual laborers, which is against public policy, and unlawful and unconstitutional.

Pa. Const. art. 9, § 159.

The said provision is also violative of the spirit of the constitutional inhibition against the regulation of labor by local laws.

Pa. Const. art. 3, § 7.

Per Curiam:

The important question in this case is raised upon the specifications forming part of the proposed contract for the new inlet and pumping station about to be built by the water department of the city of Reading. These specifications require the contractor to employ no one not a citizen of the United States, and to pay no man a less sum for his labor than \$1.50 per day. The point made by the plaintiff is that such specifications are not consistent with the provisions of Act May 23, 1889, article 4, section 6, which require that such work shall be let to the lowest responsible bidder. "The learned judge of the court below, in his findings of law marked "(a)," "(b)," "(c)," and "(d)," has sustained the contention of the plaintiff and fully vindicated his decree. We affirm it for the reasons so clearly stated in these findings. The question discussed in the remainder of the opinion, affecting the organization of the water department defendant, is not raised by the assignments of error, and we express no opinion upon it.

WASHINGTON SUPREME COURT.

PUGET SOUND DRESSED BEEF & PACKING CO.

William J. JEFFS *et al.*, and Harry M. HEATH, *Appt.*

O. E. GRIFFIN, Petitioner, *Recept.*

(.....Wash.....)

The exemption of certain property from execution attaches to the proceeds of insurance thereon which the owner intends to invest in similar exempt property.

(March 22, 1895.)

APPEAL by defendant Heath from a judgment of the Superior Court for Pierce County, applying money reached by garnishment proceedings against the Oakland Home Insurance Company which had been instituted by C. E. Griffin as assignee of a judgment which had been obtained by the Puget Sound Dressed Beef & Packing Company against Heath and others, to reach money due for a loss by fire of property which Heath claimed to be exempt from execution. *Reversed.*

The facts are stated in the opinion.

Messrs. Murray & Christian, for appellant:

There is probably no civilized state or country in the world in which some kind of an exemption is not allowed.

These statutes are designed as a protection for poor and destitute families.

They are based upon considerations of public policy and should be liberally construed.

7 Am. & Eng. Encyclop. Law, pp. 180, 184; *Cameron v. Fay*, 55 Tex. 62; *New Orleans Ins. Assn. v. Jamearn*, 6 Tex. Civ. App. 282; *Tilston v. Wolcott*, 48 N. Y. 190.

Where a homestead dwelling was insured and burned, the supreme court of California held that the sum due from the insurance company was not subject to garnishment by a creditor of the husband.

Houghton v. Lee, 50 Cal. 101; *Ward v. Goggan*, 4 Tex. Civ. App. 274; *Reynolds v. Hanes*, 18 L. R. A. 719, 83 Iowa, 842; *Cooney v. Cooney*, 65 Barb. 524.

Property purchased by a pensioner with his pension money is exempt.

Crow v. Brown, 11 L. R. A. 110, 81 Iowa, 844; *Yates County Nat. Bank v. Carpenter*, 7 L. R. A. 557, 119 N. Y. 550.

A judgment for the wrongful conversion of property exempt from execution sale is itself exempt.

Below v. Robbins, 8 L. R. A. 467, 76 Wis. 600.

The debtor is no more responsible for a change in the character of the property through the destruction of his house by fire than he is for a change in its character the result of a wrongful seizure of his property by which it is transferred into a credit.

NOTE.—For note on exemption in respect to proceeds of exempt property, see *Wylie v. Grundysen* (Minn.) 19 L. R. A. 23.
27 L. R. A.

Bridgers v. Howell, 27 S. C. 425; *Cone v. Lewis*, 64 Tex. 381, 53 Am. Rep. 767; *Rockwell v. Hubbell*, 3 Dougl. (Mich.) 197, 45 Am. Dec. 252; *Brooms v. Davis*, 87 Ga. 584; *Butner v. Bowser*, 104 Ind. 255.

Messrs. R. W. Jamieson and C. P. Bennett, for respondent:

The right to sell the corpus of the debtor's real property for the payment of his debts and to divest him of title thereto being purely a creature of the statute law, statutes restrictive of this right are not in derogation of the common law and are not subject to the rule that statutes in derogation of common law are to be strictly construed.

But since the common law subjected all of a debtor's chattels, except "beasts of the plow," to execution, hence statutes exempting personal property from execution are in derogation of the common law and are to be strictly construed.

Thompson, Homestead & Exemptions, § 7; *Temple v. Scott*, 8 Minn. 421; *Rus v. Allen*, 5 Denio, 119.

When the language of a statute is plain and unambiguous, courts are not called upon to read into the statute, by construction, or judicial legislation, something not already there.

Endlich, *Interpretation of Statutes*, §§ 4-9; *Leschi v. Washington Territory*, 1 Wash. Terr. 19; *Bradbury v. Wagenhorst*, 54 Pa. 180; *Virginia & T. R. Co. v. Lyon County Comrs.* 6 Nev. 68; *State v. Washoe County Comrs.* 6 Nev. 105; *Johnson v. Hudson River R. Co.* 49 N. Y. 455; *Denn v. Reid*, 35 U. S. 10 Pet. 524, 9 L. ed. 519; *Hyatt v. Taylor*, 42 N. Y. 258; *Sneed v. Com.* 6 Dana, 389; *Dame's App.* 62 Pa. 417; 29 Am. L. Rev. 88; *Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 117; *Coffin v. Rich*, 45 Me. 507, 91 Am. Dec. 568; *Melver v. Ragan*, 15 U. S. 2 Wheat. 29, 4 L. ed. 175; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 681; *Sailing v. McKinney*, 1 Leigh, 42, 19 Am. Dec. 724; *Gains v. Gains*, 2 A. K. Marsh. 190, 12 Am. Dec. 877; *Bepley v. State*, 4 Ind. 264, 58 Am. Dec. 629.

Policies of insurance are contracts between the assured and the insurer, mere special agreements, and not insurance of the specific things mentioned, and the insurance is not an incident of the thing insured.

Lynch v. Daleell, 4 Bro. P. C. 482; *Sadlers Co. v. Babcock*, 2 Atk. 554; *Columbia Ins. Co. of Alexandria v. Lawrence*, 35 U. S. 10 Pet. 507, 9 L. ed. 512; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 496, 10 L. ed. 1044; *Bernheim v. Beer*, 56 Miss. 149; *Smith v. Ratcliff*, 66 Miss. 688.

In California the supreme court has held that the proceeds of a policy of insurance on a homestead came within the spirit and intent of the statute and have held insurance money on a homestead to be exempt.

Houghton v. Lee, 50 Cal. 101.

In this state we have no statute exempting the proceeds of a homestead from execution, no statute exempting the proceeds of an insurance policy on a homestead from execution; and no money exemption whatever except wages for services.

That which is not exempt by the words of the statute cannot be made so by the court.

Smith v. Hatchell, *supra*; *Horgan v. Amick*, 63 Cal. 408; *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128; *Monniea v. German Ins. Co.* 12 Ill. App. 240; *Morse v. Towns*, 45 N. H. 185; *Manchester v. Burns*, Id. 482; *Edson v. Traak*, 22 Vt. 18; *Cook v. Holbrook*, 6 Allen, 572; *Kellogg v. Waite*, 12 Allen, 529.

Pension money after it has been paid over to the pensioner and deposited in a bank is not exempt from execution.

Webb v. Holt, 57 Iowa, 712; *Triplett v. Graham*, 58 Iowa, 185; *Goble v. Stephenson*, 68 Iowa, 270; *Barugh v. Barrett*, 69 Iowa, 495; *Foster v. Byrne*, 76 Iowa, 295; *Kellogg v. Waite*, 12 Allen, 529; *Spelman v. Aldrich*, 126 Mass. 118; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Eckert v. McKee*, 9 Bush, 355; *Sims v. Walsham* (Ky.) March 8, 1898; *State v. Fairton Saving Fund & Bldg. Assn.* 44 N. J. L. 376; *Cavanaugh v. Smith*, 84 Ind. 380; *Crane v. White*, 27 Kan. 319, 41 Am. Rep. 408; *Friend v. Garcelon*, 77 Me. 25, 53 Am. Rep. 739; *Hissom v. Johnson*, 27 W. Va. 644, 55 Am. Rep. 327; *Roselle v. Rhodes*, 116 Pa. 129; *Manchester v. Burns*, 45 N. H. 482.

The point involved in this appeal has already been passed upon in *Carter v. Davis*, 6 Wash. 327.

See also *Eberhart's App.* 89 Pa. 509; *Thompson, Homestead & Exemptions*, § 452; *Huey's App.* 29 Pa. 220.

The proceeds of the policy of insurance were not exempt property, and did not arise out of exempt property, but on the contrary, were the proceeds of property not exempt, money which the appellant had paid the insurance company in premiums, and as the money paid for premiums was not exempt the proceeds of the premiums, the insurance money, is not exempt either.

Boyer's App. 21 Pa. 210; *McWilliams v. Webb*, 32 Iowa, 577; *Pittman's App.* 48 Pa. 315; *Mandlore v. Burton*, 1 Ind. 39; *Scott v. Brigham*, 27 Vt. 561; *Edson v. Traak*, 22 Vt. 18; *Butt v. Green*, 29 Ohio St. 668; *Shelly's App.* 86 Pa. 380; *Hill v. Johnson*, 29 Pa. 363; *Garrett & Martin's App.* 32 Pa. 162, 73 Am. Dec. 719; *Hammer v. Freese*, 19 Pa. 257.

HOYT, Ch. J., delivered the opinion of the court:

On December 1, 1893, the Puget Sound Dressed-Beef & Packing Company recovered judgment against William J. Jeffs, James F. Myhan, and Harry M. Heath, copartners doing business under the firm name of the Rainier Market. On March 10, 1894, the said Puget Sound Dressed-Beef & Packing Company assigned said judgment to one C. E. Griffin, who thereafter caused a writ of garnishment to be issued against the Oakland Home Insurance Company, requiring it to answer as to its indebtedness to one of the judgment debtors, Harry M. Heath. Said insurance company answered, and admitted that a loss under one of its policies issued to said Heath had occurred, and that its liability therefor was in process of adjustment. Subsequently, the court found that the insurance company was indebted to said Heath

in the sum of \$650.50, and ordered that such sum be paid to the clerk of the court, which order was complied with by the garnishee. Thereupon, the said Heath filed in the cause a petition from which it appeared that he was a householder, and that the property which was covered by the policy upon which the liability of the insurance company arose was exempt from execution. It further appeared from such petition that it was the intention of the petitioner to use the moneys due upon the policy of insurance in the purchase of other goods of the same character as those destroyed, and the prayer thereof was that the moneys in the hands of the clerk of the court should be paid over to him, to be used for that purpose. To this petition the respondent C. E. Griffin interposed a demurrer on the ground that it did not state facts sufficient to warrant the making of the order prayed for, for the reason that the moneys paid upon such policy of insurance were not exempt from execution. This demurrer was sustained by the court, and thereupon on motion of said C. E. Griffin, the court ordered that the money be applied upon his judgment. From this order said Harry M. Heath has appealed to this court, and, as reason for its reversal, alleges that the court committed error in sustaining the demurrer to the petition. The respondent made no claim in the lower court that it did not sufficiently appear from the petition that the property destroyed was exempt from execution, nor does he make any such claim here. His contention there was, and the only one of sufficient importance to be noticed here is, that the money paid upon the insurance policy was not exempt from execution by reason of the fact that the property, the destruction of which gave rise to the liability, was so exempt. The claim on the part of appellant was and is that such money was exempt for a sufficient time to allow it to be invested in the purchase of property to replace that which had been destroyed.

The question presented by these opposite contentions is an important one. Its determination must depend upon the construction to be given our statute relating to the exemption of personal property from sale on execution. If such statute is to be strictly construed, and exemptions thereunder confined to the articles specifically named therein, the contention of the respondent must be sustained for the reason that nowhere in the statute is there any specific provision for the exemption of money paid on account of the loss by fire of exempt property. But, if it is to receive such a liberal construction as to affect the evident object of the legislature in its enactment, it will well warrant the appellant's contention. Which of these constructions should this statute receive? Statutes exempting real property from sale on execution have received a liberal construction by nearly all the courts of this country. See *Peverly v. Sayles*, 10 N. H. 356; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Connaughton v. Sands*, 32 Wis. 387; *Campbell v. Adair*, 45 Miss. 170; *Kuntz v. Kinney*, 33 Wis. 510; *Robinson v. Wiley*, 15 N. Y. 489; *Howe v. Adams*, 28 Vt. 541; *Moss v. Warner*,

10 Cal. 296; *Bevan v. Hayden*, 13 Iowa, 122; *Montague v. Richardson*, 24 Conn. 388, 63 Am. Dec. 178. And, if statutes exempting real property should be so construed, there is no good reason why those exempting personal property should not receive a liberal construction. The only reason given by those courts which have adopted a different rule of construction of such statutes, when applied to personal property, is that at common law real property was not subject to sale on execution, and was only made subject to such sale by statutory provisions, so that statutes exempting it were not in derogation of the common law, and did not come within the rule of strict construction applied to statutes of that kind, while those exempting personal property were in derogation of such law, for the reason that thereunder such property was subject to such sale. At one time there might have been some reason for a distinction of this kind, for the reason suggested; but in modern times, in this country, such reason has ceased to have much force, and most of the courts now refuse to recognize it. And a very great majority of the courts of this country now liberally construe all exemption statutes, without regard to the property to which they relate. Such courts say that such statutes are remedial, and should receive such a construction as to give effect to the intention of the legislature. See *Carpenter v. Herrington*, 25 Wend. 370, 37 Am. Dec. 239; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Wassell v. Tunnah*, 25 Ark. 101; *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 897; *Gilman v. Williams*, 7 Wis. 829, 76 Am. Dec. 219; *Alvord v. Lent*, 28 Mich. 369; *State v. Romer*, 44 Mo. 99; *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71; *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210.

The courts of some of the states have not adopted this broad rule of liberal construction but, in our opinion, reason, as well as the weight of authority, is with those that have. We shall therefore apply it in determining the rights of the parties to this appeal; and thereunder it is our duty to look for the object sought to be accomplished by the legislature, and give it effect, even although the provisions of the statute are not as full and specific as they should have been. What was the evident object of the legislature in providing that household furniture should be exempt from execution? There can be but one answer. It was that the family might have something which would enable them to maintain a home, and live together therein. This object can only be subserved by sustaining the contention of the appellant. If the householder is to be protected in the use and enjoyment of his household furniture, he should be protected in taking such steps as will enable him to replace it if lost or destroyed; and common prudence would require that he should make some provision which would enable him to replace it in case it was destroyed by fire, and the usual and economical provision in that regard is to procure a policy of insurance thereon. And when such policy is procured, and money paid on account of the destruction of the property, the object of the legislature can

only be subserved by holding that such money takes the place of the property insured, and, until a reasonable time has elapsed for its being used in replacing the destroyed property, is exempt from execution, the same as the property would have been.

We have not lost sight of the argument made by the respondent to the effect that the insurance money is not the proceeds of the property destroyed, but, instead thereof, is money paid upon a contract for an independent consideration, which consideration had no connection with the property. But this course of reasoning has no substantial force when brought in contact with the intention of the legislature, which is made to appear from a liberal construction of the language used in the statute upon the subject of exemptions. The object of the insurance, it is true, is not to protect the insured property. It is, however, to procure the means by which such property can be replaced, if destroyed; and, for the purposes of the application of the exemption law, the money paid thereon should be held to bear the same relation to the property destroyed as would other property which might be obtained by way of direct exchange. The fact that the money paid for the insurance was not exempt from execution cannot affect the question. As well might it be claimed that, because money not exempt from execution was used in repairing household furniture, it would thereafter not be exempt. The exact question here presented has not often come before the courts. From the carefully prepared briefs of counsel, and from such examination as we have been able to give the matter, we are of the opinion that the weight of authority thereon is with the contention of the appellant. Especially is this true of the more recent cases upon the subject. In the case of *Reynolds v. Hanes*, 83 Iowa, 342, 13 L. R. A. 719, this exact question was, after careful consideration, decided by the supreme court of Iowa as contended for by the appellant. That learned court cited a large number of cases in support of its conclusions, and only mentioned one which held directly to the contrary. The statute of that state was substantially the same as ours, and the court concedes that if the object of its enactment could not be considered, and only the articles specifically mentioned therein held to be exempt, a contrary conclusion would have been compelled; but it held that the object of the legislature was the controlling consideration, and that the statute should be read as though apt words had been used to express the intention of the legislature. In the case of *Cameron v. Fay*, 55 Tex. 62, the supreme court of that state, under a statute substantially like ours, sustained a claim for exemption under facts substantially the same as in the case at bar. The case of *Houghton v. Lee*, 50 Cal. 101, presented facts so nearly like these that the holding of that court that moneys paid upon an insurance policy were exempt may be said to be exactly in point upon the question here presented. Other cases could be cited where this exact question has been decided in accordance with the contention of the appellant, and a few could be

ed to sustain the contention of the respondent. We are best satisfied with the reasoning of those of the former class, and feel justified in following them. Besides the cases directly in point, there are a large number of cases, the holding of which can only be sustained by the same course of reasoning which will sustain the contention of the appellant in the case at bar. Thus, in the case of *Crow v. Brown*, 81 Iowa, 844, 11 L. R. A. 110, it was held that property purchased with pension money was exempt by virtue of the provisions of the federal statute which provided that such money should be wholly for the benefit of the pensioner. This decision was made after a careful consideration by that learned court, and the fact that there was a dissenting opinion by one of the judges cannot be said to detract from the authority of the case. On the contrary, the very fact that there was a division among the judges of the court would be likely to cause the case to be more carefully considered than it otherwise would have been. In the case of *Belov v. Robbins*, 76 Wis. 600, 8 L. R. A.

467, it was held by the supreme court of Wisconsin that a judgment for the wrongful conversion of exempt personal property was itself exempt, and it is evident that the course of reasoning which led to such a decision would fully sustain the contention of the appellant above referred to. The cases which in principle cannot be distinguished from the one at bar, and which are in line with the contention of the appellant, are very numerous. We shall cite only a few of them. See *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 7 L. R. A. 557; *Bridgers v. Howell*, 27 S. C. 425; *Cone v. Lewis*, 64 Tex. 381, 53 Am. Rep. 667; *Broome v. Davis*, 87 Ga. 584.

In our opinion the money paid upon the insurance policy was exempt from execution.

The judgment will be reversed, and the cause remanded, with instructions to overrule the demurrer to the petition.

Anders, Gordon, and Scott, JJ., concur.

OREGON SUPREME COURT.

L. VANBEBBER, *Appt.*,

v.

James PLUNKETT *et al.*, *Respts.*

(.....Or.....)

The doctrine of an account stated does not apply to a single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple contract.

(January 14, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Benton County in favor of defendants in an action upon an account stated. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Kelsay, and W. S. McFadden, for appellant.

Mr. W. S. Hufford, for respondents:

The plaintiff must prove an account stated against each of the defendants, as that, and nothing else, will support his allegations.

Truman v. Owens, 17 Or. 523; *Holmes v.*

NOTE.—What constitutes an account stated.

The primary meaning of account stated was a mutual examination by parties who had had dealings with each other of the respective items of claim on the different sides of the account and an agreement upon which items should be allowed and upon the balance properly due after subtracting the sum of the items on one side from the sum of those on the other. When the parties had themselves thus agreed upon a balance the courts treated it as conclusive in the absence of special circumstances and in any litigation between the parties would not permit them to go behind such balance. This principle was, however, very soon extended beyond its original application. In the earliest books of reports are cases in which the principle was extended to cases in which a statement of account was rendered by one of the parties and retained without objection by the other. And finally decisions were made to the effect that the mere admission of an existing liability was sufficient to make an account stated.

As stated in *State v. Hartman Steel Co.*, 51 N. J. L. 446, the courts have drifted away from the original standard of a stated account. An account stated originally presented to the legal mind the idea of mutual accounts and of a balance struck on a comparison of such accounts made by the respective creditors. Such an account stated involved an agreement in respect to the items which were to be allowed and so implied an assent to the correctness of the balance found to be due against each of such creditors.

37 L. R. A.

General definitions.

There is a substantial agreement as to the definition of what was originally known as an account stated.

In stating an account two things are necessary: (1) That there should be a mutual examination of the claims by each of the parties; (2) that there be a mutual agreement between them as to the correctness of the allowance and disallowance of the respective claims and of the balance as it is struck upon the final adjustment of the whole account and demands on both sides. The minds of the parties must meet upon the allowance of each claim allowed and upon the disallowance of each item or claim rejected. They must mutually concur upon the final adjustment and nothing short of this in substance will fix and adjust their respective demands as an account stated. *Lockwood v. Thorne*, 18 N. Y. 236.

An account stated is an agreement between persons who have had previous transactions fixing the amount due, in which respect it is distinguished from a mere admission or acknowledgment. It is a new cause of action. It is not a contract upon a new consideration and does not create an estoppel but establishes *prima facie* the accuracy of the items charged without further proof. *McKinster v. Hitchcock*, 19 Neb. 100.

An account stated is an acknowledgment of an existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and independent cause of action so

Page, 19 Or. 232; *Auzerais v. Naglee*, 74 Cal. 60; *Fleischner v. Kubli*, 20 Or. 838.

An action upon an account stated is not an action founded upon the items of the account, but is founded upon the new promise or agreement to pay the balance found due on such accounting or settlement, and is entirely a new contract.

It is for the court to decide whether a conversation amounts to an account stated or not.

Bishop v. Chambre, 8 Car. & P. 55.

A mere offer to pay a sum of money, unaccompanied by any admission that there is a debt due, will not constitute an account stated.

Wayman v. Hiliard, 7 Bing. 101; 1 Am. & Eng. Encyclop. Law, pp. 114, 115, note.

far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results. *Chace v. Trafford*, 118 Mass. 529, 17 Am. Rep. 171.

Where two persons by compromise liquidate and state at an agreed sum an unliquidated and disputed claim which one holds against the other, this constitutes a valid contract and the only remedy is upon the contract to recover the amount thus liquidated. *Fred W. Wolf Co. v. Salem*, 83 Ill. App. 614.

An account stated exists where an account is rendered and a debt in a specified sum is acknowledged as due from one person to the other or where persons who have had previous transactions agree upon a definite balance as due. *Ware v. Manning*, 86 Ala. 238.

An account stated is an agreement and acknowledgment that a certain sum of money or balance is due from one of the parties and an express or implied promise to pay it. *Marmion v. Waller*, 58 Mo. App. 610.

An account stated is an account balanced and rendered with assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance. *Volkering v. DeGraaf*, 81 N. Y. 271.

Where there is a disputed claim and the parties settled the dispute by agreeing upon the amount due in an account stated which one party promises to pay, that promise is founded upon a sufficient consideration and can be enforced against him although he might be able to prove that nothing was in fact due from him. *Dunham v. Griswold*, 100 N. Y. 224.

A stated account, is an agreement between both parties that all the items are true. *Auzerais v. Naglee*, 74 Cal. 64.

An account stated is an agreement between persons who have had previous transactions fixing the amount due in respect of such transactions and promising payment. *Zaccarino v. Pallotti*, 49 Conn. 86.

Stated accounts are those which have been examined by the parties and where a balance due from one to the other has been ascertained and agreed upon as correct. *McClelland v. Crofton*, 6 Me. 308.

It is the consent of defendant to the balance claimed that imparts to an account the character of an account stated. *McCall v. Nave*, 52 Miss. 494.

If an account is presented, examined, corrected, and returned approved, it is an account stated. *Sergeant v. Ewing*, 36 Pa. 153.

Acknowledgment of and a promise to pay the balance may support an action upon an account stated. *Fitch v. Leitch*, 11 Leigh. 471.

If the balance is struck by the parties and interest computed on the balance it will be an account stated. *McClelland v. West*, 70 Pa. 138.

Where plaintiff went over the account in defendant's presence and found an amount due to himself the result of which was not objected to by defendant, there was an account stated. *Kook v. Bonitz*, 4 Daly. 117.

The original transaction in this matter was not for the payment of money, but it was a contract to build a certain amount of fence, which plaintiff claims was never built, and this supposed stated account, set up by plaintiff, is an entire new contract, for the payment of certain damages to plaintiff, for the defendant's failure to build said fence; and, to constitute an account stated, there already must be the relation of debtor and creditor existing between the parties, and as this action is for unliquidated damages the same could not be a subject of an account stated.

Truman v. Owens, 17 Or. 527; *Whitwell v. Willard*, 1 Met. 216; *Volkering v. DeGraaf*, 81 N. Y. 271; *Gough v. Findon*, 7 Exch. 48.

An agreement that the items are correct will make the account a stated one. *Claire v. Claire*, 19 Neb. 54.

The term "account stated" is but an expression to convey the idea of a contract having an account for its consideration and is no more an account than is a promissory note or other contract having a like consideration for its support. *Auzerais v. Naglee*, 74 Cal. 64.

The making up of an account and signing an acknowledgment of its correctness and of the balance shown at its foot will make an account stated. *Bullock v. Boyd*, 3 Edw. Ch. 208, 6 L. ed. 405.

In some of the cases there is no distinction made between the terms "stated," "liquidated" and "settled."

Thus in *Bainbridge v. Wilcock's*, *Baldw. C. C. 530*, the terms "stated," "settled," or "liquidated," are treated as equally applicable.

In *Baker v. Middle*, *Baldw. C. C. 394*, the terms "settled" and "stated" seem to be treated as interchangeable, and it is stated that long acquiescence makes an account settled, and that though not signed by the party it is a stated account if it is in writing and shows a balance or that there is none.

But in *Lockwood v. Thorne*, 18 N. Y. 236, a settled account is defined to be one that has been paid or adjusted by the parties.

In *Rapalje & Lawrence, Law Dictionary*, a settled account is stated to be one which has been adjusted between trustee and *cestui que trust*. But since as shown by authorities cited below the term "stated" may be applied to such accounts it would seem that there is really no distinction which the courts have thought material to preserve.

In *McNeel v. Baker*, 6 W. Va. 153, the court recognizes the rule that a stated account properly exists only where accounts have been examined and the balance admitted as the true balance between the parties without having been paid. When the balance thus admitted is paid, the account is made a settled account.

Balances made in the debtor's books and assented to, may constitute an account stated. *Mathewson v. Eureka Powder Works*, 44 N. H. 239.

Where several items of claims are brought into account on either side and being set against one another a balance is struck and the consideration for payment of the balance is the discharge of the items on each side, there is a real account stated. It is then the same as if each item was paid and a discharge given for each and in consideration of that discharge the balance was agreed to be due. It is not necessary to make out a real account stated that the debts shall be debts in present or that they shall be legal debts. *Re Laycock v. Pickles*, 4 Best & S. 497.

Wolverton, J., delivered the opinion of the court:

This action was brought as for an account stated. At the trial in the court below, when plaintiff had rested his case, upon motion of defendant Ashnah Plunkett a judgment of nonsuit was rendered in her favor, from which the plaintiff appeals.

The evidence offered tended to show that on or about the 13th day of January, 1886, the plaintiff exchanged with defendants a 68-acre tract of land for a certain other 68-acre tract belonging to the defendant Ashnah Plunkett; that there was a difference in the value of the said tracts in plaintiff's favor, and that for the purpose of making up said

difference the defendants agreed to build and construct for plaintiff about three fourths of a mile of fencing, 60 to 80 rods of which was to be of boards and posts, and the balance to be of the kind commonly known as a "worm fence." The defendants having failed and neglected to construct the fence, the plaintiff had it built by one J. R. Mays, whom he paid therefor. The plaintiff, testifying in his own behalf, said, among other things, "that on or about the 1st day of June, 1889, at the Occidental Hotel, in Corvallis, Oregon, the defendant James Plunkett agreed that we will pay you \$300 for that fence [referring to the fence in the contract growing out of the exchange of lands], and that he

If the balance is reached while the parties are together looking over the account, it becomes final without any additional time for considering it. *Darlington v. Taylor*, 3 Grant, Cas. 196.

An account stated for the purpose of ascertaining what had been done with certain money and not for the purpose of ascertaining what is due between the parties will not be binding upon them. *Holmes v. Morse*, 50 Me. 102.

To make an account stated it is sufficient that the account has been examined and assented to as correct by both parties. This consent may be express or implied from circumstances. *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81.

There is no express agreement upon an account by a mutual looking over the same. But the law raises from such facts an implied agreement to the correctness of the account. *Samson v. Freedman*, 102 N. Y. 692.

The promise to pay need not be express. *Kent v. Higleyman*, 17 Mo. App. 9.

But, the person to be charged must assent to the balance to make it an account stated. *Bumsey v. Gant*, 10 Humph. 238.

Illustrations of what have been held to be accounts stated.

A reply by a landlord upon being asked by a tenant to pay the amount which the tenant had expended for repairs and which the landlord had promised in advance to repay that, "I cannot pay you now, but will out of the next rent," will be an account stated. *Seago v. Deane*, 4 Bing. 459, 3 Car. & P. 170, Moore & P. 257.

Where turnips growing in a field were purchased and partly removed when the seller said to the buyer, "You owe me £3," to which the buyer answered, "I will send it before I draw any more turnips," it was held to be an account stated. *Pinobon v. Chilcott*, 3 Car. & P. 236.

A letter written upon receipt of an account for tolls due, in which £5 is enclosed and the statement made that the creditor "should have the remainder next week" is an account stated. *Peacock v. Harris*, 10 East, 107.

An acknowledgment of the amount due for trees which had been felled and converted to the use of the debtor will constitute an account stated. *Knowles v. Michel*, 13 East, 249.

In *Elmes v. Wills*, 1 H. Bl. 64, where the promise was to pay a certain amount unless the promisor should show within a month that it had been paid, was treated as an account stated.

Where the directors of a mine which needed money agreed among themselves to each give the secretary his L. O. U. for £100, to be used in the working of the mine, it was held that there was an account stated on which the secretary could maintain an action. *Graves v. Cook*, 2 Jur. N. S. 475.

Where an accounting was had between the parties, both being present and the clerk of one made

entries of the items in a book which was copied by the other into another book and without acknowledging the correctness of the items, he admitted the balance to be correct it was held to be evidence of an account stated. *Rigby v. Jeffrya*, 7 Dowl. P. C. 551.

Where an insurance company entered the amount of a claim to the credit of the insured on its books and paid a portion or it to one having an order from the assured, the court held there was such an admission of the amount due as to enable the assured to maintain an action upon an account stated. *Re Teignmouth & General Mut. Shipping Assn. L. R. 14 Eq. 148, 41 L. J. Ch. 679, 26 L. T. N. S. 684.*

Where one person sold a library of books for another, some of which were returned as imperfect, after which the owner wrote to the seller that he had received the returned books which together with certain other credits left a balance of a certain amount, which he would pay in a certain time, it was held to be a stated account. *Wheatley v. Williams*, 1 Mees. & W. 533, Tyrw. & G. 1043.

In *Plano Mfg. Co. v. Parmenter*, 32 Ill. App. 638, a balance sheet between an agent for the sale of machines and a representative of the manufacturers, in which the number of the machines received and their disposition are stated, was treated as an account stated but the rule was applied that if he subsequently admitted the receipt of a machine not represented therein, he must pay for it unless he showed that the statement was erroneous.

Where two persons managing an estate had become indebted to plaintiff and one of them was shown the account by a clerk of plaintiffs and admitted that it was correct, except as to one item and subsequently both persons heard the amount mentioned without objections and the other admitted that something was due, it was held that there was evidence to go to the jury of an account stated. *Chisnam v. Count*, 2 Mann. & G. 317, 2 Scott, N. R. 599.

Where the only objection made is the question of articles charged for and the amount is then made to conform with the objection after which the balance is paid, it will be regarded as an account stated. *Glichrist v. Brooklyn Grocers Mfg. Assn.* 66 Barb. 390.

An agreement to the balance due accompanied by a member of the debtor firm writing an acknowledgment of the correctness of the amount due on the paper containing the statement of the account addressed to another member of the firm and delivering it to the creditor, will make an account stated. *Heidenheimer v. Ellis*, 67 Tex. 426.

Where an employer gives orders to his men for goods to be furnished by a merchant and the merchant renders to the employer his statement of the amount which he has furnished on the orders, which amount is deducted from the monthly pay roll of the men, there is an account stated between

[plaintiff] assented to said proposition to accept the \$300 for the said fencing and in payment therefor." One L. Haskins, a witness for plaintiff, testified that he was present at the Occidental Hotel at the time referred to by plaintiff, and "that he heard the plaintiff ask defendant James Plunkett what

they were going to do about that fencing, and that Plunkett stated, 'We will pay you \$300 for that fencing built by the Mays,' and that plaintiff assented thereto." Hiram Wood testified that in the year 1890 James Plunkett said to him, "We have settled with Uncle Van [referring to plaintiff] for the fencing

the employer and merchant. *Bull v. Brookway*, 48 Mich. 523.

The fixing by way of statement and compromise of a disputed claim for extra work in the building of a house will be an account stated. *Hanly v. Noyes*, 35 Minn. 174.

A will or codicil thereto acknowledging a debt but afterwards revoked cannot figure as a liquidated or settled account. *Settle v. Settle*, 12 Helsk. 661.

A rough statement in writing exhibiting an estimate of the condition of a partnership and the situation of the partners in relation thereto and to each other, will not be an account stated. *Burden v. McKimoyie*, 1 Bail. Eq. 875.

Where an account was rendered to a firm of transactions with an employe who was at the time absent and after retaining it for some months the firm disputed it when the creditor requested its retention until the return of the employe so that its accuracy could be ascertained, there is no account stated. *Porter v. Lobach*, 2 Bosw. 188.

The giving of an order on a third person for payment upon the receipt of a machine and the bill thereof in accordance with the contract of sale, but before any work is done or anything due on the contract, does not constitute an account stated. *Truman v. Owens*, 17 Or. 527.

In *Memory v. Niepert*, 38 Ill. App. 181, where a person who had undertaken to ship produce at a certain price failed to procure it at that price and authorized the other person to procure it at his home market and charge back the loss, which was done and a statement of the account of loss rendered to the first person, the court held that this does not constitute a new contract superseding the old one, but that the old one remained in full force and the rendering of the account was merely a method of adjusting the amount of damage under it.

The balance must be definitely fixed.

There must be a promise express or implied to pay a single sum whether such consists of a single item in a unilateral account or is a totality of all items admitted to be correct in such account, or is the balance remaining after the mutual application in payment of each other of such items in counter accounts as are mutually admitted to be correct. *State v. Hartman Steel Co.* 51 N. J. L. 445.

The general admission of a pecuniary demand not specifying the amount is not an account stated. *Lane v. Hill*, 18 Q. B. 252; *Teal v. Auty*, 3 Brod. & B. 99, 4 J. B. Moore, 542.

An acknowledgment of a debt without specifying the amount is sufficient to entitle the creditor to nominal damages. *Bernasconi v. Anderson*, *Moody & M. 183*; *Kirton v. Wood*, 1 *Moody & R. 233*.

But there was an English *not prius* case which held that admitting the owing of a debt but not stating the sum will entitle to nominal damages. *Dixon v. Deveridge*, 2 Car. & P. 100.

The creditor must be definite.

The admission must be that the amount is due the plaintiff. Thus where the acceptor of a bill of exchange stated in a letter that if he had had the money he should not have let the bill go to protest, it was held that this was not sufficient to make an account stated, although the amount of the bill was mentioned in the letter, since it merely admitted the amount due to the proper holder of the 27 L. R. A.

bill, which might not be the plaintiff. *Jardine v. Payne*, 1 Barn. & Ad. 663.

Must be of a subsisting debt.

There must be an acknowledgment of a subsisting debt. *Tucker v. Barrow*, 7 Barn. & C. 623, 1 Mann. & R. 513, *Moody & M. 189*, 3 Car. & P. 85, 89.

Where the maker of a check which had been lost by bankers to whom it was given for collection, promised them to give another for the amount, it was held that there was no debt due from one to the other, which could be the subject of an account stated. *Lord Abinger* says: "There is a good deal of confusion in the books on the question of accounts stated. But they lay down this, that where there is a promise to pay a sum of money as due, it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to the jury that the plaintiff claims that sum to be due, and that there are matters of account between the parties; it does not go farther than that; and it is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not." *Lubbock v. Tribe*, 3 Mees. & W. 612, 1 Horn & H. 180.

A promise to replace a wood boat which had been sunk by negligence or on failing to do so to pay a certain sum of money will not amount to an account stated. *Rutledge v. Moore*, 9 Mo. 533.

An account cannot become stated between parties who have had no dealings with each other, since as between them no account in fact exists. *Field v. Knapp*, 108 N. Y. 87.

Where a loan is made on securities which fail because of the negligence of the broker to search the records and who promises to make good the loss to his client, there is no account stated since there can be an account stated only where a debt actually exists. *Whitehead v. Howard*, 5 J.; B. Moore, 105, 2 Brod. & B. 272.

In *Hopkins v. Logan*, 5 Mees. & W. 241, 7 Dowl. P. C. 380, it is suggested that there must be something to show that the amount is due at the time of the accounting in order to make a good account stated.

In *Burlingame v. Shelmire*, 35 N. Y. S. R. 161, where the account rendered contained charges for personal services in receiving and shipping fruit, the court says the cases relating to this subject are those where an actual account has existed between the parties. But in cases where the prices are not agreed upon or where they are not fixed by the market but depended solely upon the personal services, the general rule relating to accounts stated does not necessarily prevail.

Where there has been no pre-existing debt or previous dealings between the parties the mere retention of a statement of a single transaction will not amount to an account stated. *Mellon v. Campbell*, 11 Pa. 415.

There must be an admission of a debt due. And a promise to pay an amount on a contract which is never carried out is not sufficient. *Lemere v. Elliott*, 5 Hurlst. & N. 653, 30 L. J. Exch. 630, 7 Jur. N. S. 1203, 4 L. T. N. S. 804.

But there is one case which in accordance with the cases which have held that the mere acknowledgment of indebtedness was sufficient has held that the pre-existence of a debt was not absolutely necessary.

Thus where at an auction sale a lot was knocked

built by John Mays, and we are to pay him for it." And one Mrs. Kisor testified that during the summer of 1890, or about that time, at her father's house, in King's valley, defendant Ashnah Plunkett, in speaking of the fence built by said Mays, stated, in effect: "We have settled with the plaintiff for

that fencing built by the Mays, and are to pay him [Vanbebbber] for it." The foregoing is substantially all the evidence adduced by plaintiff, and the counsel for defendants contend that it was insufficient to go to the jury to charge defendant Ashnah Plunkett in an action upon an account stated, and, conse-

down to a person who had not money enough to pay the deposit and entered into an arrangement by virtue of which he gave his L. O. U. to the auctioneer for the amount, it was held that there might be a recovery on an account stated. *Cleave v. Moors*, 8 Jur. N. S. 48.

In that case Martin, B., says in the old form of account stated there must be an antecedent debt, but if two persons agree to make a thing a debt, it is such between them and the transaction acts as a sort of estoppel.

Need not be signed.

Signing the account is not necessary. Retention of it is sufficient. *Willis v. Jernegan*, 2 Atk. 252; *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 260.

An acknowledgment is sufficient to constitute an account stated, although the paper is not signed. *Vinal v. Burrill*, 16 Pick. 401.

May be oral.

An account stated need not be in writing. It may be verbal, or partly verbal and partly in writing. *Watkins v. Ford*, 69 Mich. 337.

There may be an oral statement of account which consists of many writings. *Newhall v. Holt*, 6 Mea. & W. 662.

Where a commission merchant's account has been rendered showing that a balance has been struck between the parties and an acknowledgment by the debtor of its correctness though made verbally between the parties, it becomes a closed account. *James v. Fellowes*, 20 La. Ann. 114.

But in contrast with the above it has been held that the account must be in writing and likewise the balance must be in writing. *Wood v. Gault*, 2 Md. Ch. 433.

Vouchers need not be surrendered.

The vouchers need not be delivered up to make it an account stated. *Willis v. Jernegan*, 2 Atk. 252.

With third person.

There seems to be no settled rule with reference to how far a person other than the debtor or creditor himself may give or receive the admission.

It has been held that loose declarations by a person at different times to third persons not agents of the plaintiff that he owed the plaintiff or was in honor bound to pay him a certain sum, are not sufficient to sustain a claim on account stated. *Thurmond v. Sanders*, 21 Ark. 255.

Admission by the debtor to a person who is not an agent of the creditor and had no authority to make any demand, that defendant was liable to pay plaintiff the rent for certain property, is no evidence of an account stated. *Hoffer v. Dement*, 5 Gill, 132, 46 Am. Dec. 623.

Evidence of an admission to a third person not shown to be an agent of the seller that the buyer owed the seller a certain amount will not be sufficient to constitute an account stated for the price of certain goods sold and delivered. *Breckon v. Smith*, 1 Ad. & El. 433.

One court held that admission by assignees of an insolvent that a certain amount of rent is due by him to the landlord will not constitute an account stated, since an account stated must be of transactions between the parties making it. *Clarke v. Webb*, 4 Tyrw. 673, 1 Crompt. M. & R. 29, 2 Dowl. P. C. 671.

So where an administratrix of the debtor ad-

mitted the correctness of the debt to the administratrix of the creditor, it was held no account stated, because the debt was not owing to or by either party in her own right. *Pelch v. Lyon*, 9 Q. B. 147.

But in *Anonymous*, 1 Vent. 268, the principle of account stated was applied in case of an executor called upon to pay the debt of his testator.

Amongst merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or third post. *Sherman v. Sherman*, 2 Vern. 276.

There may be an account stated against a personal representative. *Bucklin v. Chapin*, 1 Lans. 443.

There may be an account stated between a debtor to a partnership and the survivors after the death of one partner so that an action can be maintained on it without alleging the death of the partner and the survivorship of plaintiffs. *Holmes v. DeCamp*, 1 Johns. 84, 3 Am. Dec. 293.

One of the contracting parties and the administrator of the other may state an account. *Vandever v. Statesir*, 30 N. J. L. 503.

There may be an account stated between partners and representatives of a deceased partner. *Campbell v. Campbell*, 40 N. Y. S. R. 817.

There may be an account stated between a debtor and the administratrix of the creditor. *Smith v. Forty*, 4 Car. & P. 123.

Where a surviving partner renders an account to the representatives of the deceased partner without vouchers and showing results merely and not the details it will nevertheless become stated account if acquiesced in without any objection on those grounds and without any claim for vouchers, details, or explanations. *Ogden v. Astor*, 4 Sandf. 311.

There may be an account stated between a legatee under a will and a debtor to the estate, whose debt is the subject of the legacy. *Topham v. Morecraft*, 8 El. & Bl. 972, 4 Jur. N. S. 611.

So it was held that where after a debt is contracted the creditor takes a partner, after which more transactions are had and then an account is stated with both, they may maintain an action upon it, as well that part contracted before the partnership as afterwards. *Moor v. Hill*, Peake, Add. Cas. 10.

The clerk of a partnership cannot without authority state an account with a creditor of the firm so as to bind the parties. *Brettel v. Williams*, 4 Exch. 623, 19 L. J. Exch. 123.

A bookkeeper of a corporation has not by reason of his office power to state an account showing claims against the corporation which will bind it as upon an account stated. *Harvey v. West-Side Elev. (Patented) R. Co.* 13 Hun. 392.

But the rendition by a bookkeeper with defendant's knowledge of an account to defendant's workmen of the amount which the books show to be due them will become an account stated against defendant. *Wiley v. Brigham*, 16 Hun. 106.

Where a maker of a bill of exchange admitted to the agent of the unknown holder that the amount was due, and on a subsequent date after he had learned who the holder was, stated to the same agent that he could not pay the amount, it was held to be an account stated with the holder. *Baynam v. Holt*, 8 Jur. 963.

An account of tolls due may be validly stated,

quently, that the judgment of nonsuit was properly granted. "A motion for a nonsuit," says Lord, *Ch. J.*, in *Brown v. Oregon Lumber Co.*, 24 Or. 817, "is in the nature of a demurrer to the evidence. It admits not only all that the evidence proves, but all that it tends to prove. The evidence given for the

plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it. Whether there is any evidence tending to prove the material allegations upon which a cause of action is based is a question of law for the court, but whether a given amount of evidence is suf-

with a toll keeper who has not been appointed as required by act of parliament if the trustees or creditors of the turnpike have made no objection. *Peacock v. Harris*, 10 East, 107.

An account cannot be stated by a member of an old firm which has been succeeded by a new one of which he is also a member which fraudulently states that goods consigned to the old firm came into possession of the new one so as to bind the members of the new firm. *Newhall v. Wyatt*, 68 Hun, 1.

The fact that a statement of account is signed by an agent out of the territory for which he is appointed will not vitiate it if it pertained to business over which he had authority, nor will the fact that he affixed to his name a wrong designation affect its validity. *Stowe v. Sewall, 3 Stew. & P. (Ala.) 67.*

An agreement between the merchant and husband as to the amount due for supplies furnished to the family will not constitute an account stated, as against the wife. *Holmes v. Page*, 19 Or. 232.

But a husband may bind his wife by an account stated between him and one who has furnished supplies for her plantation. *Klots v. Butler*, 58 Misc. 338.

If the clerk of one partner states an account between the partners showing a balance due the other the latter may treat it as prima facie evidence of the adjustment of the partnership transactions. *Goodin v. Armstrong*, 19 Ohio, 44.

Where a tradesman brought suit for goods furnished defendant and when the writ was served defendant told the officer that he would pay the amount in a short time, and an undated paper, proved to be in his writing, was given in evidence stating the transmission of \$4, with a promise to pay the balance in the book in a week. It was held there was no evidence of an account stated. *Moseley v. Reade*, 10 Jur. 18.

An acknowledgment of the amount claimed in the writ after the action is brought will not be sufficient to support an account stated, if there is no evidence of any debt existing prior to the bringing of the action. *Allen v. Cook*, 2 Dowl. P. C. 548.

In *Nutt v. United States*, 125 U. S. 650, 81 L. ed. 821, it was contended that an amount found by the quartermaster general to be due to a claimant for war damages was equivalent to an account stated between private individuals, and that it became such upon its acceptance by congress and the claimant; but the court held that congress had not adopted the report as its statement of what was due by the United States and that the report was never submitted to the claimant as a correct statement of indebtedness, and that therefore it was not an account stated. But there is no discussion of the question whether or not such a statement could be an account stated under any circumstances.

The law of account stated does not apply to the statement by officers of the government of the indebtedness of a railroad to the United States. *Central Pac. R. Co. v. United States*, 24 Ct. Cl. 145.

An account stated grows out of commercial transactions being the rendition of a running account by one party to the other, and his acceptance or acquiescence in its accuracy and amount. It is therefore in legal effect but the liquidation of fractional items into a single amount by the agreement of the parties express or implied. In the official reports of an accounting officer of the govern-

ment there is no single element of account stated. *Ibid.*; *Nutt v. United States*, 22 Ct. Cl. 68.

Agreement must be reached.

Where two partners meet and agree as to some items of an account and disagree as to others and the disputed items are put down by clerks in their employ with the agreed items just as they were claimed and left undecided, that is not an account stated. *Rehill v. McTane*, 114 Pa. 827, 60 Am. Rep. 841.

A parol statement of accounts between persons without arriving at a balance is not binding as an account stated. *Boulog v. Garrett*, 30 Ind. 238.

Where a factor rendered an account of sales and the consignor called on him for a more detailed statement of the transaction and paid something on account upon receiving a promise of such further statement which he wrote for from time to time but never received, there was no account stated. *Carpenter v. Nickerson*, 7 Daly, 424.

A statement of an account showing the account of an individual partner with the firm will not enable him to sue at law if there is nothing showing the amount the other partners owe him. *Ferguson v. Wright*, 61 Pa. 258.

Where a member of a banking company wrote the management that his account had not been debited with the amount of certain calls on his stock and that he "thought" he owed a certain sum which they would please charge to his account, to which no reply was made, there was no evidence of an account stated. *Hughes v. Thorpe*, 5 Mees. & W. 664.

Where after a contract of sale of certain stocks the title failed and it was then agreed that a certain portion of the purchase money should be paid and the remainder stand to pay the expenses of making good the title the amount of which was to be ascertained by the arbitrators, it was held that prior to the ascertainment of the expense of perfecting title, there was nothing which could support an action on an account stated. *Baker v. Heard*, 5 Exch. 960, 20 L. J. Exch. 444.

Where the acceptor of a bill on being asked for payment stated that the bill had been altered as to the place of payment, that he had been prepared to pay the amount, and that the money might be had by calling at his house, there is no such acknowledgment of a subsisting debt as to constitute an account stated. *Calvert v. Baker*, 4 Mees. & W. 417, 1 Horn & H. 404, 7 Dowl. P. C. 17, 2 Jur. 1020.

Where the indorser of a bill of exchange stated to the holder that he thought it would not be paid at maturity, but that he would send money in part payment of it at a future day, there was no evidence of an account stated, since at the time the promise was made there was nothing to show that there was a debt then due. *Burgh v. Legge*, 5 Mees. & W. 418, 8 Jur. 828; *Bird v. Legge*, 7 Dowl. P. C. 814.

That the amount is to be paid at some time in the future will not prevent the account from becoming an account stated, if a balance is struck and admitted to be correct. *Baird v. Crank*, 96 Cal. 226; *Tuggle v. Minor*, 78 Cal. 98.

Want of consent.

Balancing an account in a person's own books and carrying the balance forward does not constitute an account stated where there is no evidence

ficient to sustain such allegations is a question of fact for the jury. When there is no evidence tending to sustain the plaintiff's cause of action, it is the duty of the court to grant the nonsuit, and withdraw the case from the jury." See also *Herbert v. Dufur*, 23 Or. 467. *Shattuck, J.*, in *Tippin v. Ward*,

5 Or. 458, says: "A case should be submitted to the jury, unless there is an entire lack of evidence tending to maintain the issues on behalf of the plaintiff, or unless, upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover." *Southwell*

that it was done with the consent of the other party. *Nostrand v. Ditmas*, 127 N. Y. 355.

Balancing an account on one's own books done without the consent of the other party, is not a stated account in law. *Loventhal v. Morris* (Ala.) May 22, 1894.

But the assent may be implied. *Hendy v. March*, 75 Cal. 555.

Refusal to pay.

Where one item of the account is objected to and all future dealings between the parties and the final statement are made with the understanding that that item remains open and unsettled, there is no account stated in regard to it. *Dudley v. Geauga Iron Co.* 13 Ohio St. 168.

A statement of a claim for damages because of an alleged breach of contract to sell and deliver a certain kind of material which the seller claims to have fulfilled does not by retention become an account stated. *Fraley v. Blapham*, 10 Pa. 320, 51 Am. Dec. 458.

There can be no account stated if the debtor at all times disputes the amount of the claim. *Hall v. Morrison*, 3 Bosw. 520.

If the debtor dissents from the balance found, there is no account stated. *Cape Girardeau & S. L. R. Co. v. Kimmel*, 58 Mo. 53.

Where defendant insisted that nothing was due from him and it was agreed that the balance might be ascertained by referees, which was never done, there was no account stated. *Reinhardt v. Hines*, 51 Miss. 544.

The refusal upon receiving an account to pay it, claiming an offset coupled with a subsequent payment into court of a portion of the amount claimed in the account does not make an account stated as to the whole of the demand. *Kennedy v. Withers*, 3 Barn. & Ad. 787.

But the repudiation of the debt before any statement is rendered is not conclusive that the retention of an account subsequently rendered has not ripened into an account stated. *Putnam v. Peabody*, 11 N. Y. Weck. Dig. 440.

But see *contra*, *Edwards v. Hoeflinghoff*, 38 Fed. Rep. 635, *infra*, under Effect of objection to rendered account.

Offer to pay less than claim.

An offer to pay a sum less than the sum claimed, if not accepted, cannot be used to prove an account stated for the larger sum claimed. *Atkinson v. Woodall*, 81 L. J. M. C. 174.

Where upon demand by an outgoing tenant for \$40 to pay for growing crops, the incoming tenant offered to pay \$17, this was held to be no account stated. *Wayman v. Hilliard*, 7 Bing. 104, 4 Moore & P. 729.

Compulsion.

An admission to assignees in bankruptcy of having received a sum from the bankrupt at a certain time, made under a compulsory examination, is not an account stated. *Tucker v. Barrow*, 7 Barn. & C. 623, 1 Mann. & R. 518, *Moody & M.* 139, 3 Car. & P. 85, 89.

A receipt signed by the captain of a vessel upon receiving from the consignees of a payment of freight less certain tonnage dues which he claimed the charterers must pay but which the consignees refused to pay, but which must be paid before the vessel could be cleared from the port, will not constitute an account stated as against the charterer. *Smith v. Drew*, 10 Ben. 614.

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Obtaining acquiescence in the rendered account by threatening to sell certain property which the creditor has in pledge from the debtor will not make the account an account stated since the acquiescence is not voluntary. *Stenton v. Jerome*, 54 N. Y. 430.

There is no account stated where upon presentation of a claim the debtor expresses surprise at the amount and declares that it belongs to another person and after suggesting possible defenses promised to pay to avoid trouble. *Stephens v. Ayers*, 57 Hun, 51.

Conditional promise.

The assent, whether express or implied, must not be qualified by any condition or contingency which relieves it from the character of a promise to pay the amount. Where parties act together and reduce an account to a balance by agreement, such balance may amount to an account stated, although there may exist some outstanding independent claim which one of the parties at the time signifies his intention to produce as an offset against the balance, or as a demand in addition to the balance so agreed upon. But this can be so only when such unconsidered demand is an independent matter, having no connection with or relation to the subject-matter, the items of which are resolved into a sum certain by the agreement of the parties. *State v. Hartman Steel Co.* 51 N. J. L. 446.

A qualified acknowledgment is not sufficient. *Evans v. Verity*, Ryan & M. 239.

An acknowledgment by trustees for the separate use of a wife, that they have money which they hold to her separate use, but which they refuse to pay over without her separate receipt, does not constitute an account stated which would support an action by husband and wife for the money. *Bond v. Nurse*, 16 L. J. Q. B. 196, L. R. 10 Q. B. Div. 244, 11 Jur. 655.

If a part only of the items of an account are settled no account stated will arise as to those items nor will it arise on a promise to pay one account upon an unaccepted condition that the other party shall pay or allow a counterclaim arising out of the same transactions. *State v. Hartman Steel Co.* *supra*.

Where parties settle a disputed claim by striking a balance which the debtor promises to pay when able, an action to recover the balance is not an action upon an account stated, but upon the promise, and in order to recover ability to pay must be shown. *Work v. Beach*, 37 N. Y. S. R. 547, 53 Hun, 9, 35 N. Y. S. R. 22.

But the mere fact that the debtor refused to pay the balance unless an agreement is made as to other transactions between the parties will not prevent the account as to which the balance is struck from being an account stated. *White v. Whiting*, 8 Daly, 23.

Objection to some items.

That one item is disputed will not prevent the amount of the others from becoming an account stated. *Mulford v. Caesar*, 53 Mo. App. 233.

The objection to some only of the items in the account will admit the others to be correct. *Joseph v. Southwark Foundry & Mach. Co.* 90 Ala. 47; *Buros v. Campbell*, 71 Ala. 236; *Tuggle v. Minor*, 76 Cal. 95.

The acknowledgment of one part of the amount will be an account stated. *Allen v. Cook*, 2 Dowd & C. 545.

v. Beasley, 5 Or. 458, and *Grant v. Baker*, 12 Or. 831. The doctrine now established by precedents has come to this: The court is the exclusive judge of the competency of evidence offered to prove a fact under the issues. If competent, and its tendency, however slight, is to prove such fact, the jury

ought to have it, as they are the exclusive judges of its sufficiency. Hence a total failure of competent proof of some material allegation of the complaint will entitle the court to withdraw the case from the jury, and grant a nonsuit on motion of defendant. *Grant v. Baker*, *supra*.

But in a New Jersey case it was said that the notion that there can be an account stated of certain items of an account while other items of the same account are questioned and left open for further adjustment and litigation, cannot be supported by any rational view of the nature of an account stated. It confounds every admission with an account stated. *State v. Hartman Steel Co.* 51 N. J. L. 446.

Arbitration or court proceedings.

Where there is a regular submission to arbitrators their award is not an account stated. *Bates v. Townley*, 3 Exch. 158, 19 L. J. Exch. 399, 12 Jur. 606.

Proof of an award and an admission of the amount due will sustain a count upon an account stated. *Buschman v. Morling*, 30 Md. 384.

An account stated cannot be based on an appraisal where it does not appear that both parties mutually agree on the appraisers or recognise them as authorized to bind them by their action. *Chicago & C. S. R. Co. v. Peters*, 45 Mich. 696.

A statement of account produced before arbitrators who have been appointed by the parties to settle the accounts between them, which is shown to have been gone over by the parties without objection except as to one item, may go to the jury as evidence of a stated account. *Tama v. Lewis*, 43 Pa. 402.

Where a bankrupt and his creditor attended before the commissioners, and the bankrupt objected to some of the items on the creditor's account, and the commissioners checked off those which they allowed, to which the bankrupt made no objection, it was held that his conduct was evidence that he admitted the balance found by them to be due. *Jarrett v. Leonard*, 2 Maule & S. 266, 2 Rose, Bankr. Cas. 263.

Where matters of dispute are submitted to arbitration, but not on bond, and the arbitrators make an award, the transaction will amount to a statement of an account between the parties. *Keen v. Batshore*, 1 Esp. 194.

A statement of account contained in an answer to a bill in equity filed in another court which was dismissed is not an account stated and if the statement thus made is afterward accepted as correct it will not oust the jurisdiction of equity to compel the rendition of account. *Adam's App.* 113 Pa. 449.

Mistake.

There is no account stated if it is rendered under a mistake or misapprehension. *Polhemus v. Helman*, 50 Cal. 438.

If the acknowledgment is procured by misrepresentation there is no account stated. *Upton v. Bedlow*, 4 Daly, 216.

A promise by the executors to pay a debt of testator's which they erroneously supposed to be due will not constitute an account stated. *Gough v. Findon*, 7 Exch. 48, 21 L. J. Exch. 58.

In *Kinney v. Heatley*, 18 Or. 38, it was held that the retention by a shipper of canned fish on the Pacific coast to England should not be bound as upon an account stated by retaining accounts in which he was charged with bad condition of the fish upon its arrival at its destination, when the bad condition was caused by a peculiar stress of weather and the heat of the rest of the cargo, of which facts he did not learn until some time after he had received and acquiesced in the account.

Exception of errors.

The expression, "errors excepted," does not pre-

vent it being an account stated. *Johnson v. Curtis*, 8 Bro. Ch. 266.

The placing upon the statement of the words "errors and omissions excepted," will not prevent the account from becoming stated. *Fleischner v. Kubli*, 20 Or. 323.

The insertion of the statement that errors and omissions are excepted is immaterial. *Branger v. Chevalier*, 9 Cal. 663.

Placing the letters E. and O. E., meaning errors and omissions excepted, on the account rendered does not prevent its becoming an account stated by its retention for the proper length of time. *Kent v. Highleyman*, 28 Mo. App. 614.

Effect upon person rendering.

It is sometimes held that if the bill as presented is not accepted it is no more binding on the one presenting it than on the other party.

Thus presenting a bill in which a gross sum is charged for services which is not acquiesced in any further than is shown by the fact that it is not objected to will not make an account stated which will preclude the recovery of a greater amount for the services if they are shown to be worth more. *Williams v. Glenn*, 16 N. Y. 830; *Stryker v. Cassidy*, 76 N. Y. 50, 33 Am. Rep. 232; *Bronson v. Hoffman*, 7 Hun, 675; *Harrison v. Ayers*, 18 Hun, 336.

A mere rendition of a bill for services will not preclude a recovery of a larger amount than is claimed in the bill. *Nauman v. Zoerblaut*, 21 Wis. 468.

The conclusiveness of the account does not apply against the one rendering it. Thus where one tenant in common rendered an account to the other and paid the amount shown to be due, it was held on the subsequent accountings he could show overpayment. *Schettler v. Smith*, 2 Jones & S. 17.

But in other cases it seems to be held that the mere rendition of a bill is conclusive upon the one rendering it.

Thus where an agent for certain real estate left word at the bank where he was in the habit of leaving money due his principal that he would pay in £10 upon the principal's giving him a receipt for £27, expended for repairs on the estate, which was never given, it was held that the agent had stated an account against himself, which he could not dispute upon being sued for the £10. *Roper v. Holland*, 3 Ad. & El. 62, 4 Nev. & M. 603, 1 Hurlst. & W. 107.

So where a person who negotiates a sale of land presents a bill for his services he cannot afterwards recover more than the amount so claimed. *Daniels v. Wilber*, 60 Ill. 536.

A painter who undertakes to superintend the painting of the house of another gratuitously, and who after the work is finished sends in the bill for the cost, payment of which is refused, cannot afterwards recover a larger amount for his time. *Ayland v. Rice*, 23 La. Ann. 75.

But in that case the ruling was placed upon the ground that there had never been any agreement to pay for his time and consequently there was nothing upon which to base a recovery.

Character of account necessary.

Number of items.

If the charges are all on one side it is sufficient if there is an acknowledgment or admission express or implied of a certain sum due, and there may be a stated account of the claims of one person only.

The question now recurs, Was it competent for the plaintiff to prove, under his declaration upon an account stated, the facts set forth in his bill of exceptions? Or, in other words, was the evidence introduced competent to support his cause of action as stated? This involves an examination of the question

as to whether the facts of the case, giving them the full force claimed by plaintiff, constitute an account stated. The prior liability of the defendants to plaintiff was upon contract, and for breach thereof. The defendants had failed to construct certain fencing which they had agreed to make, for which

although the other may have counter-demands which are not deducted. *Ware v. Manning*, 86 Ala. 238.

There may be an account stated although the items are only on one side of the account. *Styart v. Rowland*, 1 Show. 215; *Kook v. Bonitz*, 4 Daly, 117.

An account may be stated when there is only one item. *Higmore v. Primrose*, 5 Maule & S. 65.

There need not be items on both sides of the account. It is sufficient if there is one item on one side only and a bill rendered and retained without objection. *Cobb v. Arundell*, 26 Wis. 553.

Character of debt.

There can be no statement of account which will sustain assumption of the balance due on a specialty contract. *Gileon v. Stewart*, 7 Watts, 100.

The statement of the amount due on a mortgage will not support an action upon an account stated. *Middleditch v. Ellis*, 2 Exch. 633.

But in Massachusetts it was held that where two persons draw out an account of the sums due from each to the other, and on the same paper execute an instrument under seal with a penalty agreeing that the paper contained every claim which either had against the other, and that when the account should be balanced all the securities against each other should be canceled, the agreement would support an action on an *instrument computant*. *Hoyt v. Wilkinson*, 10 Pick. 81.

A claim which is absolutely void by reason of illegality or immorality in the consideration cannot be relied on in support of a count upon an account stated. *Kennedy v. Brown*, 13 C. B. N. S. 677, 32 L. J. C. P. 137, 9 Jur. N. S. 119, 7 L. T. N. S. 623, 11 Week. Rep. 284.

The binding effect of a statement of account will not be defeated by the fact that there were items included which could not have been recovered at law. *Dawson v. Remnant*, 6 Esp. 24.

To circumvent statute.

There may be an account stated between a vendor and vendee of land. *Neff v. Wooding*, 33 Va. 432.

Where after the making of a contract to purchase real estate the seller presented to the buyer a statement of the amount due, on which he wrote an acknowledgment that the account was correct, it was held to constitute an account stated. *Yates v. Gardiner*, 20 L. J. Exch. 327.

The purchase price of land of which possession has been given under a contract void under the statute of frauds may be recovered under an account stated, made by the parties after possession was taken. *Cooking v. Ward*, 1 C. B. 853, 15 L. J. C. P. 246.

A binding promise to pay the debt of a third person which is fixed at a definite amount will support a count for an account stated. *Morse v. Allen*, 44 N. H. 33.

An admission of a claim upon a promise to pay the debt of another, void under the statute of frauds, will not bind the persons making the admission on an account stated. *French v. French*, 2 Mann. & G. 644, 3 Scott, N. R. 121, 5 Jur. 410.

A promise to pay a liability which has become due to pay the debt of another, but which is not enforceable under the statute of frauds, is not sufficient to constitute an account stated. *Wilson v. Marshall*, 14 Week. Rep. 609, 2 Ir. C. L. Rep. 354.

An account cannot be stated so as to take out of 27 L. R. A.

the statute of frauds a case by which one person agrees to rent the farm of another for fourteen years and take the crops then growing thereon and pay the value thereof, if the statement of the amount to be paid is attempted before the crops are out. *Falmouth v. Thomas*, 1 Cramp. & M. 30, 3 Tyrw. 26.

When mortgagor and mortgagee meet at a lawyer's office and have him make an estimate of the amount due on a mortgage, which he does, and agree to the amount as stated, it will become an account stated. *Killops v. Stephens*, 66 Wis. 571.

Where a tenant admitted that a certain amount of rent was due, it was held to sustain an action for account stated, although it appeared that he held under a written instrument which was not produced or accounted for. *Arthur v. Dartoh*, 9 Jur. 118.

If a suit for attorney's services fails because not presented as required by statute, there can be no recovery upon an account stated. *Brooks v. Bockett*, 9 Q. B. 847, 16 L. J. Q. B. 173, 11 Jur. 284; *Scadding v. Eyles*, 9 Q. B. 858, 15 L. J. Q. B. 364, 10 Jur. 945.

Where a bill for attorney's charges was not delivered as required by statute, it was held that the admission of the amount claimed in a proceeding before bankruptcy commissioners was not sufficient to constitute an account stated. *Ricke v. Nokes*, 4 Moore & S. 595, 1 Moody & R. 359.

In *Ashby v. Ashby*, 3 Moore & P. 133, where a promissory note was not valid because not on paper properly stamped, it was held that since defendant had acknowledged that he owed the amount, although there was no reference to the note and the acknowledgment was made to a third person, the action could be maintained on an account stated.

Admitting that a certain amount is due and promising to pay in installments and giving a writing containing the promise, is an account stated and may support an action as such, although the writing is void as not containing a stamp. *Singleton v. Barrett*, 2 Cramp. & J. 393.

Who may state accounts.

In *Pratt v. Weyman*, 1 McCord, Eq. 153, in which the question of the conclusiveness of the statement of the account was determined, the court intimated that the character of the parties who state the account may be material in determining its binding effect.

Married woman.

A married woman cannot state an account. *Johnson v. Lucas*, 1 El. & Bl. 659, 23 L. J. Q. B. 174, 17 Jur. 1066.

An account cannot be stated by husband and wife on one side with another person unless it is in regard to a matter in which the wife is interested. *Ibid.*

There can be no account stated between husband and wife. *Southwick v. Southwick*, 1 Sweeny, 47, affirmed, 49 N. Y. 510.

Infant.

An infant cannot bind himself by stating an account. *Trueman v. Hurst*, 1 T. R. 40; *Bartlett v. Emery*, Id. 42, note.

An account stated by an infant is not evidence even of the fact that he was supplied with the goods mentioned in it. *Inglidew v. Douglas*, 2 Starke, 33.

The statement of an account by an infant is void.

failure they became liable in damages. This, be it understood, was the nature of defendants' prior liability to plaintiff. Now, it is claimed that there was an account stated about July 1, 1889, of the differences existing between plaintiff and defendants, and that defendants undertook and agreed to pay

plaintiff an ascertained balance of \$300,—the amount which plaintiff had paid to Mays for constructing said fencing. This is the foundation of the present action. "When two persons, having had monetary transactions together, close the account by agreeing to the balance appearing to be due from one of

able merely. *Williams v. Moor*, 11 Mees. & W. 256, 2 Dowl. N. S. 993, 12 L. J. Exch. 253, 7 Jur. 817.

Illiterate or infirm person.

An illiterate person will not be bound by an account of the terms of which he had no knowledge. *Guenivet v. Perret*, 18 La. Ann. 356.

If one has health to understand all the material facts which appear on the face of an account and does understand them, the state of his health physically is sufficient for the occasion. *Wilson v. Frisbie*, 57 Ga. 293.

Banker and depositor.

There may be an account stated between banker and customer. *Manhattan County v. Lydig*, 4 Johns. 377, 4 Am. Dec. 230; *Hutchinson v. Market Bank of Troy*, 48 Barb. 302.

In *Willis v. Jernegan*, 2 Atk. 252, the account between banker and customer is referred to as a stated account.

In *Williamson v. Williamson*, L. R. 7 Eq. 542, the balance in a bank pass-book was treated as an account stated.

In *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 93, 29 L. ed. 811, which was an action by a bank depositor to recover the amount which the bank had paid out on forged checks, the court says it is a suit by the depositor in effect to falsify a stated account to the injury of the bank. But the case is not decided on the principle of account stated, but upon that of estoppel and the general rules governing the relations of bank and depositor.

In *Weisser v. Denison*, 10 N. Y. 70, 61 Am. Dec. 751, where the question of the conclusiveness of the writing up of a bank pass-book was under consideration, the court held that the most that can be claimed is that the writing up of a bank pass-book was a stating of an account by the bank, and that the depositor by retaining the account after a reasonable time for its examination had elapsed without objection must be deemed to have acquiesced in it and admitted it to be correct and so equally bound by it as by a stated account. And a similar ruling was made in *Welsh v. German American Bank*, 73 N. Y. 423, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 84 N. Y. 213, 38 Am. Rep. 501.

In *National Board of Marine Underwriters v. National Bank of the Republic*, 9 Misc. 252, it was held that the doctrine of account stated did not apply to accounts rendered by a bank to its customer so as concluded him as to the fact that checks were paid to the right person.

The account stated by a bank to its depositor places upon him the burden of showing fraud or mistake in order to enable him to dispute the balance shown by it. *Shipman v. Bank of the State of New York*, 12 L. R. A. 791, 126 N. Y. 820.

The balancing of a bank pass-book and retention and cancelling of the checks is a settlement of the account. *Peddicord v. Connard*, 85 Ill. 102.

Entries in a bank pass-book do not constitute an account stated if the depositor within a reasonable time after they are made makes objections to them. *Schneider v. Irving Bank*, 1 Daly. 500.

Writing up a banker's pass-book and its retention without objection make it an account stated. *Clark v. Mechanics Nat. Bank*, 11 Daly. 239, 15 N. Y. Week. Dig. 505.

But the doctrine of retention merely of an account rendered has not been applied with its full effect to accounts between bank and depositor.

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An account between banker and customer, although balanced monthly, which is carried on for a period of years, constitutes together a running account and is in effect but one transaction. *Pickett v. Merchants Nat. Bank*, 32 Ark. 346.

In *Ex parte Randleson*, 2 Deacon & Ch. 534, it was held that a banker's pass-book in which the entries were only on one side, could not be held to be a stated account merely because the customer had assented to them.

Acquiescence in banker's balances does not amount to a settlement of account. *Moose v. Salt*, 32 Beav. 239; *Clancarty v. Latouche*, 1 Ball & B. 423.

On the other side, it has been held that balances of accounts on a banker's ledger, which are copied on the customer's pass-book every month and not objected to, will be regarded as account stated. *Marye v. Strouse*, 6 Sawy. 204, 5 Fed. Rep. 453.

Omitting to object to the state of the account shown in the bank pass-book for six years is such an unreasonable delay that the matter cannot be submitted to the jury as to whether it is accounted for. *Hutchinson v. Market Bank of Troy*, 48 Barb. 302.

But where after a depositor became a lunatic his account continued to be kept by his family and the pass-book was balanced as usual, it was held after his death that the balances could not be used as accounts stated as against his administrator, since there had been no account stated with the lunatic himself or with any one authorized to represent him. *Tarbuok v. Bispham*, 3 Mees. & W. 7.

Partners.

Partners may state an account among themselves. *Millaudon v. Sylvestre*, 3 La. 257; *Henry v. Chapman* (Tex.) May 7, 1891; *Stevens v. Barks*, 74 Hun. 388; *Kingsley v. Melcher*, 56 Hun. 547; *Lloyd v. Carrier*, 2 Lans. 364; *Powell v. Noye*, 23 Barb. 184; *Wilde v. Jenkins*, 4 Paige, 451, 3 L. ed. 524; *Cochrane v. Allen*, 58 N. H. 250; *Harrison v. Farrington*, 40 N. J. Eq. 353; *Dickinson v. Granger*, 18 Pick. 313; *Andrews v. Allen*, 9 Serg. & R. 241; *Foster v. Allanson*, 2 T. R. 479; *Moravia v. Levy*, Id. 483, note; *Clarke v. Glennie*, 3 Starkie, 10; *Wray v. Milstone*, 5 Mees. & W. 21.

Partners may state an account as to a branch only of the partnership transactions. *Gibson v. Moore*, 6 N. H. 547.

It was held that the adjustment of partnership accounts is valid and a settlement, in *Peteet v. Crawford*, 51 Miss. 43.

The principle of account stated is applicable between partners but the making of a mere balance sheet showing the state of the firm's affairs and not purporting to be a statement of the accounts of the partners as between themselves will not constitute an account stated. *Bambrick v. Simms*, 102 Mo. 158.

A statement of accounts between partners showing the amount of profits that had been made but which fails to state in whose hands they are or the amount each partner is entitled to receive or whether the partners had received the capital they had put in or had accounted for funds drawn out, will not be an account stated which will enable one partner to sue at law. *Burns v. Nottingham*, 60 Ill. 531.

Factor and consignator.

There may be an account stated between a factor and his consignator. *Smith v. Marvin*, 27 N. Y. 137;

them, this is called an 'account stated.' It is of importance from the fact that it operates as an admission of liability by the person against whom the balance appears; or, in the language of the common law, 'the law implies that he against whom the balance appears has engaged to pay it to the other, and

on this implied promise or admission an action may be brought.' 1 Am. & Eng. Encyclop. Law, p. 110. Wells, J., in *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171, says: "An account stated is an acknowledgment of the existing condition of liability between the parties. From it the law

Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; *Austin v. Ricker*, 61 N. H. 97; *Wittowski v. Harris*, 61 Fed. Rep. 712; *Eichel v. Sawyer*, 44 Fed. Rep. 845; *Dows v. Durfee*, 10 Barb. 213; *Mertens v. Nottebohm*, 4 Gratt. 163.

Broker and customer.

There may be an account stated between a broker and a customer. *Lawson v. Douglass*, 43 N. Y. S. R. 356; *Beach v. Kidder*, 23 N. Y. S. R. 500; *Stenton v. Jerome*, 54 N. Y. 490; *Champion v. Joslyn*, 44 N. Y. 663.

Attorney and client.

There may be an account stated between attorney and client. *Case v. Hotchkiss*, 3 Keyes, 334, 37 How. Pr. 285; *Gruby v. Smith*, 13 Ill. App. 43.

A recovery of an attorney's fee may be had under a count for an account stated on proof of the performance of the services, and defendant's subsequent admission to a third person, not the attorney's agent, that he was indebted to the attorney in a specified sum for the services. *Wharton v. Cain*, 50 Ala. 408.

Officers.

The doctrine of accounts stated is not generally applied to the accounts of public officers.

But the doctrine of accounts stated appears to have been held to be applicable to officer's accounts, in *Milwaukee County Supra. v. Hackett*, 21 Wis. 613.

And in Alabama it was held that a statement of his accounts by a tax collector to the county and its retention by the county for thirty-five days, will not make an account stated. *Lott v. Mobile County*, 79 Ala. 60.

Other cases.

A trustee and *cestui que trust* may state an account. *Roper v. Holland*, 3 Ad. & El. 90, 4 Nev. & M. 668, 1 Hurst. & W. 167; *Howard v. Brownhill*, 23 L. J. Q. B. 23, 2 C. L. Rep. 125.

An account may be stated between guardian and ward. *Driggs v. Garretson*, 25 N. J. Eq. 178.

There may be an account stated between landlord and tenant. *Cartledge v. West*, 2 Denio, 378.

A landlord and his agent for the collection of rents may become bound on a stated account. *Philips v. Belden*, 2 Edw. Ch. 1, 6 L. ed. 238.

A landlord and receiver of rents may state an account. *Davison v. Hanslop*, T. Raym. 211.

There may be an account stated upon a claim for personal services. *Baird v. Crunk*, 98 Cal. 233.

A statement of the amount due for personal services may have the effect of an account stated. *Paulsen v. Schultz*, 85 Cal. 538.

There may be an account stated for work and labor done (*Sherkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161; *Holler v. Apa*, 43 N. Y. S. R. 529; *McFarland v. Cutter*, 1 Mont. 333; *Warner v. Myrick*, 16 Minn. 91) and for work done and materials furnished. *Albrecht v. Gies*, 33 Mich. 389.

There may be an account stated between insurer and insured as to the amount of loss under the policy. *Smith v. Glens Falls Ins. Co.* 66 Barb. 556.

There may be an account stated as to stone delivered to a contractor and a boat damaged in delivering the stone. *Towley v. Denison*, 45 Barb. 490.

Effect to change contract or create debt.

If a special contract fixes the price of a commodity at a certain sum, the seller cannot render 27 L. R. A.

the buyer liable for a greater amount by rendering bills with the charges at a greater price although the buyer does not make any objections to them on that ground. *Kusterer Brewing Co. v. Flar*, 99 Mich. 190.

A monthly statement of the amount due for getting out logs, which is approved, will not preclude the one rendering it from afterwards claiming the contract price for the work which is \$1 per thousand higher than claimed in the statement. *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529.

There can be no liability on an account stated if no liability in fact exists. The mere presentation of a claim although not objected to cannot of itself create a liability. *Austin v. Wilson*, 33 N. Y. S. R. 508.

Subsequent events.

Looking over accounts and then giving a note for a balance found to be due, which states that if any more claims come in they may be deducted from the amount of the note will make the balance found an account stated. *Moody v. Thwing*, 46 Minn. 511.

Where after the rendition of an account there are payments from time to time, the creditor cannot sue for the balance as an account stated without rendering an account showing the amount claimed to be due after deducting the payments. *Loventhal v. Morris* (Ala.) May 22, 1894.

The fact that the debtor claims a sum due him on a former account which is to be deducted from the balance found will not prevent the balance found from being an account stated. *Filer v. Peebles*, 8 N. H. 223.

A proposal to extend time of payment, not accepted by the debtor, together with a sale of collateral securities, will not alter the nature of the transaction as an account stated. *Lawson v. Douglass*, 43 N. Y. S. R. 356.

That after the account is stated one of the parties receives something of value which ought to be credited on the account of the other person, will not prevent the action from proceeding on the account stated, but there may be a credit allowed on the amount which is found to be due. *Vinal v. Burrill*, 16 Pick. 401.

Retention of rendered account.

The retention for an unreasonable time without objection was at a very early time given the effect of a stated account when the transactions were between merchants, and the doctrine has been extended in most jurisdictions so that at the present time it embraces the accounts between all classes of persons generally.

It is not necessary in order to give the accounts the weight and quality of stated accounts that they should have been examined and approved. *Greene v. Harris*, 11 R. I. 3.

Courts of equity in adjusting mutual dealings between merchants established the rule that the rendition of an account and its retention by the party to whom sent, without objection within a reasonable time, should have the force and effect of a stated account, and be presumed correct until the contrary is clearly made to appear. *Witkowski v. Harris*, 64 Fed. Rep. 712.

When one merchant sends an account current to another residing in a different country between whom there are mutual dealings and he keeps it two years without making any objection, it should

implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and independent cause of action so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results." And says Mr. Greenleaf:

be deemed an account stated, and his silence and acquiescence, shall bind him at least so far as to cast the *onus probandi* on him. *Freeland v. Heron*, 11 U. S. 7 Cranch, 147, 8 L. ed. 207.

The fact that the account was not made out between the parties but that one made it out and sent it to the other who received and acquiesced in it, will not prevent its being a stated account. *Toland v. Sprague*, 37 U. S. 12 Pet. 384, 9 L. ed. 1107.

An account rendered and not objected to within a reasonable time is to be regarded as admitted by the person charged to be *prima facie* correct. *Wiggins v. Burkham*, 77 U. S. 10 Wall. 129, 19 L. ed. 585.

Between merchants at home an account which has been presented and no objection made thereto after the lapse of several posts is treated under ordinary circumstances as being by acquiescence a stated account. *Ibid*.

If a merchant neglects over a reasonable time to object to an account current he is deemed to acquiesce in it and it is treated as an account stated. *Richmond Mfg. Co. v. Starks*, 4 Mason, 207.

Long acquiescence in letters containing accounts is *prima facie* evidence of an acquiescence in their contents. *Hopkirk v. Page*, 2 Brook. 20.

Where an author receives from a publisher a statement of his account and promises to examine it and correct it, he will become liable upon it, as an account stated, if he retains it for several weeks without objection and then gives an acceptance for the amount. *Weed v. Dyer*, 53 Ark. 155.

Leaving an account with defendant five years before trial, and repeatedly importuning him for payment, heat no time making any objection to any item in the account and finally going out of business is sufficient to justify a finding of account stated. *House v. Beak*, 45 Ill. App. 615.

Keeping a bill for the price of labor for over a month and then rendering a counter-bill in which credit is given for the former one will render the amount of the former one conclusive unless it can be impeached for fraud or mistake. *Bewick v. Butterfield*, 60 Mich. 203.

An account stated is shown by proof that one person mailed to the other a statement of the account between them and that the other admitted its receipt and promised to pay the balance shown thereby. *McCormack v. Sawyer*, 104 Mo. 36.

An account is to be considered as liquidated after a demand of payment with knowledge of what is claimed upon the part of the debtor and without objection by him; or after it has been rendered to him without objection to it upon his part within a reasonable time. *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 36 Ky. 668.

An account is to be considered as liquidated when rendered if no objections are made to it. *Walden v. Sherburne*, 15 Johns. 409; *Beiers v. Reynolds*, 12 Barb. 238.

Accounts rendered monthly and after examination retained without objection constitutes accounts stated. *Manchester Paper Co. v. Moore*, 104 N. Y. 680.

Rendering a balance claimed to be due after rendering monthly statements of accounts may become an account stated. *Robbins v. Downey*, 45 N. Y. S. R. 279.

It is not necessary that objection to the correctness of an account should be made at the time of

"The admission must have reference to past transactions; that is, to a subsisting debt, or to a moral obligation, founded on an extinguished legal obligation to pay a certain sum." 2 Greenl. Ev. § 126. "An account stated is commonly called 'an admission of a debt,' but it is merely evidence of it."

asking or receiving the balance struck. The party is not precluded from impeaching it within a reasonable time to be determined from all the attending circumstances. *Lookwood v. Thorne*, 18 N. Y. 286.

Rendering monthly statements of the amounts due to which the debtor makes no objection but gives his due-bill for the amount will constitute an account stated. *Mackay v. Kahn*, 44 N. Y. S. R. 236.

In *Reading Fire Ins. & Trust Co. v. Reading Iron Works*, 137 Pa. 232, it was held that where accounts were furnished annually by a corporation to its stockholders showing the state of their accounts with the company, a stockholder who annually for eight years received such a statement without intimating that it was incorrect, must be considered as consenting to its accuracy.

The principle of account stated was applied in *McCulloch v. Judd*, 30 Ala. 703, where the debtor came to the office of an attorney in whose hands a number of accounts had been placed for collection and after examining the one against him made no objection to it.

A request by an attorney for payment of his bill, followed by a promise to pay, will amount to an account stated. *Pulliam v. Booth*, 21 Ark. 420.

Rendering an account to a father for goods purchased by his son and its retention by him without objection will make it an account stated as to him which will preclude the objection that the son had no authority to bind the father by the purchase. *Avery v. Leach*, 9 Hun, 106.

Retention of the account makes the account liquidated. *Field v. Reid*, 21 Ga. 314.

Where a person on receiving the account took it with him promising to look it over but neglecting to do so, in the meantime writing that he would pay the balance and trying to fix some terms of credit, it was held to have become a stated account. *Powell v. Noye*, 23 Barb. 184.

In *Quincey v. White*, 63 N. Y. 370, it is intimated that to give an account delivered the force of an account stated because of silence on the part of the party receiving it the circumstances must be such as to justify an inference of assent upon his part to its correctness. Where he has disclaimed all liability upon the account he is not bound to examine the items upon its delivery to him and his omission to object will not be taken as an admission of their correctness.

If the creditor exhibits to the debtor his books containing a detailed statement of the account between them showing the balance which was examined by the debtor without objection and the account left to stand a year and a half without objection, it is an account stated. *Rich v. Eldredge*, 42 N. H. 153.

Where a bank received a check for collection and forwarded it to its correspondent from which it received a notification of its payment and credited the amount to its customer but was afterwards informed that the check was not paid, and attempted to charge it back to the customer who would not permit it, and accounts were then rendered for two years without any mention of it, there was an account stated which precluded the bank from afterwards looking to the customer for the amount. *Harley v. Eleventh Ward Bank*, 7 Daly, 476, affirmed, 76 N. Y. 618.

Retention by one person of a statement of ac-

Re Laycock v. Pickles, 4 Best & S. 504. Lord, J., in *Truman v. Owens*, 17 Or. 527, after citing many authorities, concludes that: "To constitute an account stated it must appear that the plaintiff and defendant accounted together on their mutual demands, or of the demands of the plaintiff against the defend-

ant, and upon the accounting there was found due to the plaintiff from the defendant the amount claimed. It will be noted, then, that the account stated relates to some previous transactions or dealings between the parties, or to some article or articles formerly sold by one to the other, and that the relation of

account in which he is charged with items of indebtedness incurred by a third person for which he was not responsible will not make the account conclusive against him as an account stated. *Spangler v. Springer*, 22 Pa. 454.

A letter containing an account if rendered by one to the other of the parties to the account and retained by the latter without objection within a reasonable time will be evidence of the correctness of the account. *Smith v. Kennedy*, 1 Wash. Terr. 55.

Retaining the statement of the account without objection and using the check sent to pay the balance will render the account stated as against the receiver. *Schuyler v. Ross*, 57 N. Y. S. R. 805.

Receiving and using a check for the balance of an account sent with a statement of the account will bind the one receiving it although at the time he received it he objected to the messenger who brought it that it was too small. *Davenport v. Wheeler*, 7 Cow. 221.

The retention of an account rendered will make the account a stated account. *Ruffner v. Hewitt*, 1 W. Va. 585; *Lawson v. Douglass*, 43 N. Y. S. R. 356; *Mansell v. Payne*, 18 La. Ann. 124; *Keane v. Branden*, 12 La. Ann. 20; *Thompson v. Mylne*, 4 La. Ann. 206; *Freeman v. Howell*, 4 La. Ann. 195, 50 Am. Dec. 551; *White v. Henderson*, 2 La. Ann. 241; *Terry v. Sickles*, 13 Cal. 427; *Lawrence v. Ellsworth*, 41 Ark. 502; *Burns v. Campbell*, 71 Ala. 271; *Hirschfelder v. Levy*, 60 Ala. 351; *Smith v. Kennedy*, 1 Wash. Terr. 55; *Manchester Paper Co. v. Moore*, 104 N. Y. 680; *Allen v. McConihe*, 34 N. Y. S. R. 994; *Vernon v. Simmons*, 15 Daly, 390; *Towsey v. Denison*, 45 Barb. 490; *Blanc v. Scruggs*, 23 La. Ann. 208; *Darby v. Lastrapes*, 23 La. Ann. 605; *Verrier v. Guillou*, 97 Pa. 63; *Gooch v. Vaughan*, 22 N. C. 610; *Hawkins v. Long*, 74 N. C. 781; *Allen v. Stevens*, 1 N. Y. Legal Obs. 359; *Livermore v. St. John*, 4 Robt. 17; *Powell v. Pacific Railroad*, 65 Mo. 558; *Shepard v. Bank of State of Missouri*, 15 Mo. 141.

But mere silence by a customer when a bill for goods is presented to him will not give rise to a conclusive presumption that the amount of the bill is correct. *Hyman v. Coen*, 22 Ill. App. 623.

An account rendered which does not pretend to be a final adjustment and settlement of the transaction between the parties will not become an account stated by mere failure to object to it. *Glasscock v. Rosengrant*, 55 Ark. 376.

The fact that a son for whose benefit his father has transferred property to a trustee but who has no knowledge of such fact, casually sees accounts which the trustee renders to the father, will not make them accounts stated as against him. *Andrews v. Hobson*, 31 Ala. 210.

Any circumstances calculated to rebut the inference to be drawn from the keeping of the accounts without objection are competent evidence to be submitted to the jury, in order that with a knowledge of all the circumstances of the case they may form their conclusion of the actual intention of the parties. *Lookwood v. Thorne*, 18 N. Y. 236.

Where a factor has transmitted to his principal accounts of two different sales of the same goods, the principal after having approved the first is not bound to notice or object to the second at the peril of its being taken as a stated account, and held to be binding on him. *Cartwright v. Greene*, 47 Barb. 9.

The acceptance and retention of an account
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without objection although tending to establish an admission of correctness is not conclusive. It may be met by proof of mistake undiscovered while the account was so retained and the question then becomes one of fact for the jury. *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161.

The conversion of an open account into an account stated is an operation by which the parties assent to a sum as the correct balance due from one to the other. The mere rendering of an account or the cessation of it by the death of one of the parties or a bare discontinuance of the dealings will not make the account a stated one. The inference of assent from mere passiveness has always been made against the passive party and never in favor of that party as against the other. A person who has chosen to hold an equivocal position in such a case is not at liberty to assert the rights which pertain to a definite and decided act. *White v. Campbell*, 25 Mich. 463.

Time necessary.

The time within which an account should be taken as a stated one unless objected to cannot be definitely fixed. It depends on the circumstances of the case whether an acquiescence or a presumed agreement to the correctness of the account exists. *Bainbridge v. Wilcocks*, *Baldw. C. C.* 539.

What shall be considered a reasonable time for the party to make objections so that the correctness of the account may be presumed from acquiescence must depend upon the circumstances of each particular case. It is to be determined by the situation of the parties and nature of their business. It would be unreasonable in the extreme to apply the rule applicable to merchants to the mechanic or the farmer. *Lookwood v. Thorne*, 12 Barb. 487.

Keeping the rendered account three or four years after receiving it without objection will make it a stated account. *Bruen v. Hone*, 2 Barb. 580.

Retaining an account without objection from September until the next January will render it a stated account. *Standard Oil Co. v. Van Etten*, 107 U. S. 829, 27 L. ed. 820.

Where a merchant in one country sent an account current to another in a different country, who kept it about two years, it was held to be considered as a stated account. *Tickel v. Short*, 2 Ves. Sr. 239.

Between merchants at home an account which has been presented and no objection thereto made after the lapse of several posts, is treated under ordinary circumstances as being by acquiescence a stated account. *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250.

Merchants may be bound if they do not signify their objection within several mails after receipt of account. *Freas v. Truitt*, 2 Colo. 490.

If a person receives a stated account from abroad and keeps it by him for any length of time without objection he will be bound by it. *Murray v. Toland*, 3 Johns. Ch. 509, 1 L. ed. 719.

Where brokers on the 26th day of December mailed an account to their customer with notice that if it was not paid by December 31 they would bring suit against him, and suit was brought on January 14, it was held that the account had become stated. *Knickerbocker v. Gould*, 115 N. Y. 532.

debtor and creditor already exists between them and that subsequently to such transactions there is a mutual agreement between them as to the allowance or disallowance of their respective claims, and striking of the balance, or agreement as to the amount due, or some other assent, either expressly or

fairly to be implied from the circumstances, as failure to object within a reasonable time from the presentation of the account. The idea is that there was an agreement between the parties, founded upon an examination of the transactions, either active or presumptive." In *Whitwell v. Willard*, 1 Met. 216,

Mere delivery not sufficient.

The mere rendering of an account by one person to the other is not sufficient to make it an account stated. *Robertson v. Wright*, 17 Gratt. 354.

The mere delivery of an account is not sufficient without some contemporaneous or subsequent conduct to show acquiescence. *Irvine v. Young*, 1 Sim. & Stu. 333.

The mere rendering of an account does not make it a stated one, but if the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it, then it becomes a stated account. *Toland v. Sprague*, 37 U. S. 12 Pet. 334, 9 L. ed. 1107.

Proof that a creditor mailed to his debtor an account does not without more prove an account stated. *Rowland v. Donovan*, 18 Mo. App. 554, App.

The averment that the plaintiff had made a statement and delivered it to the defendant who made no objections to it does not necessarily establish the conclusion which is necessary to sustain an action upon an account stated. *Emery v. Pease*, 20 N. Y. 62.

The mere rendering of an account does not make an account stated and the omission to object to it raises only a presumption of assent which may be represented by circumstances tending to a contrary conclusion. *Guernsey v. Rexford*, 63 N. Y. 631.

The mere delivery of an account without evidence of contemporaneous or subsequent conduct will not prove it to be a stated account but an acceptance implied from circumstances will suffice. *Kepperling v. Bitzner*, 10 Lanc. L. Rev. 332.

Effect of objection.

If when an account for goods sold is presented for payment the person does not dispute or deny but admits the correctness of the items but denies the liability to pay insisting that another person is justly chargeable with and ought to pay the same, it will not constitute an account stated. *Ryan v. Gross*, 48 Ala. 374.

The rule governing accounts stated does not apply if when it was sent the parties had already come to a disagreement and therefore assent from silence could not be reasonably inferred. *Edwards v. Hoeflinghoff*, 38 Fed. Rep. 635.

But see *contra*, *Putnam v. Peabody*, 11 N. Y. Week. Dig. 440, *supra*, under *Refusal to pay*.

The fact that the entire account is disputed will not prevent the account being stated so far as the running of the statute of limitations is concerned, if the items are not objected to. *Toland v. Sprague*, 37 U. S. 12 Pet. 334, 9 L. ed. 1107.

To whom applicable.

In a few jurisdictions there has been an inclination to confine this rule to the case of merchants' accounts where it originated.

Thus, the rule making the retention of an account with objection a stated account applies only between merchants. *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435.

The rule of retention does not apply in cases where the parties are not merchants. *Rich v. Eldredge*, 42 N. H. 158.

But the great majority of the courts have either expressly or impliedly refused to so limit it and have permitted it to be extended to accounts generally.

The earlier rule in the law upon the subject of 27 L. R. A.

account stated was that it was applicable to merchants only, but this is not the rule at present. The needs of modern business have so enlarged it that it may be properly applied to all classes of business men. *Fleischner v. Kubit*, 20 Or. 523.

The rule is not confined to dealings between merchants. *Brown v. Kimmel*, 67 Mo. 430.

The rule of acquiescence is not confined to merchants but will apply equally to an account rendered by auctioneers to their employers. *Townes v. Birchett*, 12 Leigh. 173.

In *Shepard v. Bank of State of Missouri*, 15 Mo. 141, it is said: "It is true these cases (those holding the account to be stated) are between merchant and merchant and are only found in chancery proceedings, but there is no reason why the same doctrine should not prevail between any other persons with whom are accounts current or accounts of transactions in the ordinary course of business. And the rule was applied between bank and depositor."

An account by commission merchants of sales made, unobjected to, will be evidence of its correctness. *Bailey v. Bensley*, 37 Ill. 556.

Where a broker renders an account showing a sale of stocks, which the customer keeps in ignorance of the facts, his acceptance will not make it a stated account. *Follonsbee v. Parker*, 70 Ill. 11.

If a partner in a single partnership transaction receives from the other a statement of accounts between them and is silent for thirteen years afterward it amounts to an acquiescence. *Atwater v. Fowler*, 1 Edw. Ch. 417, 6 L. ed. 133.

Retention by one partner of an account rendered to him by the other is not sufficient to sustain an action of assumpsit for the balance. An express promise to pay is necessary to sustain such an action between partners. *Killam v. Preston*, 4 Watts & S. 15.

The rule will apply to accounts between partners which were entered in the partnership books and not objected to for a number of years. *Lewis v. Loper*, 54 Fed. Rep. 237.

Accounts between a factor and merchant repeatedly rendered and received without objection with requests for indulgence and repeated promises to pay, become stated accounts the items of which cannot be questioned. *Flower v. O'Bannon*, 43 La. Ann. 1042.

Failure of merchants to object to a statement by their factor of an account against them for losses on consignments will if not objected to in a reasonable time become a stated account. *Talout v. Chew*, 27 Fed. Rep. 273.

The rule that if the account is presented it must be objected to within a reasonable time or it will become binding does not apply to accounts rendered by a trustee to his *cestui que trust*. *Abi's App.* 123 Pa. 25.

If a trustee renders accounts of his *cestui que trust* who is *sui juris*, they will become stated accounts if retained an unreasonable time without objection. *Powell v. Powell*, 10 Ala. 900.

An account of land transactions retained for two years will become an account stated. *Stebbins v. Niles*, 25 Misc. 267; and the principle of that decision was followed in *Coopwood v. Bolton*, 28 Miss. 212.

Retention of an account rendered by an agent for management of lands will become conclusive. *Tharp v. Tharp*, 15 Vt. 105.

plaintiffs brought an action of trespass against Willard, who was sheriff of the county, for the alleged nonfeasance of one A. Matthews, his deputy, in not properly seizing, keeping, and disposing of a large amount of property, consisting of divers and sundry items of different values, upon execution then

in the hands of the officer. A motion was made that an auditor be appointed by the court under the statute to state the account. Shaw, *Ch. J.*, in passing upon the question, said: "The primary idea of account, *computatio*, whether we look to proceedings of courts of law or equity, is some matter of

In an action for a balance claimed to be due by a corporation, the court said the account was rendered and no objection being made to it as stated and balanced, the transaction may be deemed to have been acquiesced in. This is the rule of law in matters of account of a commercial nature if not in matters of account in general; and there is no reason why it should not apply to a private corporate body engaged in trade and conducting its affairs through the instrumentality of officers and agents as well as to individual natural persons carrying on similar business in the same way. *Bradley v. Richardson*, 23 Vt. 720, 2 Blatchf. 354.

Retention will make a stated account of a factor's statement. *Harris v. Ely*, 1 Selden Notes, 34; *Smedley v. Williams*, 1 Pars. Sel. Eq. Cas. 359; *Hall v. Sloan*, 9 Phila. 138; *Bevan v. Cullen*, 7 Pa. 281; *Thompson v. Fisher*, 18 Pa. 310; *Sentell v. Kennedy*, 29 La. Ann. 679.

Death or cessation of dealing.

An account closed by the death of one of the parties is not a stated account so as to make the exception of the statute of limitations in favor of running accounts between merchants cease to be applicable and render the amount subject to the running of the statute. *Bass v. Bass*, 8 Pick. 187.

Neither the death of one merchant nor the cessation of dealings between them will have the effect of closing the account so as to start the running of the statute of limitations. *McLellan v. Crofton*, 6 Me. 308.

An account closed by the cessation of dealings between the parties is not an account stated. *Mandeville v. Wilson*, 9 U. S. 5 Cranch, 15, 3 L. ed. 23.

Balance brought forward.

The mere fact that the balance is carried forward on the books instead of being paid will not prevent the account from being a stated account. Thus where a banker balanced the pass-book of the depositor monthly and stated the balance due each statement became after a reasonable time an account stated, back of which the depositor cannot go to correct errors without leave of a court of equity. *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181.

An account rendered and accepted and balance carried forward into a new account becomes an account stated. *Allen v. Nettles*, 39 La. Ann. 738.

The claim must be clear.

In order to have silence amount to an account stated the person sought to be charged must in terms be a party to the account or the grounds upon which it is sought to hold him liable should be clearly made known to him and a demand for payment should be made. Thus where an account was sent to one member of a firm under the name of a former firm of which he was not a partner with no accompanying explanation that he was to be held liable for it, the court held that his neglect to object to it did not make it an account stated as against him. *Benites v. Hampton*, 3 Utah, 389.

To become an account stated the bill rendered must have been unambiguous and clearly indicate the nature and extent of plaintiff's demand, therefore it was held that although a bill was rendered as follows: "One Portable Engine and take his 4 x 7 at Hack's, \$399.50," and it was retained and payment made upon it, it did not become an account stated because it was not definitely stated

what the seller claimed to be the amount which the buyer was required to pay. *Manion Blacksmith & Wrecking Co. v. Carreras*, 26 Mo. App. 229.

Admission of debt.

The rule has been in some cases extended to the mere admission or acknowledgment of indebtedness.

In regard to a promise to pay the costs of an action the court in *Porter v. Cooper*, 1 Cramp. M. & R. 337, 4 Tyrw. 456, 6 Car. & P. 354, says: "In the later cases the courts have deviated far from what was the original meaning of an account stated. I think the rule to be this that if there is an admission of a sum of money due, for which an action would lie, that will be evidence to go to the jury on the count for an account stated."

An acknowledgment that a certain sum is due from one person to another makes an implied promise to pay the amount and will sustain an action upon an account stated. *Tassey v. Church*, 4 Watts & S. 141, 39 Am. Dec. 65.

Where a borrower of money and his surety signed a memorandum in which they stated, "We jointly and severally owe you \$20," the jury may find it to be an account stated. *Buck v. Hurst*, L. R. 1 C. P. 297, 12 Jur. N. S. 704.

Where a director of a corporation whose funds had been attached in the hands of their banker in order to obtain a release of them wrote a letter to the creditor that if he would accept a certain amount on his claim, the director and his brother directors would pay the balance of the claim, the amount of which was stated in the letter, there was an account stated. *Barker v. Birt*, 10 Mees. & W. 61, 6 Jur. 736.

A promise by the drawer to the indorsee of an over-due bill of exchange to pay the amount will support an action on an account stated. *Oliver v. Dovatt*, 2 Moody & R. 230.

Where a person who has agreed to take a house and purchase the fixtures at a valuation to be fixed by certain persons named, after the valuation is made takes possession and enjoys the fixtures, he will be liable upon an account stated. *Salmon v. Watson*, 4 J. B. Moore, 73.

Admission of a certain sum being due in respect of a demand for which an action would lie will support an action of account stated. *Ware v. Dudley*, 16 Ala. 742.

An admission that the amount claimed on an account rendered is due will make an account stated. *Gregory v. Bailey*, 4 Harr. (Del.) 256.

An admission, whether oral or written, of indebtedness in a specific sum makes the demand an account stated. *Nooe v. Garner*, 70 Ala. 443; *Chapman v. Lee*, 47 Ala. 143.

An admission of a balance or acknowledgment made by one person to another that a sum of money is due the latter is sufficient to make an account stated. *Stevens v. Tuler*, 4 Mich. 386.

Where defendant acknowledged his indebtedness for a specific sum upon a balance of an account the court was at liberty to treat it as an account stated. *May v. Kloss*, 44 Mo. 300.

Question for court or jury.

The question whether a conversation is sufficient to constitute an account stated is a question for the court and not for the jury. *Bishop v. Chabre*, 3 Car. & P. 65, *Moody & M.* 116.

What constitutes a reasonable time is a question-

debt and credit, or demands in the nature of debt and credit, between the parties. . . . But in this action the plaintiffs charge the defendant's deputy with a tort, a non-feasance, and breach of duty. There is no relation of debtor and creditor, in relation of responsibility for money or property intrusted by one to another, either in fact or in law; and consequently refused the appointment of an auditor. It would seem that an account stated should be the result of computation between the parties concerning monetary transactions, or debts in the restrictive sense, as distinguished from liabilities and demands, either existing reciprocally or entirely upon the one side or the other. As to the ascertained balance the law implies a promise to pay, and an action is maintainable thereon. The promise is new in its nature, and the consideration therefor is the stating of the account. What existed before as an account between the parties is now an account stated, and in an action thereon it is not necessary to inquire as to particular items which go to make it up. To maintain the action as averred, the plaintiff must prove an account stated. That, and nothing else, will support his allegations. *Volkening v. De Graaf*, 81 N. Y. 271. An account may, however, be stated with reference to a single item, but that item must consist of a debt then due and owing. 2 Chitty, Cont. 962; *Tucker v. Barrow*, 7 Barn. & C. 625; *Whitehead v. Howard*, 2 Brod. & B. 372. In *Lubbock v. Tribe*, 8 Mees. & W. 612, Lord Abinger, C. B., said: "It is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not. Here there was nothing due from the defendant to the plaintiff at all. The only thing in respect of which they had a claim upon him was upon his promise, and they might have had an action against him for not performing that promise, because, no doubt, it was made upon a good and sufficient consideration; but it was not in the nature of any debt due from one to the other at all;" and held that an action upon account stated would not lie. See also *Gough v. Bindon*, 7 Exch. 48. So it is with regard to the ordinary account stated, as distinguished from an express settlement of cross-demands, it must consist of moneyed transactions or debts; and when there has been a statement of the account a promise to pay the ascertained balance arises by implication if no express undertaking is entered upon at the time.

Recurring to the facts of this case, it is apparent that the obligation of the defendants to construct the fence in question was not a debt due and owing from the defendants to plaintiff; it was merely a demand for unliquidated damages for breach of contract, and hence was not a proper subject upon which to base an account stated. To test the question as to the correctness of this conclusion, suppose the plaintiff had sued the defendants upon their agreement to build the fence, and for damages for their default. Would it be a good defense to plead an account stated with reference thereto, without also showing payment of the amount found to be due? In other words, is the mere statement of the account as alleged a discharge of the old cause of action for breach of contract? Unmistakably not. And, inasmuch as a new cause of action is not given until the old is discharged, it follows that the action upon an account stated cannot be maintained. The alleged account stated amounts to an accord, but an accord without satisfaction is no defense to the original action. An accord with satisfaction, however, gives a new action, and the old is barred. "A claim or demand may be satisfied by the party liable delivering, paying, or doing, and the claimant accepting, something different from that which was owing or claimed, if the parties so agree. It is a substantial payment. When such agreement is executed,—carried fully into effect,—the original demand is canceled, completely satisfied, and extinguished. It is thus discharged by what the law denominates 'accord and satisfaction.' It is a discharge of the former obligation or liable by receipt of a new consideration, mutually agreed on." 1 Sutherland, Damages, 425. Again, suppose the plaintiff had sent to defendants a statement in writing of his claim against them for \$300 for building this fence, and the defendants had retained it an unreasonable or any length of time without objection, would a promise to pay such sum arise by implication? Undoubtedly not. If such were the rule, it would be an easy matter for any claimant to convert an action for unliquidated damages, whether arising from contract or tort, into an action upon a money demand, wherein it would not be permissible to inquire into the original cause of action. Every person against whom such a claim is made would be compelled to be constantly on the alert, and make due and timely objection, in order to prevent an undue advantage

of law for the court. *Standard Oil Co. v. Van Ethen*, 107 U. S. 329, 27 L. ed. 320.

What is a reasonable time when the facts are undisputed is a question of law. *Fleischner v. Kubli*, 20 Or. 323.

But it has also been held that the question of what is a reasonable time is one of fact for the jury. *Austin v. Ricker*, 81 N. H. 97.

The evidence being undisputed it is a question of law whether the facts constitute an account stated. *Stevens v. Ayers*, 32 N. Y. S. R. 15.

Whether on a given state of facts the transaction constitutes a stated account is a question of law. *Lookwood v. Thorne*, 11 N. Y. 170, 63 Am. Dec. 81.

If the evidence is not without conflict and free from adverse inferences, the question whether an

account is stated or not is for the jury. *Rice v. Schiess*, 90 Ala. 415.

On any given state of facts it becomes a question of law whether the transaction constitutes an account stated. *McPherson v. Small*, 9 Jones & S. 533.

Whether an account presented in evidence is an account stated or not is in the province of the jury to determine from the facts. *Davis v. Tiernan*, 3 How. (Miss.) 783.

Whether silence for an unreasonable time after the receipt of a statement of account amounts to an admission of the correctness of the account, and whether the delay is unreasonable, are questions of fact for the jury. *Moran v. Gordon*, 33 Ill. App. 45.

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being taken of him. The doctrine of an account stated cannot be carried to this extent. A single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple

contract, cannot form the basis for an account stated.

The lower court therefore properly granted the nonsuit, and its judgment is affirmed. Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NATIONAL WATER WORKS CO.

v.

KANSAS CITY.

(22 Fed. Rep. 852.)

(July 2, 1894.)

1. A provision in a statute authorizing a waterworks franchise that "at the expiration of the twenty years if the grant be not renewed the city shall purchase" is not an incidental, directory, or subordinate provision, but mandatory, vital, and controlling.
2. It is too late to say that a decree for performance of a contract is not responsive to pleadings where for three years the complainant has placed itself in the attitude of asking for such a decree and has never dismissed its bill or withdrawn its prayer, but any formal defect in this particular is subject to amendment, even in the appellate court.
3. The title and right of possession to a waterworks plant does not pass absolutely to a city on the expiration of the franchise without payment or tender of payment therefor, under a statutory provision that the city shall purchase if the grant be not renewed.
4. The disability of a city under its charter and acts of the legislature to take the title to waterworks cannot be set up by the waterworks company, if it has paid for the property, to defeat a purchase by the city under a statutory provision that the city shall purchase if the grant be not renewed when the franchise expires.
5. "The fair and equitable value" which by statute and ordinance a city is to pay for waterworks on the expiration of a franchise is not the amount on which the income or earnings would pay interest, neither is it merely the original cost of construction or the cost of reproduction, but it includes in addition to the cost of reproduction the additional value created by the fact of connection with buildings and of the actual operation of the plant.
6. The value of connections with buildings which is to be added to the cost of reproduction in determining the present value of a system of waterworks which a city must pay therefor is not merely the cost of making such connections, since they are not compulsory but depend upon the will of property owners and are secured only by effort and inducements.
7. A city which has for many years recognized and accepted a waterworks system as fully complying with a contract cannot afterwards repudiate such recognition and claim damages for failure to comply with the contract.

NOTE.—While the compulsory purchase of the plants of private corporations engaged in furnishing municipalities with water may be unusual the above case is of much importance on the general subject of such purchases whether voluntary or otherwise. For another phase of the relation of such private companies to the municipality, see *Re Brooklyn* (N. Y.) 26 L. R. A. 270, 37 L. R. A.

CROSS-APPEALS from a decree of the Circuit Court of the United States for the Western District of Missouri, in an action to enforce a contract by defendant to purchase certain waterworks which had been erected by complainant. *Reversed in part.*

On March 24, 1878, the following Act was approved by the governor of Missouri:

"SECTION 1. The city of Kansas is hereby empowered to construct waterworks, to take and convey into and throughout the city, for the use of the same and others therein, water of the Missouri river, Blue river, or Kaw river, or all, from any point or points, and to that end to acquire, hold, use, control and dispose of real estate and personal property within and without the corporate limits of the city, and also in the state of Kansas, necessary for laying pipes, constructing reservoirs, aqueducts, appliances and means, and erecting buildings and machinery proper and convenient for such waterworks, and for operating and repairing the same; to receive, take, purify, store, conduct and distribute in and throughout the city such water, and in general to do all things necessary and proper to carry this act into effect and accomplish the object thereof."

"SEC. 22. The city of Kansas is hereby empowered to grant to any person or persons, or any corporation, the right to erect and operate such waterworks as the first section of this act provides for, and to accomplish the purpose therein mentioned on such terms and conditions as may be agreed on in a contract therefor: provided, that such grant shall only be made by or in all respects pursuant to ordinance, which shall not be valid till the same be approved by two thirds of the qualified electors of the city voting on the matter at a general election, or special election ordered and held for the purpose, when the matter of the approval of such ordinance shall be submitted to such electors; the power to order, hold, and declare the result of any election requisite being hereby conferred on the city, to be exercised by or pursuant to ordinance; and, provided further, that no grant so made shall confer the right to operate the waterworks for any period beyond twenty years from the time of approval of the ordinance as aforesaid; but the grant may be renewed by or pursuant to ordinance, approved as aforesaid, during the last of such twenty years, for another term not exceeding twenty years, on terms and conditions specified in the ordinance for the renewal of the grant; and, provided further, that in making such grant or renewing the same, the

city shall reserve to itself the right, at its option, and at any time, to acquire and become sole owner of such waterworks, including all extensions and enlargements thereof, and everything of every nature and description belonging and pertaining thereto, on such terms as may be provided and agreed on between the parties at the time the grant is made; or if no right is expressly reserved, or the city cannot, according to any reservation, purchase and become sole owner as aforesaid, then the city may, at any time, at its option, acquire and become sole owner of such waterworks, including all enlargements and extensions thereof, and everything of every nature and description belonging or pertaining thereto, on paying therefor the fair and equitable value thereof, to be ascertained, if the parties cannot agree thereon, by the circuit court of said county, on the petition of the city; the property and subject of purchase to be transferred and belong to the city on payment therefor; and, provided further, that at the expiration of the twenty years, if the grant be not renewed, the city shall purchase and become sole owner of such waterworks as aforesaid, and pay therefor a price agreed upon by the parties or ascertained as they may agree, or, if the price cannot be thus fixed, then the city shall pay the fair and equitable value of the whole works, to be ascertained by said court on the petition of either party filed for the purpose; and, provided further, that the city may furnish any party to whom such grant may be made real estate and right of way for use in constructing and operating such waterworks, according to such agreements as may be made in the premises, and guarantee that the works shall earn a certain amount annually, to be specified in the grant, and guarantee, clear, over and above current expenses, taxes and assessments, and may secure by a proper deed or agreement for the purpose, to the party to whom such grant is made, the control and possession of any real estate and right of any [way] condemned or acquired in the exercise of the right of eminent domain, for use during the time such party may need the same under any such grant."

In accordance with that statute the city, by an ordinance, No. 10,524, approved October 27, 1873, and duly ratified by the people, granted to the National Waterworks Company a right to erect and operate waterworks.

The ordinance contained the following provisions:

"SECTION 1. That the National Waterworks Company of New York, a corporation duly organized under the laws of the state of New York, be and it is hereby authorized, subject to the limitations hereinafter or by law provided, to establish, construct, maintain and operate waterworks, in or adjacent to the city of Kansas, in the state of Missouri, to receive, take, purify, store, conduct, and distribute in and throughout the said city of Kansas, pure, well-settled, and wholesome water; to lay down pipes and extend aqueducts and conductors through the streets, avenues, lanes, alleys or public grounds of the said city of Kansas; to erect

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and maintain all necessary buildings, machinery and attachments, of any description, necessary and proper and suitable for such works, and to supply to said city and the inhabitants thereof such water by said waterworks. . . . The rights hereby granted to continue for twenty years from the date of the approval of this ordinance by a vote of the qualified voters of the city of Kansas.

"SEC. 4. The city of Kansas hereby reserves to itself the right at its option and at any time, to acquire and become sole owner of said waterworks, including all extensions and enlargements thereof and everything of every nature and description belonging and pertaining thereto, on paying therefor the fair and equitable value thereof, to be ascertained, if the parties cannot agree thereon, by the circuit court, or other court of record of the county of Jackson, at Kansas City, upon the petition of the city, and in such manner as the court may determine; provided, that a copy of such petition shall be served upon said company, at least fifteen days before the same shall be presented to said court. If, at the expiration of twenty years from the time this grant shall take effect the same shall not have been renewed, or the city shall not have become owner of said works, the city shall then be required to purchase and become sole owner of said waterworks as aforesaid, and pay therefor a price agreed upon by the parties, or ascertained as they may agree; or, if the price cannot be thus agreed upon, then the city shall pay the fair and equitable value of the whole works, to be ascertained by said circuit or other court of record as aforesaid, in such manner as said court shall determine on the petition of either party for the purpose; provided, that the party presenting such petition shall have served a copy thereof upon the other party, at least fifteen days before the day of presentation; and, provided also, that if upon examination it be found that such works are not in all respects in good condition, and of first class and sound materials, and in every way efficient, then the city shall not be required to purchase the same at any time nor at any price."

On December 26, 1891, the company filed a bill, alleging that under the contract thereby created the company completed the works for operation as required, and that they were duly accepted by the city; that on the 25th day of May, 1878, the city, by a certificate signed by its mayor and the president of the common council, did certify that said company was operating its works to the satisfaction of the city; that the company had kept and performed all the conditions, covenants, promises, and agreements on its part, and that it would at all times be ready, able, and willing to do so; that the company had expended large sums of money in building the works; and that in order to do so it has issued its bonds in the aggregate of \$3,000,000, secured by mortgages covering the waterworks plant; that the defendant city falsely pretended that the ordinances and the contract embodied therein, were not in force, and were no longer binding and obligatory

upon said defendant, and particularly that said defendant was not and would not be bound either to purchase said waterworks, as by said ordinance was provided and agreed, or to renew the company's said grant; that the mayor and common council, law officers, and legal advisers of the city had publicly declared and represented that said ordinances and contract were not binding and obligatory upon the city, and had threatened and did threaten and intend to repudiate the same, and refuse to keep and perform the covenants, agreements, and promises therein contained and expressed to be kept and performed on the part of the city with respect to the renewal of said contract, and the purchase of and payment for said waterworks; that in furtherance of said unlawful intent, purpose, and threats, the city had adopted certain charter amendments, and had passed ordinances providing for constructing and operating waterworks in the city, and for issuing bonds for the purpose, and authorizing plans, specifications, and details for the work to be prepared, and had publicly advertised for sealed bids for the purchase of said bonds. The bill prayed a decree "that the several ordinances accepted by your orator, hereinbefore set forth, as they are taken together, are in full force and effect, and that the contract embodied therein is a valid and subsisting contract, binding and obligatory upon your orator and the defendant, and that the defendant keep and abide by the same; and that, upon your orator's duly and faithfully doing and performing all things yet remaining to be done upon its part, the defendant, its officers and agents, keep and perform the covenants, promises, and agreements on its part, so far as they are executory and unperformed; and that your orator may have such other and further relief as the case may require, and as may be conformable to equity, and to your honors may seem meet, and the defendant, its mayor, common council, officers, and agents, may be perpetually enjoined and restrained by the decree of this court from proceeding to construct and maintain said separate and distinct system of waterworks, and from taking or appropriating to its own use, except under and in pursuance of its contract with your orator, any portion of your orator's said system of waterworks; and that your orator may have such other and further relief as the equity of the case may require, and as to the court may seem meet."

The answer of the city, filed December 6, 1893, admitted certain allegations of the bill, but denied that the company had complied with its contract by making a complete and sufficient system of waterworks for the city, as provided for in the ordinance. It alleged that by reason of such failure on the company's part the city was relieved from any obligation to purchase the company's system, or any part thereof; and admitted the purpose and intent of the city, in the immediate future, to acquire the ownership and control of a system of waterworks of its own. The city filed a cross-bill which set up the various breaches of the contract on the part of the company alleged in the answer,

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and alleged that the city had been and was by those breaches released from all obligations to the company; that the company, by its proceeding in this case, and by many other means and practices, was preventing the city from exercising its unquestioned right to provide itself with a new system of waterworks; and that the company had threatened, and was then threatening, to cut off the water supply from the city and its inhabitants, as an illegitimate means of forcing the city to comply with its demands, and to desist from its purpose of building its own waterworks,—and prayed that the city be released and absolved from all obligations under the contract to purchase its system of waterworks, or any part thereof, and the company be enjoined and restrained from interfering in any way with the city's proceedings to sell its bonds and construct its own waterworks, and also for the payment of damages on account of the failure of the company to furnish the degree of fire pressure stipulated for in the contract, which had been paid for years at the contract rates, and further restraining the company from carrying out its threat of cutting off the water supply pending the suit, and also that a receiver be appointed for the company.

After the expiration of the franchise, on the 15th day of November, 1893, the city filed a supplemental cross-bill setting up the expiration of the contract and alleging that the city had not renewed its grant to the company; that no terms of agreement could be entered into between the city and the company with reference to the matter; and that the company had failed to have such works as the city was bound to purchase. That since the company had no interest in or title to that portion of the plant within the limits of the city, and had coerced consumers into paying water rentals without making any allowance to the city for the use of its streets and property; that under the contract the necessary real estate and rights of way for the erection of the works was purchased and had been paid for by the city, but that the company was wrongfully withholding the title to the same from the city; that the city had been largely damaged by the want of the fire pressure guaranteed by the contract. It prayed a decree declaring that the company's right and title to the works, within the limits of the city, had expired, and that the same belong to the city; that the court ascertain and determine the interest of the company in the works described by the pleadings, and that the city be permitted to obtain the same upon making just compensation, to be determined by the court in such manner as the court may provide; that the company be required to convey the real estate standing in its name to the city; that the damages which the city had suffered by reason of the failure of the company to furnish the required fire pressure in the past be determined and adjudged in favor of the city; that the sum, if anything, which the city ought to pay to the company for furnishing water for public use, pending the litigation, be determined; that the company be enjoined from cutting off the supply

of water to the city for public purposes; that, if necessary, a receiver be appointed to take and operate the works.

On January 2, 1894, an answer to the supplemental cross-bill was filed setting up *inter alia*:

"That the said city is without authority or power to purchase said system of waterworks for the following reasons and because of the following facts, to wit:

"(a) The Constitution of the State of Missouri, of 1875, withdrew from said city the power to become indebted to an amount sufficiently large to purchase said system of waterworks, and said city has no means to apply to such purpose, and could only accomplish the same by becoming indebted to an amount which would make its indebtedness exceed the limitations in said constitution contained, and the annual interest on such indebtedness larger than could be paid out of the taxes authorized to be levied for that purpose.

"(b) By section 17 of article 18 of the charter of said city, adopted in 1889, it is expressly provided, referring to the contract with this defendant embodied in said Ordinances Nos. 10,524 and 14,776, that 'the city can purchase such works, or renew the franchise thereof only by ordinance passed by a majority vote of the members elect of each house of the common council; and only then in the event that said ordinance shall be approved by a vote of two thirds of the qualified voters of the city voting at an election held for such purpose.' And the defendant states that no such ordinance has been passed, nor has any election been held, as provided in said charter.

"(c) Under Ordinance No. 2,263 of said city, approved August 21, 1890, an amendment to the charter of said city was adopted, the same being mentioned in the seventeenth paragraph of the original bill of complaint, and a copy thereof annexed to said bill as Schedule E; and in and by such amendment the said city expressly, and for the precise purpose of disabling itself from carrying out its contractual obligations to this defendant, limited its power to hold property for waterworks purposes to such property as might be located in the state of Missouri.

"(d) Questions having been made as to the validity of said charter amendments, the complainant caused the general assembly of the state of Missouri to enact 'An act concerning waterworks, and a supply of water for cities now having or that may hereafter have a population of more than one hundred thousand (100,000) and less than three hundred thousand (300,000) inhabitants, whether organized under general law or special charters, or under section sixteen (16) of article nine (9) of the Constitution of this state, and to issue bonds for acquiring waterworks, and to make contracts for supplying water to such cities, approved March 6, 1893, which is in substance the same, and contains the same limitations and restrictions upon the powers of the complainant as it imposed upon itself by its charter amendment, namely, to acquire only such property as is situated within the state of Missouri. The complain-

ant is the only city to which said act has or can have application, and the same was caused to be enacted by said complainant for the same purpose which moved the adoption of said charter amendments, as hereinbefore stated.

"(e) Under section four of said Contract Ordinance No. 10,524, the said city could only become the owner of said system of waterworks by exercising its option to purchase the same on or before November 15, 1898; and the said city, until long after that date, adhered to the election made and purposes expressed in its original cross-bill herein. And the defendant shows that under the charter of said city the authority to act for said complainant in the premises is vested in its common council by the passage of a proper ordinance; that no action whatever has been taken by such body, or by an officer or person authorized to act for said city, relative to the matter; and that the only step taken in the premises has been through the solicitors in this cause, upon their own motion, by the filing of the so-called 'Supplementary Cross-bill' herein.

"(f) For more than four years prior to the filing of the said supplementary cross-bill, the city has claimed and contended that it was absolved and released from the contract with this defendant, and that it did not propose to, and would not, purchase the defendant's system of waterworks, or any part thereof, although said company has always denied, and does still deny, said claim.

"By reason of which facts this defendant avers that said city is disabled, debarred, and prohibited from purchasing its said system of waterworks, and that said city waived any and all right to do so."

The city subsequently filed an amendment to its supplementary cross-bill stating that it was and always had been willing to purchase the property at a reasonable price asking that it be allowed to do so.

Commissioners were appointed to estimate and fix the value of the works and system as a whole, to be predicated on the actual value of the works, and not upon the stock of the company, and to be the fair and equitable value of the whole works at the time. Upon the pleadings, evidence, and the report of the commissioners, the cause was heard and it was decreed:

"First. That under the act of the legislature and the contract between the National Waterworks Company of New York and the city of Kansas City, set out in the pleadings in this case, the said city is legally bound to purchase from said company, and said company is legally bound to sell to the said city, the full, complete, and entire waterworks plant by which the said city and its inhabitants are now supplied with water, including all portions of said plant, as well that portion in the state of Kansas, and commonly known as the 'Quindaro Supply Works and Flow Pipe' as that portion situated in the state of Missouri, together with all lots and lands belonging to or in any wise used as part of said plant, with the exceptions mentioned in the eleventh paragraph of this decree, and everything of every nature

belonging or pertaining to said waterworks plant.

"Second. That said city, under the said contract, is bound to pay for said complete or whole waterworks plant, and the said company is bound to receive in full payment therefor 'the fair and equitable value of the whole work,' as provided in said contract.

"Third. The court finds that the fair and equitable value of the said complete and whole waterworks plant is two million seven hundred and fourteen thousand dollars (\$2,714,000).

"Fourth. That said city is entitled to the possession, use, and control of said whole and complete waterworks plant, and said company shall, on the 30th day of April, 1894, surrender and deliver to the said city the said whole and complete waterworks plant, and everything pertaining thereto, and all rights, leases, or contracts relating thereto, and necessary or essential to the full enjoyment of said waterworks as they are now enjoyed and operated by the said company; and the said company is hereby enjoined from using or operating said works, or retaining possession or control of any part thereof, after the said 30th day of April, 1894, and is enjoined from refusing or denying to said city the complete and peaceable possession of said works on that day; and said city is enjoined from refusing or neglecting to demand and accept the possession of said works on that day, and no appeal of this cause by either or both of the parties thereto shall operate to suspend these injunctions.

"Fifth. In the event that said company is unable to deliver the possession of the whole and complete waterworks plant, including the Quindaro Supply Works, then said company shall deliver and the city shall receive on or before said 30th day of April, 1894, that part of the plant in the state of Missouri; and said company is hereby enjoined from interfering with the possession of said city to that part of said works situated in the state of Missouri; and this injunction shall remain in force pending any appeal in this case.

"Sixth. The said company, within six months from the date of this decree, shall make, execute, and deliver to the city a good and sufficient assignment and conveyance of said whole and complete waterworks plant mentioned in the first paragraph of this decree, acceptable to the city or approved by this court, and when such conveyance is accepted by the city, or approved by this court, the city shall become bound to pay to the said company the sum of two million seven hundred and fourteen thousand dollars (\$2,714,000), being the fair and equitable value of said works in the manner following, that is to say: The city shall agree and assume to pay on the incumbrances and liens on said waterworks plant, to the holder or holders thereof, as their several rights and interests and priority thereto shall appear, an amount of said lien equal to said sum of two million seven hundred and fourteen thousand dollars (\$2,714,000), and shall become bound

to save said company harmless as to that amount of said lien. When said sale and transfer of said waterworks plant is made as provided in this paragraph, the liability of the city to pay therefor as herein provided shall relate back to the 30th day of April, 1894.

"Seventh. If the waterworks company shall fail to make and tender a sufficient conveyance of said whole and complete waterworks plant within said six months from the date of this decree, then the city shall not be required to pay the price fixed for the complete and whole plant; and the question whether the city shall pay, or is liable to pay, any sum whatever for that part or fraction of the plant in Missouri which does not include the source of supply, is reserved.

"Eighth. That said city is not entitled to recover from said company any sum for or on account of any of the several claims for damages set up in its cross-bill.

"Ninth. The said city shall pay to said company the contract price for hydrant rentals down to and including the 30th day of April, 1894, amounting, principal and interest, after deducting all payments made thereon, to the sum of one hundred and thirty-nine thousand four hundred and fifty-two dollars and eighty-two cents (\$139,452.82), to be paid in the time and manner following, viz.: One third of said sum shall be paid upon delivery by said company to the city of the possession of the whole and complete waterworks plant as required in the fourth paragraph of this decree, one third when said company shall deliver to the city a sufficient conveyance or transfer of the whole and complete waterworks plant, and the remaining third six months thereafter; each of said installments to bear interest at 6 per cent per annum from April 30, 1894.

"Tenth. That said company shall have the right to collect and retain all water rentals which were due prior to the 30th day of April, 1894, and no claim therefor shall be made by the city against the company or the consumers; and the city shall collect and appropriate to its own use all water rentals which may accrue after the 30th day of April, 1894, and said company shall have no claim against the city or the consumers therefor.

"Eleventh. That, conformably to the consent expressed by counsel for both parties at the hearing, the property described in the pleadings as the 'Kaw Point Pumping Station,' and the six or ten acres of land, more or less, connected therewith, and now owned by said company, shall remain its property, and shall not be conveyed to said city as part of said waterworks plant. The value of said Kaw Point pumping station has been deducted from the price to be paid for the complete works.

"Twelfth. That each party shall pay one half of the costs of these suits.

"Thirteenth. That this case is reserved for the purpose of making such other and further orders as may be found necessary to carry this decree into effect, and as may be equitable and just."

Before Brewer, *Circuit Justice*, Sanborn, *Circuit Judge*, and Thayer, *District Judge*.

Mr. C. O. Tichenor, for National Waterworks Co.:

The act complained of and which it is sought by the bill to prevent, is the building of a system of waterworks by the city, and for the reason that such act will destroy the value of complainant's plant.

It is similar in principle to that in the following cases:

Minturn v. Larue, 64 U. S. 23 How. 435, 16 L. ed. 574; *Chenango Bridge Co. v. Binghamton Bridge Co.* 70 U. S. 3 Wall. 51, 18 L. ed. 187; *Charles River Bridge Proprs. v. Warren Bridge Proprs.* 36 U. S. 11 Pet. 420, 9 L. ed. 773; *New Orleans Water Works Co. v. Ritters*, 115 U. S. 874, 29 L. ed. 525; *Citizens Gas Light Co. v. Louisville Gas Co.* 81 Ky. 263.

If, as decreed by the court, the company must sell, and the value of the plant is much less than the mortgages thereon, then this debt must be cut down; as a result of this forced sale many of these bondholders must lose, and yet, neither of the trustees in these mortgages is a party; not a single bondholder is a party.

Alexander v. Horner, 1 McCrary, 642; *Shields v. Barrow*, 58 U. S. 17 How. 139, 15 L. ed. 160.

All persons interested in the object of the suit, and whose rights will be directly affected by the decree, must be made parties to the suit.

McArthur v. Scott, 113 U. S. 391, 28 L. ed. 1031; *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 29 L. ed. 66; *Kendig v. Dean*, 97 U. S. 425, 29 L. ed. 1062; *Hoot v. Wilson*, 76 U. S. 9 Wall. 501, 19 L. ed. 762; *Robertson v. Carson*, 86 U. S. 19 Wall. 95, 22 L. ed. 178; *Ribon v. Chicago, R. I. & P. R. Co.* 83 U. S. 16 Wall. 450, 21 L. ed. 368; *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Coiron v. Millaudon*, 60 U. S. 19 How. 115, 15 L. ed. 575; *Barney v. Baltimore*, 73 U. S. 6 Wall. 285, 18 L. ed. 826.

The city has so disabled itself that it cannot elect to buy.

The contention that the city had no right to disable itself, would be true if the amendment of the act were sought to be used against the company seeking to compel the city to buy, but it is not true where the company does not wish to sell.

McCracken v. Hayward, 43 U. S. 2 How. 612, 11 L. ed. 399; *Edwards v. Kearzey*, 96 U. S. 600, 24 L. ed. 796; *New York Guaranty & Indemnity Co. v. Louisiana Board of Liquidation*, 105 U. S. 625, 26 L. ed. 1108; *New Orleans v. Morris*, 105 U. S. 603, 26 L. ed. 1185; *Louisiana v. New Orleans*, 102 U. S. 206, 26 L. ed. 133; *New Orleans v. New Orleans Water Works Co.* 142 U. S. 88, 35 L. ed. 946; *New York v. Squire*, 145 U. S. 190, 36 L. ed. 671.

How the city can be entitled to any damage for being prevented from buying a system of works which it not only in various ways declared it would not buy, but took steps so that it could not do so, is not apparent.

Jenkins v. Hiles, 6 Ves. Jr. 654; 3 Pom. Eq. Jur. p. 450, note; *Western U. Tel. Co. v. Hull*, 124 U. S. 453, 31 L. ed. 482; *United States v. Behan*, 110 U. S. 344, 28 L. ed. 170; *Smith v.* 27 L. R. A.

Bolles, 132 U. S. 130, 33 L. ed. 281; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147; *Hadley v. Bazendale*, 9 Exch. 351; *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 583; *Wiley v. Athol*, 6 L. R. A. 342, 150 Mass. 426; *Topliff v. Topliff*, 122 U. S. 131, 30 L. ed. 1114.

Where a contract, entered into by the city, for the construction of certain public works, provides that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action in finally accepting them is binding.

Omaha v. Hammond, 94 U. S. 92, 24 L. ed. 70; *Comstock v. Sanger*, 51 Mich. 502.

A party may waive any provision either of a contract or of a statute intended for his benefit.

Shutte v. Thompson, 82 U. S. 15 Wall. 159, 21 L. ed. 125; *Creswell v. Lanahan*, 101 U. S. 347, 25 L. ed. 853; *Murdock v. Lewis*, 26 Mo. App. 244.

This is not a case where a company builds under a license given by law coupled with the right to purchase by the municipality where the works are built, in other words a naked right to furnish water until it had to sell; it is a case where the works were built under a contract with the city. This contract does not say simply that the company shall sell at a price to be fixed by an arbitrator; the terms used are, "on paying therefor the fair and equitable value thereof."

Wheeling Gas Co. v. Wheeling, 8 W. Va. 329; *Murray v. Stanton*, 99 Mass. 348; *Willard v. Tayloe*, 75 U. S. 8 Wall. 563, 19 L. ed. 504.

Messrs. Lathrop, Morrow, Fox & Moore, also for National Water Works Co.:

To base a decree for specific performance on the original bill of the company "would be to violate the obvious principle that in every case the cause of action must exist at the time the suit is brought.

Straghan v. Hallwood, 30 W. Va. 274; 1 Beach, Mod. Eq. Jur. § 496, p. 518; *Turner v. Pierce*, 31 Wis. 342; *Etans v. Bagshaw*, L. R. 8 Eq. 469; *Cross v. De Valle*, 63 U. S. 1 Wall. 5, 17 L. ed. 515; *Langdale v. Briggs*, 23 L. T. N. S. 467, 21 Week. Rep. 620.

With the pleadings of the city in such utter conflict and antagonism, a dismissal of the cross-bill with its supplement and amendment is inevitable.

1 Beach, Mod. Eq. Jur. §§ 491, 497, pp. 450, 514; *Shields v. Barrow*, 58 U. S. 17 How. 130, 15 L. ed. 158; *Verplank v. Mercantile Ins. Co. of New York*, 1 Edw. Ch. 46, 6 L. ed. 54; *Mavor v. Dry*, 2 SIm. & Stu. 113; *Hackley v. Mack*, 60 Mich. 591; *Waddell v. Beach*, 9 N. J. Eq. 798; *Hall v. Harrington*, 41 Mich. 146; *Lauts v. Gordon*, 28 Fed. Rep. 264; *Cross v. De Valle*, *supra*; *Ayres v. Carter*, 58 U. S. 17 How. 591, 15 L. ed. 179; *Jackson v. Grant*, 18 N. J. Eq. 145; *Maynard v. Green*, 30 Fed. Rep. 643; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141; *Richmond v. Irons*, 121 U. S. 30, 30 L. ed. 866.

The Constitution of Missouri of 1875, limiting municipal indebtedness to 5 per cent upon the assessed valuation, is an insuperable barrier to the acquisition of the company's works by the city at the present time.

Chicago, M. & St. P. R. Co. v. Evans, 58 Fed. Rep. 433; *Cooley*, Const. Lim. 5th ed. pp. 230, 231, 239, 240, 334, 336; *Maryland v. Baltimore & O. R. Co.* 44 U. S. 3 How. 551, 11 L. ed. 721; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *New Orleans v. New Orleans Water Works Co.* 142 U. S. 79, 35 L. ed. 943.

The city is not entitled to a decree against the company for specific performance of the contract of November 15, 1873, for the reason that the cross bill nowhere alleges that, prior to the filing thereof, it had put the company in default by offering to buy its whole plant and pay the purchase price thereof.

Pom. Spec. Perf. §§ 323, 324, 334, 331; 2 Beach, Mod. Eq. Jur. § 588, p. 658; *Morgan v. Morgan*, 15 U. S. 2 Wheat. 290, 4 L. ed. 242; *Boone v. Missouri Iron Co.* 58 U. S. 17 How. 340, 15 L. ed. 171; *Wescott v. Mulcane*, 58 Fed. Rep. 305.

By its disabling legislation, by its adopted plan for a new system of waterworks, by its vote of two millions of dollars worth of bonds to construct the same, by its original answer, alleging that the contract of November 15, 1873, was no longer obligatory, and by its original cross-bill making the same allegation and praying a formal decree of cancellation, the city elected to treat the contract as at an end, and so far as itself is concerned, has no right now to ask for a decree for specific performance of the same contract under an equivocal allegation, filed by its counsel at the final hearing.

Fowler v. Bowery Sav. Bank (N. Y.) 4 L. R. A. 145, and cases cited in note; *Scarf v. Jardine*, 7 App. Cas. 845; *Sanger v. Wood*, 8 Johns. Ch. 416, 1 L. ed. 668.

The works were built substantially according to contract by the company and were accepted as such by the city. Any deviations which exist were made with the knowledge and acquiescence of the city and do not justify a refusal to take the works because not constructed as required by the contract.

Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; *American Electric Constr. Co. v. Consumers Gas Co.* 47 Fed. Rep. 43.

In the eye of a court of equity, an executed parcel license is as effectual to create title which cannot be successfully attacked as a deed would be.

Baker v. Chicago, R. I. & P. R. Co. 57 Mo. 265; *Rersick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *House v. Montgomery*, 19 Mo. App. 170; *Chiles v. Wallace*, 33 Mo. 84; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 691; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 492; *Buchanan v. Loganport, C. & S. W. R. Co.* 71 Ind. 265; *Simons v. Morehouse*, 88 Ind. 394; *Hodgson v. Jeffries*, 52 Ind. 334; *Russell v. Hubbard*, 59 Ill. 335; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574; *Clark v. Glidden*, 62 Vt. 702; *Angell, Water-Courses*, § 318; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582.

Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961, says in reference to the effect of a repeal of a franchise to a street railway company: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their

nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal."

See *Dernott v. Jones*, 69 U. S. 2 Wall. 1, 17 L. ed. 702.

Missrs. Karnes, Holmes & Krauthoff, also for National Waterworks Co.:

There is in the cross bill a new substantive cause of action upon which a decree can be had without connecting it with the original bill. The complainant is here wanting to go entirely upon new ground, in fact to make a new case. If this is to be done, it must be by a dismissal of the present bill and the filing of a new one.

Calling the pleadings a supplemental cross-bill does not alter the case.

Hill v. Hill, 10 Ala. 527; *Rotier v. Barclay*, 15 Ala. 439; *Dann v. Baker*, 12 How. Pr. 521; *Watson v. Thibou*, 17 Abb. Pr. 184; *Harrington v. Slade*, 22 Barb. 161; *Slavson v. Englehart*, 34 Barb. 198; *Milner v. Milner*, 2 Edw. Ch. 114, 6 L. ed. 330; *Gillett v. Hall*, 13 Conn. 426; *Clark v. Hull*, 31 Miss. 520; *Ledwith v. Jacksonville*, 33 Fla. 1; *Story*, Eq. Pl. 9th ed. § 336.

The original and supplemental bills "make but one pleading and, so far as they conflict, destroy each other."

Story, Eq. Pl. 9th ed. § 332, note 4; *Choteau v. Rice*, 1 Minn. 106; *Sanderlin v. Thompson*, 17 N. C. 539; *Bannon v. Comegys*, 69 Md. 411.

A plaintiff cannot file a bill for one purpose and then by amendment convert it into a bill for an opposite purpose. Thus, a person cannot file a bill to set aside a deed, and then by amendment turn it into a bill to execute the trusts of the same deed.

Allen v. Spring, 23 Beav. 615; *Holston v. Ball*, 1 Phill. Ch. 177; *Taylor v. Taylor*, 1 Macn. & G. 397; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Denison v. Little*, Id. 11, note; *Straughan v. Hallwood*, 30 W. Va. 274; *Maynard v. Green*, 30 Fed. Rep. 643.

Every fact and circumstance negatives the fundamental essential that the city has been "doing equity." Its refusal to pay hydrant rentals, if that were the only non compliance disclosed by the record, would, alone, disentitle it to be heard in a court of equity.

Pensacola Gas Co. v. Provisional Municipality of Pensacola, 33 Fla. 322.

A bill to annul a contract for fraud or illegality and to specifically enforce it if the court shall hold that it is valid, is fatally defective.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 33 Fed. Rep. 440; *Shields v. Barrow*, 58 U. S. 17 How. 130, 15 L. ed. 158.

The city is entirely without available means to apply to the purchase of waterworks. The full rate limited by the constitution has been continually levied, and the ordinary current expenses of the city have been barely met, and have several times exceeded the revenue collected.

1 Dill. Mun. Corp. 4th ed. § 130; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360; *Lake County Comrs. v. Rollins*, 130 U. S. 662, 32 L. ed. 1062; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1066; *Doon Dist. Twp. v. Cummins*, 143 U. S. 366, 35 L.

ed. 1045; *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044; *Barnard v. Knox County*, 13 L. R. A. 244, 105 Mo. 382; *State v. Columbia*, 111 Mo. 365; *Scott v. Davenport*, 84 Iowa, 208; *McDonald v. Patterson*, 54 Cal. 245; *Trustees of Public Schools v. Taylor*, 80 N. J. Eq. 618; *List v. Wheeling*, 7 W. Va. 501; *East St. Louis v. United States*, 120 U. S. 600, 30 L. ed. 798; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360.

Such contracts do not evidence an indebtedness, nor even an absolute obligation.

The city could renew or purchase.

Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; *Garrison v. Iowa*, 17 N. Y. 458; *Weston v. Syracuse*, 17 N. Y. 110; *Budd v. Budd*, 59 Fed. Rep. 735; *Orouder v. Sullivan*, 13 L. R. A. 647, 128 Ind. 486; *East St. Louis v. East St. Louis Gas Light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Dively v. Cedar Falls*, 267 Iowa, 227; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Grant v. Davenport*, 36 Iowa, 396; *Burlington Water Co. v. Woodward*, 49 Iowa, 58.

Under the Constitution of Missouri the interest upon the indebtedness created in the purchase of these waterworks must be included in and covered by the rate there limited.

State v. Columbia, *supra*.

The suggestion that this interest will be paid out of the proceeds of the operation of the waterworks is without force, for such proceeds cannot be "a basis for the creation of debt."

Millsaps v. Terrell, 60 Fed. Rep. 193.

The city did not hold its authority by contract binding on the state, and there could not be an impairment of a contractual obligation by reason of the action withdrawing or modifying that power.

Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 807, 23 L. ed. 553; *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 13 L. ed. 518; *Conner v. Bent*, 1 Mo. 285; *St. Louis v. Russell*, 9 Mo. 508; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943; *Seibert v. United States*, 129 U. S. 284, 30 L. ed. 1163; *Scotland County Ct. v. United States*, 140 U. S. 41, 35 L. ed. 351.

A clause of assumption by a vendee creates a personal liability, which can be enforced by the creditor in an action at law. The party assuming becomes charged with a primary obligation to pay, which inures to the benefit of the creditor.

Heim v. Vogel, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389, 39 Am. Rep. 519; *Ironwood Waterworks Co. v. Trebilcock*, 99 Mich. 454; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *Citizens Bank of Texarkana v. Terrell*, 78 Tex. 450.

Where such an option to purchase was reserved, subsequent legislation, inconsistent with the exercise of such option, operated by implication of law, as a surrender of the same.

People v. Kankakee River Imp. Co. 103 Ill. 491; *State v. Field*, 99 Mo. 352.

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with the company, both contemplated that the system therein provided for should be a permanent one, and that no further or different works should be built.

The effect of the Act of 1873, and of the contract made in pursuance thereof, was to exhaust the power of the city in respect to the construction of waterworks.

Atlantic City Waterworks Co. v. Atlantic City, 89 N. J. Eq. 367; *Newport v. Newport Light Co.* 84 Ky. 166; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 535; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563.

The course and conduct of the city, illustrated by its legislation, its pleading, and the testimony in this case, conclusively establish an election on its part to stand upon the proposition that it is released from all its obligations under the contract with the company.

Rison v. Neuberry (Va.) Feb. 1, 1894; *Provisional Municipality of Pensacola v. Lehman*, 57 Fed. Rep. 324; *Pensacola Gas Co. v. Provisional Municipality of Pensacola*, 38 Fla. 323; *Hitchcock v. Galeston*, 96 U. S. 841, 24 L. ed. 659; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Asheville Street R. Co. v. Asheville*, 109 N. C. 688.

No one, not even a city, can claim under a contract and against it at the same time, nor in the same proceeding.

2 Addison, Cont. 998, 999, 1218, 1219; Bishop, Cont. §§ 784, 785, 828, 835; Leake, Cont. 869, 871, 872; *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465; *Calhoun v. Milard*, 8 L. R. A. 248, 121 N. Y. 69; *Society for Savings v. New London*, 29 Conn. 174; *Belleue Water Co. v. Belleue* (Idaho) Dec. 28, 1893.

Cities have the right to own property outside of their limits and also in other states, to supply the needs of the public.

People v. Kelly, 76 N. Y. 475; *Re New York*, 99 N. Y. 569; *Duluth v. Duluth Gas & Water Co.* 45 Minn. 210; *Ironwood Waterworks Co. v. Trebilcock*, 99 Mich. 454; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 249; *Tarrytown v. Pocantico Water Co.* 15 N. Y. S. R. 816; *Pelham Manor v. New Rochelle Water Co.* 67 Hun, 98; *Spring Valley Water Works v. San Francisco City & County*, 6 L. R. A. 756, 82 Cal. 286.

In respect to the subject-matter of this litigation, the city exercised a mere business power, and not a legislative function. It follows that the same rules are to be applied which would govern private persons, and that there is no question in this case involving rules peculiar to municipal corporations or franchises granted by them.

San Francisco Gas Co. v. San Francisco, 9 Cal. 453; *Vincennes v. Citizens Gas Light & Coke Co.* 16 L. R. A. 485, 132 Ind. 114; *Com. v. Philadelphia*, 182 Pa. 288; *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann. 183; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 14 L. R. A. 669, 3 Wash. 316; *Wagner v. Rock Island*, 21 L. R. A. 519, 146 Ill. 139; 1 Dill. Mun. Corp. § 27; *Brumm's App.* 23 W. N. C. 137; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Tindley v. Salem*, 187 Mass. 171, 50 Am. Rep.

289; *State v. Atlantic City*, 49 N. J. L. 558; *Lake Roland Elec. R. Co. v. Baltimore*, 20 L. R. A. 126, 77 Md. 852; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *St. Tammany Water Works Co. v. New Orleans Water Works Co.* 120 U. S. 64, 30 L. ed. 563; *Columbus Water Co. v. Columbus*, 15 L. R. A. 354, 48 Kan. 99.

Such contracts are an invitation to capital to build the system, and it is the duty of courts to see that the highest good faith is exercised by the municipality.

Chenango Bridge Co. v. Binghamton Bridge Co. 70 U. S. 3 Wall. 51, 18 L. ed. 187; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* *supra*; *New Orleans Water Works Co. v. Rivers*, 175 U. S. 874, 29 L. ed. 525; *Brown v. Atchison*, 39 Kan. 54; *State v. Crete*, 32 Neb. 568.

In view of the large expenditure to be incurred and risks to be taken, the courts will always construe such contracts as an assurance that the investment will not be a losing one.

Atlantic City Water Works Co. v. Atlantic City, 39 N. J. Eq. 367; *Searey v. Yarnell*, 47 Ark. 269; *Footte & Everett, Law of Incorp. Companies*, 72, 76, 80.

Courts exercise a broad equity and great liberality to protect the investor.

Winfield v. Winfield Water Co. 51 Kan. 70.

Where a contract was made for the furnishing of material at "its market value at the time of delivery," and it appeared that the contract called for a quantity so large that the manufacturer was willing to yield a large discount, it was contended that the contract should be construed as though it read "market value for the large quantity required."

Lord Chief Justice Cockburn, speaking for the court, held that there was no authority to import words into the contract as written.

Orchard v. Simpson, 2 C. B. N. S. 299.

It has been ruled that a somewhat similar property was justly to be valued at "its real worth or intrinsic value to a purchaser able and willing to operate it, . . . according to its capacity to make net earnings and according to what it would cost to build and equip such a road, then and there, if it had never been built, and the right of way had yet to be acquired and the road built from the stump.

Grant v. East & West R. Co. of Alabama, 54 Fed. Rep. 569.

It cannot be either fair or equitable to allow less than: (a) the system would have cost the city, net, if it had built the same itself, had received the same income from its private consumers, and paid the same hydrant rentals for public service; or (b) the cost of actually reproducing the system under the conditions as they exist to-day.

Citizens Water Co. of Bridgeport v. Bridgeport Hydraulic Co. 55 Conn. 1.

The contract with the city relates to a supply of water for public purposes, but it differs in no respect from any contract the company might make with a private individual for the supply of water at a specified price.

Vincennes v. Citizens Gas Light & Coke Co. 16 L. R. A. 485, 132 Ind. 114; *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann. 188; 37 L. R. A.

Wagner v. Rock Island, 21 L. R. A. 519, 146 Ill. 139; *Drumm's App.* 23 W. N. C. 137; *State v. Atlantic City*, 49 N. J. L. 558.

The conditions upon which such corporations are compelled to supply applications are that the latter shall "comply with the reasonable regulations of such company."

Portland Natural Gas & Oil Co. v. State, 21 L. R. A. 639, 135 Ind. 54.

It is an obligation to supply those "who pay" the company's rates.

New York Cent. & H. R. R. Co's Petition v. Metropolitan Gas Light Co. 5 Hun, 201; *Com. v. Lowell Gas Light Co.* 12 Allen, 75.

Courts of equity have uniformly required the party seeking relief against a company to conform to such conditions, and the rule has been alike applied where the complainant was the United States, the state of New York, a municipality, or a private consumer.

United States v. American Water Works Co. 37 Fed. Rep. 747; *People v. Canal Board*, 55 N. Y. 390; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

The obligation to pay in such a case rests upon the established principle that those who receive a commodity under a contract impliedly agree to pay the contract price.

Wagner v. Rock Island, 21 L. R. A. 519, 146 Ill. 139; *Merrimack River Sav. Bank v. Lowell*, 10 L. R. A. 123, 152 Mass. 556; *Cincinnati v. Cameron*, 33 Ohio St. 836; *Provident Inst. for Savings v. Jersey City*, 118 U. S. 506, 28 L. ed. 1102; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587.

Even if construed as a condition precedent, the city was nevertheless bound to pay for the water actually furnished by the company.

Wiley v. Athol, 6 L. R. A. 342, 150 Mass. 426.

The city has not sustained a single dollar of damages; and even if there was evidence of damage, slight or large, to individual citizens, there was no liability therefor, either upon the city or upon the company, nor did it invest the city with a right to recoup such damages against the company's claim.

Montgomery v. Montgomery Water Works, 79 Ala. 233; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Phoenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 118; *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12; *House v. Houston Waterworks Co. (Tex.)* March 16, 1898; *Britton v. Green Bay & F. H. Water Works Co.* 81 Wis. 48; *Edon v. Fairbury Water Works Co.* 21 L. R. A. 653, 37 Neb. 546.

Messrs. Frank Hagerman, John C. Gage, L. C. Slavens, R. W. Quarles, O. H. Dean, and F. F. Rozzelle, for Kansas City.

Brewer, Circuit Justice, stated the conclusions of the court as follows:

The urgency of the situation seems to forbid that this case should be retained by us for the length of time which would be required for the preparation of an opinion thoroughly and satisfactorily discussing all the difficult questions presented by counsel. All the time at our command we have given to an examination and consideration of the

voluminous testimony, the elaborate briefs, and exhaustive arguments of counsel. We feel, therefore, that it is a duty to simply formulate briefly the conclusions to which we have arrived, and announce the decree which must be entered.

1. The Act of 1873 provided "that at the expiration of the twenty years, if the grant be not renewed, the city shall purchase." The ordinance passed in pursuance of that act, and in effect the contract under which the works were created, provided that on a failure to renew the grant at the expiration of twenty years "the city shall then be required to purchase." There has been no renewal of the grant. The twenty years have elapsed. The imperative voice of the act and the ordinance is that the city "shall purchase." This is not an incidental, directory, or subordinate provision, but one mandatory, vital, and controlling. The thought of the legislature was that the city should own its waterworks; that, if any arrangement was made with a corporation for their construction and operation, the control and right of such company should be temporary, and the city should become, willingly or unwillingly, at a certain time the owner. The time fixed was at the expiration of twenty years, with a privilege of extension for another twenty years. This vital, mandatory, and controlling provision compels a decree that the company sell and the city buy. Such was the will of the legislature; such the terms of the act and the ordinance.

2. With reference to the matter of pleading, nearly two years before the expiration of the twenty years the company filed a bill alleging performance on its part of the terms of the contract, and also threatened action on the part of the city in violation of its obligations, and praying a decree that the contract "is a valid and subsisting contract, binding and obligatory upon your orator and the defendant, and that the defendant keep and abide by the same, and that, upon your orator's duly and faithfully doing and performing all things yet remaining to be done upon its part, the defendant, its officers and agents, keep and perform the covenants, promises, and agreements on its part, so far as they are executory and unperformed, and that your orator may have such other and further relief as the case may require, and as may be conformable to equity, and to your honors may seem meet." At that time the obligation of the city to purchase had not yet arrived, but under such a bill a decree, after the lapse of twenty years, and when, there being no renewal of the term, the obligation of the city to purchase has arisen, may properly require the last act of compliance with the terms of that contract, to wit, purchase and payment by the city; so, notwithstanding the fact that the cross-bill of the city, and the amendments thereto, may not be altogether harmonious, and might, if they stood as the only affirmative pleadings, be obnoxious to the criticisms of the counsel for the company, yet there is in the original bill, with its prayer, coupled with the changes of right brought by lapse

of time, sufficient allegation and prayer upon which to rest a decree for the completion of the sale and purchase. It is true, and indeed confessed in the argument of counsel for the company, that it would now prefer not to sell, but to continue the franchise; but, nevertheless, it has for nearly three years placed itself before the court in the attitude of asking a decree for performance of this contract; and, never having dismissed its bill or withdrawn its prayer, it is now too late to say that the decree for sale and purchase is not responsive to the pleadings. If there were any formal defect,—any omission or addition of statement necessary to distinctly present the issues and uphold the decree,—an amendment would be permissible at the present time, and in the appellate court. Pleadings in equity cases may be conformed to the proofs; and we have the parties before us, the entire facts of the controversy, and the arrival of the time when a final determination of the rights between them is necessary. No technical defect in the pleadings should stay the hands of a court of equity.

3. We dissent *in toto* from the claim of the city that at the lapse of the twenty years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. Much was said in argument of the relative rights of lessor and lessee to buildings erected during the term of the lease. The city and the company were called licensor and licensee, and it was insisted that, as the right to operate was to cease at the expiration of twenty years, the relation was equivalent to that of lessor and lessee; that full title and right of possession passed instantly to the city, leaving all questions of amount and time and manner of payment to be subsequently determined. Much was said, too, about the rule of construction of public grants; that rule being that the grants are to be construed favorably to the public, and unfavorably to the grantee. It is unnecessary to attempt to define the peculiar quality of the title held by the company, nor do we question the rule of construction of public grants; but all contracts involving property rights and obligations between municipalities and individuals must be presumed to be based upon and to recognize the ordinary laws of business transactions, and, if any departure therefrom is contemplated, such departure must be clearly manifested. Now, the familiar and ordinary law of business transactions is that he who parts with title receives, at the time, payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance.

While it is true that the act provides that no grant so made shall confer the right to operate the waterworks for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of the twenty years the city shall purchase and pay therefor. If the city fails to purchase and pay, it acquires no title, no right of possession, to the property of the waterworks. There is no language which would justify the court in saying that it is clearly expressed that the purpose of this contract and the thought of the legislature were to vest the title and right of possession in the city at the end of twenty years, leaving to future litigation the fixing of the amount and the enforcing of the fact of payment. If at the expiration of the twenty years the city had tendered to the company, in payment for the property, an amount admitted or found to be "the fair and equitable value," doubtless the right of the city to the possession and future earnings would have immediately accrued, and the present decree would have been based upon such transfer of right, but no such tender was made. In so far, therefore, as the decree of the circuit court attempted to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous.

4. It is objected that the city, by virtue of the certain amendments to its charter and certain acts of the legislature, has become disabled from taking the title to all the property which makes up the waterworks system. This is a matter in respect to which the company need not concern itself. If it is paid the fair and equitable value of the property, as provided by the contract, then its rights have ceased, and the city can settle with other parties the matters of title and possession.

5. The difficult question, however, still remains; and that is, What is "the fair and equitable value" which, by the statute and the ordinance, the city is to pay for the waterworks? This amount was found by the circuit court to be \$2,714,000. The company insists that the test is to take the income or earnings, and capitalize them. The earnings pay 6 per cent on four millions and a half. In other words, the company has produced a property which earns 6 per cent on four millions and a half; and that, it is claimed, is the fair valuation of the property, 6 per cent being ordinary interest. On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a waterworks system, as a complete structure, irrespective of any franchise, —irrespective of anything which the property earns, or may earn in the future. We are not satisfied—that either method, by itself, will show that which, under all the circumstances, can be adjudged "the fair and equitable value." Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost

of the construction cannot control, for "original cost" and "present value" are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that "the fair and equitable value" is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant,—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn. Our effort has been to deduce from the volume of testimony that which, in this view of the situation, can be safely adjudged "the fair and equitable value." The original cost of the works is not accurately and satisfactorily shown. If it would have assisted us in reaching a conclusion,—if, in consequence of our ignorance thereof, we have not placed the value upon this property which it deserves,—the company is alone to blame, for by the production of its books it could have clearly shown the actual cost of every part and of the whole of

this property. There is a large amount of testimony as to the probable cost of reproducing the system, to which strenuous objection is made on the ground of an alleged temporary and extreme depression in the cost of labor and material. We have before us the estimate placed by two gentlemen of experience and capacity, appointed as commissioners, with direction to report "the fair and equitable value;" but neither by the order of the court appointing them, nor by their report, are we advised as to what they considered a criterion of the present "fair and equitable value." If they added anything beyond what in their judgment was the reasonable cost of reproduction, we are not advised as to how much they added, or what they took into consideration in making such addition. We have the fact of liens placed upon the property to the extent of \$8,000,000, with the qualified approval of the city officials. We have also the statement of the earnings, and the estimate of the value upon the basis of a capitalization of those earnings, amounting, as stated, at six per cent, to four and one-half millions. Rejecting the latter as too high, and the cost of reproduction as too low, and taking into consideration the entire history of the transaction between the company and the city, from its commencement to the present time, we have sought to place a value upon the property as it stands, with all the connections already made between the pipes and the private and public buildings, and with the work which it is in fact doing of supplying all these buildings with water, and receiving pay therefor. That valuation, after much discussion, comparison of figures, and readjustments, we have all agreed, is three millions of dollars; and in reaching this result we have excluded from our estimate the value of the Jarboe street reservoir property, which as we understand the testimony, has heretofore been paid for by the city.

6. In its cross-bill the city has made claim for damages, and insisted that the waterworks system does not come up, in efficiency and completeness, to the requirements of the contract. We agree with the circuit court, after reviewing carefully the testimony, that the city is not entitled to maintain this claim. It has for many years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition.

This is perhaps all that it is necessary for us to say. We have stated our conclusions, and outlined our reasons therefor. Further than that we are unable to go, without, as stated in the opening, taking more time than the circumstances will permit. In order to close as far as possible all disputed matters, we have prepared the form of a decree which is to be entered by the circuit court.

This case is accordingly remanded to the circuit court, with directions to vacate its former decree, and in lieu thereof to enter the following decree, to wit:

First. It is ordered, adjudged, decreed, and determined that under the Act of the legislature of the state of Missouri of March 27 L. R. A.

24, 1878, and the contract evidenced by Ordinance No. 10,524, between the National Waterworks Company, of New York, and the city of Kansas City, Missouri, which act and ordinance are referred to in the pleadings in this case, the said city is now legally bound to purchase from said company, and said company is legally bound to sell to the said city, the full, complete, and entire waterworks plant and appurtenances by which the said city and its inhabitants are now supplied with water, including therein that portion of said plant situated in the state of Kansas, and commonly known as the "Quindaro Supply Works," and the flow pipes leading therefrom as well as that portion of said works which is situated in the state of Missouri, together with all lots of land, buildings, and reservoirs belonging to, or in any wise used as a part of, said plant, with the exception mentioned in the eleventh paragraph of this decree, and everything of every nature pertaining to said waterworks plant.

Second. That said city, under the said contract, is bound to pay for said complete waterworks plant aforesaid, and the said company is bound to receive in full payment therefor, "the fair and equitable value of the whole works," as provided in said contract evidenced by Ordinance No. 10,524.

Third. The court finds, adjudges, and decrees, that the fair and equitable value of said complete and whole waterworks plant, excluding the Jarboe street tract, which belongs to the city, is three million dollars, and that said city is legally obligated to pay that sum therefor.

Fourth. That said company is entitled to retain the possession, use, and control of the whole and complete waterworks system and plant aforesaid until final payment therefor shall be made by said city as hereinafter provided; and said city is hereby enjoined from interfering with such possession, use, or control until such payment is made, and said company, on its part, is hereby enjoined from refusing or neglecting to supply water to the city, and from refusing or neglecting to provide private consumers with water, as heretofore during such period.

Fifth. It is further ordered and decreed that on or before the 1st day of December, A. D. 1894, the said company shall cause to be executed, and shall deliver to the clerk of this court, who shall hold the same in escrow, good and sufficient deeds, assignments, releases, bills of sale, and other conveyances whereby the whole and complete waterworks system and plant aforesaid, including that portion thereof which is situated in the state of Kansas, may be transferred to said city free and clear of all burdens, obligations, liens, and incumbrances of every kind, save the lien created by the two mortgages executed by the waterworks company, respectively, on August 1, 1883, and June 1, 1885, each of which mortgages secures bonds of said company, said to be now outstanding in the sum of one million five hundred thousand dollars; that said deeds, releases, assignments, bills of sale, or other conveyances shall be retained by said clerk, but

said clerk shall furnish full and complete copies of all such instruments to the city or its attorneys of record, for their inspection.

Sixth. It is further ordered and adjudged that after the execution and delivery to the clerk of the deeds, assignments, releases, and bills of sale aforesaid, the said city shall be entitled to thirty days in which to except to the sufficiency of such conveyances; and power is hereby reserved to hear and determine such exceptions, and to make all needful orders in relation thereto. When such deeds, assignments, releases, and bills of sale shall have been executed and filed as aforesaid, and after the approval thereof by the court, if the same shall be excepted to by the city shall thereupon pay to the clerk of this court the said sum of three million dollars, being the fair and equitable value of said waterworks plant as heretofore assessed, or it shall cause the same to be so paid. Said payment shall be made to said clerk for the benefit of whom it may concern, and power is hereby reserved to the court to determine who are entitled to said fund after the same shall have been so paid into the court; and power is also reserved to permit any person or persons or corporation who may hereafter claim to have a legal or equitable lien upon said fund to intervene for the protection of his or their interest.

Seventh. It is further ordered and adjudged that upon payment being made by said city as aforesaid of said sum of three million dollars, and of the hydrant rentals mentioned in paragraph nine, said clerk shall deliver to said city or its authorized representatives all deeds, assignments, releases, bills of sale, and other muniments of title then held by him in escrow; and thereupon said city shall become vested with the title to said waterworks, and it shall forthwith be entitled to the exclusive possession, control, use, and enjoyment of said entire waterworks system and plant, and to all revenues, of whatsoever nature, thereafter resulting therefrom; and said waterworks company shall forthwith surrender the possession and control thereof to said city, and the interest of said company therein shall thenceforth cease and determine.

Eighth. It is further ordered, adjudged, and decreed that said city shall have the right to enter into any agreement which it may deem proper for the assumption, continuation of the lien, payment, or cancellation of any of the outstanding mortgage bonds, aggregating three million dollars, which are referred to in paragraph five of this decree, and that any arrangement which said city may so enter into with the owners and holders of said bonds, which shall result in the cancellation or payment of any thereof or in the continuation of the lien, or in the assumption of any thereof by the city, and in the release of the waterworks company from its obligations thereon, shall operate *pro tanto* to discharge said city from its obligation to pay the three million dollars as provided in the sixth paragraph of this decree; and, for the purpose of enabling said city to avail

itself of the provisions of this paragraph of the decree, power is hereby reserved to the court to ascertain hereafter to what extent, if any, said bonds have been canceled, paid, continued, assumed, or otherwise discharged by agreement between said bondholders and the city, and to make all needful orders in that behalf.

Ninth. It is further ordered, adjudged, and decreed that in addition to the value of said waterworks plant, fixed and to be paid as aforesaid, the said city shall also pay all unpaid hydrant rentals which accrued prior to November 15, 1893, and all subsequently accruing hydrant rentals according to the rate heretofore fixed by agreement between said city and company until such time as the said city shall become entitled to the possession and use of said waterworks by virtue of compliance on its part with the previous provisions of this decree. Until the last-mentioned date, said waterworks company shall be entitled to all the earnings and revenues of said plant, whether derived from individual or public consumers; but said company on its part shall be compelled, during said period, to keep said waterworks plant in good repair, and shall also pay, as and when the same shall mature, the several interest installments that may accrue on the mortgage bonds mentioned in paragraph five of this decree. Said payment of hydrant rentals, as well as the assessed value of the works, shall be made before said city shall assume possession and control of said waterworks; and power is hereby reserved to the court to hereafter state an account, if necessary, for the sum due for hydrant rentals, and to make all needful orders necessary and proper to enforce this paragraph of the decree.

Tenth. It is further ordered, adjudged, and decreed that the city is not entitled to recover from said company any sum for or on account of any of the several claims for damages set up in its cross-bill, and as to said claims for damages said cross-bill is hereby dismissed.

Eleventh. That, conformably to the consent expressed by counsel for both parties at the hearing, the property described in the pleadings at "Kaw Point Pumping Station," and the six or ten acres of land, more or less, connected therewith, now owned by said company, shall remain its property, and shall not be conveyed to said city as part of said waterworks plant. The value of said Kaw Point pumping station has been deducted from the price to be paid for the complete works.

Twelfth. It is further adjudged that each party shall pay one half of the costs that have accrued in these suits up to the entry of this decree.

Thirteenth. That the court doth now reserve to itself the power to make any further order or orders that may hereafter be found necessary to carry this decree into full effect, and as may be deemed equitable and just.

INDIANA SUPREME COURT.

PITTSBURGH, CINCINNATI, CHICAGO
& ST. LOUIS R. CO., *Appl.*,

v.

William SULLIVAN.

(.....Ind.....)

1. **Willful and unauthorized acts by an agent** of a corporation will render the employer liable when performed while he is engaged in the discharge of duties within the general scope of his agency.
2. **A corporation which voluntarily provides a physician** for injured or sick employes whose services they are free to reject or accept, is liable only, if at all, for negligence in the selection of the physician and not for his negligent or tortious acts in the treatment of those who accept his services.

(April 9, 1886.)

A PPEAL by defendant from a judgment of the Circuit Court for Cass County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Reversed.*

The facts are stated in the opinion.

Messrs. N. O. Ross, G. W. Funk, and B. C. Moon, for appellant:

There is no charge that appellant failed to use ordinary care in the selection of its surgeon, nor that he was not a competent surgeon. For the want of such averment the complaint is bad.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228; *South Florida R. Co. v. Price*, 32 Fla. 46; *Union Pac. R. Co. v. Artist*, 28 L. R. A. 531, 60 Fed. Rep. 365; *Fire Ins. Patrol of Philadelphia v. Boyd*, 1 L. R. A. 417, 120 Pa. 642; *O'Brien v. Cunard S. S. Co.* 13 L. R. A. 329, 154 Mass. 272; *Elghmy v. Union Pac. R. Co.* (Iowa) *ante*, 296; *Haas v. Missionary Soc. of Most Holy Redeemer*, 6 Misc. 281.

A charitable corporation, organized for the purpose of giving gratuitous surgical treatment to indigent persons, is not liable for injuries resulting from performing an operation on a patient, where the corporation has exercised due care in the selection of its skilled employes and surgeons.

Van Tassel v. Manhattan Eye & Ear Hospital, 39 N. Y. S. R. 781; *McDonald v. Massachusetts Gen. Hospital*, *supra*.

Many of these companies employ physicians and surgeons and erect hospitals for the treatment of their sick and injured employes, and their sick families, free of charge. When they thus engage in acts of charity, they are entitled, as to such charitable acts, to the rights of exclusively charitable corporations.

NOTE.—See similar cases in note to *Williamson v. Louisville Industrial School of Reform* (Ky.) 23 L. R. A. 300, also later cases, *Union Pac. R. Co. v. Artist* (C. C. App. 8th C.) 23 L. R. A. 531; *Elghmy v. Union Pac. R. Co.* (Iowa) *ante*, 296, 27 L. R. A.

Richardson v. Carbon Hill Coal Co. 20 L. R. A. 338, 6 Wash. 52; 1 Shearm. & Redf. Neg. 381; 9 Am. & Eng. Encyclop. Law, p. 772; *Union Pac. R. Co. v. Artist and Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, *supra*.

Where the law requires the performance by a corporation of a charitable act, it imposes upon such corporation no greater liability for damages resulting from the manner of its performance by the servants employed by it therefor than such corporation would assume by voluntarily performing such charity.

O'Brien v. Cunard S. S. Co. *supra*; *Allan v. State S. S. Co.* 15 L. R. A. 166, 132 N. Y. 91.

Mr. Dudley H. Chase, for appellee:

The principal is liable for the tortious acts of his agent committed against third persons whilst acting as such agent and within the scope of his agency.

Oakland City Agricultural & Industrial Soc. v. Bingham, 4 Ind. App. 545; *Du Bois v. Decker*, 14 L. R. A. 429, 180 N. Y. 325; *Rucker v. Smoke*, 37 S. C. 377; 1 Am. & Eng. Encyclop. Law, p. 410.

Did not the appellant, by employing Dr. Fertich, as stated in the complaint, "hold him out as competent and fit to be trusted, and thereby in effect warrant his fidelity and good conduct in all matters within the scope of his agency?"

Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

The question of authority to do or not to do the particular act complained of is not the criterion by which the liability of the principal is to be determined.

Mechem, Ag. § 732, p. 563; *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 108; *Bank of California v. Western U. Teleg. Co.* 5 Cent. L. J. 265; *Dickson v. Waldron*, 185 Ind. 507; *Story*, Ag. § 452.

It is enough that confidence is tendered and accepted—that is a sufficient consideration; and the fact that the service is rendered gratuitously is immaterial. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.

Glavin v. Rhode Island Hospital, 13 R. I. 411, 84 Am. Rep. 675; *Coggs v. Barnard*, 1 Smith, Lead. Cas. 218; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *Whart. Neg.* §§ 640, 641.

The tendency of all modern legislation is to enlarge the responsibility of the master in favor of the servant, instead of abridging it.

Pennsylvania Co. v. Weddle, 100 Ind. 138.

The relation of principal and agent existed between appellant and Dr. G. W. Fertich, under the facts stated in the appellee's complaint and as found by the special verdict.

Story, Ag. § 8; *Bishop*, Contr. § 1027.

The act of Dr. Fertich in cutting off appellee's arm was a crime against the laws of Indiana and amounted in law to an assault and battery, or a mayhem.

Ind. Rev. Stat. 1881, §§ 1911, 1913; *Cooley*, Torts, *164; *Buswell*, Personal Injuries, p. 198, and cases cited; *Com. v. Stratton*, 114 Mass.

803, 19 Am. Rep. 350; *Com. v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264.

For such act by Dr. Fertich the appellant is liable in damages to appellee.

Rucker v. Smoke, 87 S. C. 377; *Evansville & T. H. R. Co. v. McKee*, 99 Ind 519, 50 Am. Rep. 102; *Dickson v. Waldron*, 135 Ind. 507.

Although the appellee was not expecting, to pay anything for Dr. Fertich's services, and such services were tendered to appellee gratuitously by appellant, yet the appellant is liable for the crime of its agent in damages to appellee.

Whart. Neg. §§ 640, 641; *Du Bois v. Decker*, 14 L. R. A. 429, 130 N. Y. 325; *Story, Ag.* § 452; *Reynolds v. Witte*, 18 S. C. 5, 36 Am. Rep. 686; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 84 Am. Rep. 675.

Jordan, J., delivered the opinion of the court:

The appellee brought this action to recover damages against the appellant (a railroad corporation, engaged in the business of a common carrier) for "unlawfully, wrongfully, and unnecessarily amputating appellee's right arm." The principal errors assigned in this court are: First, overruling demurrer to complaint; second, sustaining demurrer to second paragraph of answer; third, overruling a motion for judgment in favor of appellant upon the special verdict of the jury.

The complaint, *inter alia*, alleges "that on November 21, 1891, the appellee was a servant of appellant, engaged as a brakeman, that while at the station of Red Key, in Jay county, Indiana, in making a coupling, his right arm was accidentally caught, crushed, and injured; that immediately after plaintiff's said injuries, he was taken by the servants of said defendant to the office of one Dr. G. W. Fertich, being then and there one of a number of physicians employed by the defendant to render medical and surgical assistance to the servants and employes of said defendant, while engaged in their respective duties as such employes and servants; that, immediately after plaintiff's arrival at said Dr. G. W. Fertich's office for medical and surgical treatment, said G. W. Fertich proposed to give the plaintiff chloroform, in order to render plaintiff insensible to and unconscious of pain while his said hurts and injuries were being examined and treated; that, before plaintiff consented to take said chloroform, he informed said Dr. G. W. Fertich that he would not take chloroform unless he (said Dr. G. W. Fertich) would promise plaintiff that his arm should not be amputated while he was under the influence of chloroform, and insensible and unconscious therefrom; that thereupon said Dr. G. W. Fertich promised plaintiff that he would not amputate and cut off plaintiff's injured arm, and plaintiff, relying on such promise, consented to and did then and there take chloroform, and became then and there unconscious and helpless from the effects thereof, said chloroform being then and there administered to plaintiff by the order and direction of said Dr. G. W. Fertich, by his assistant, one Dr. Shepherd; that, while plaintiff was

then and there insensible, unconscious, and helpless from the effects of said chloroform, the said Dr. G. W. Fertich did then and there wrongfully, unlawfully, and unnecessarily cut off the plaintiff's right arm about six inches above the elbow; that by reason of the unlawful, unnecessary, and wrongful act of said Dr. G. W. Fertich in amputating and cutting off plaintiff's right arm, as aforesaid, plaintiff suffered great bodily and mental anguish and pain, and is now suffering great pain of body and mind; that plaintiff has thereby been rendered totally incapacitated from doing manual labor, and permanently injured physically in his means of livelihood and support; and that, at the time of his injuries complained of, there was no good or sufficient reason or cause, in fact or in the science of medicine and surgery, for the amputation of plaintiff's said arm; that plaintiff's said arm could and would have been saved to him by competent and ordinarily skillful medical and surgical treatment." To this complaint, after having unsuccessfully assailed it by a demurrer, appellant filed an answer in two paragraphs. The first was a denial, and the second was as follows: "And, for a second and further answer, the defendant says that, at the time complained of, it owed the plaintiff no duty, nor was it under any legal obligations, to furnish him the services of a physician or surgeon to treat him for the injury stated in his complaint; that, at the time complained of, G. W. Fertich, of Dunkirk, in Jay county, Indiana, was employed by the year to give and render services as a physician and surgeon to persons injured upon the defendant's road, whether employes or others, which services were gratuitous to the persons receiving them, and were provided for the exigencies of each case, temporarily, until the patient could be removed or otherwise provided for; and that such services could be accepted or refused by each person at his own pleasure. And the defendant further says that, in the selection and employment of said Fertich for the purpose aforesaid, it used due care to procure a skillful and competent surgeon and physician, and believes him to be such, and, if incompetent or incapable in any respect, it had no knowledge of the fact at the time of his employment or since; and that he was the most competent and skillful surgeon and physician in that locality. And the defendant further says that if said Fertich made any promise or agreement with the plaintiff, as charged in the complaint, it was outside his duties under said employment, and not authorized by the defendant." A demurrer was sustained to this second paragraph of answer, and appellant excepted.

The contentions of the learned counsel for the appellant are: First, that the complaint is not sufficient to entitle appellee to recover against appellant; second, that the second paragraph of answer was a defense to the complaint; third, that the gravamen of the complaint is that of malpractice upon the part of Fertich, the physician, and for such appellant is not liable in damages; fourth, that the complaint does not allege that Fertich was an agent of plaintiff, nor do the

averred facts sustain such an assumption, neither do they show that a duty, by virtue of any law or contract, existed upon the part of appellant to furnish to appellee the services of the surgeon in question, nor do they establish that appellant failed to exercise ordinary care in the selection of said physician. The contentions of the learned counsel for appellee are: First, that the relation of principal and agent existed between appellant and Fertich, under the facts stated in the appellee's complaint; second, that the act of Fertich in cutting off appellee's arm was within the scope of his authority as agent of appellant, under the facts alleged in the appellee's complaint; third, that the act of Dr. Fertich in cutting off appellee's arm, as alleged in appellee's complaint, was a crime against the laws of Indiana, and amounted, in law, to an assault and battery, or mayhem; fourth, that for such act by Fertich the appellant is liable in damages to appellee.

The first and essential point to be determined is as to the sufficiency of the complaint to constitute a cause of action against appellant. It is well settled by numerous decisions of this court and others that a corporation is responsible for the acts of an agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was willful, and was not directly authorized. A corporation that intrusts a general duty to an agent is responsible to an injured person for damages flowing from the agent's wrongful act done in the course of his general authority, although in doing the particular act the agent may have failed in his duty to his principal, and disobeyed its instructions. The doctrine formerly enunciated and adhered to by the courts was that the master could not be held liable for the willful wrongs of his servant, but that rule has been quite generally abrogated by the modern decisions. *Pennsylvania Co. v. Weddle*, 100 Ind. 188, and cases cited; *Oakland City Agricultural & Industrial Soc. v. Bingham*, 4 Ind. App. 545, and authorities there cited.

But a different question is raised, under the facts set up in the complaint and the second paragraph of the answer, in the case at bar, and the rule supported and adhered to by the decisions above cited is not decisive of the point involved in this cause. The complaint must be construed upon the theory which is most apparent and clearly outlined by the facts stated therein. *Jones v. Cullen* (at this term) (Ind.) 40 N. E. Rep. 124, and cases cited. Considering the complaint with reference to all of its alleged facts, it is apparent that it proceeds upon the theory that Dr. Fertich was a physician, employed or retained by appellant to render gratuitously medical or surgical services to its servants or employes, and that the appellee, who had been accidentally injured while in the employ of appellant, was, with his own consent, and by the aid of his fellow servants, conducted to the office of Fertich, and that while there the doctor placed him under the influence of chloroform, from the effects of which he was rendered unconscious, and while in that condition, and in violation of

the doctor's promise that he would not amputate his arm, he (Fertich) did "wrongfully, unlawfully, and unnecessarily cut off appellee's right arm." Counsel for appellee, in his well-prepared brief, makes the claim that, under the facts alleged, this physician was the agent of appellant, and that the alleged tortious and unlawful act perpetrated by Fertich was within the scope of his authority as such agent, and is the gravamen of the action. There is an entire absence in the complaint of any facts to establish that Dr. Fertich was employed by appellant to discharge any legal or contractual duties which it, as a corporation and common carrier, owed to appellee, as its servant. Neither do the facts show expressly or inferentially that in amputating appellee's arm the surgeon was in the exercise or discharge of any duty which appellant, as a master, owed to appellee, as its servant. The appellant was engaged in the business of a common carrier, and the presumption must, at least, be that it was engaged in that business alone, and such other as was necessarily incident thereto or connected therewith. The acts complained of are in no manner governed by the law which applies to the omission of the master to provide his employes with safe machinery and appliances. This is a duty enjoined by law, and one which he cannot delegate so as to exempt himself from liability by casting it upon an agent, officer, or servant employed by him. The question of appellant's liability, presented by the facts, does not come within the scope of, nor is it controlled by, the general principle just stated; hence, if there is any liability, it must result from the application of a rule more limited in its character, and one under which the principle of *respondet superior* in a more narrow sense can be applied. There was no general legal obligation resting upon appellant to provide surgical aid for its injured servants. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752.

Appellant having assumed the duty to provide a physician, and tender to its injured or sick employes his services, which they were free to reject or accept,—a duty which was voluntarily assumed, and one which was not due from appellant to its employes,—its liability cannot be extended beyond its negligence, if any, in the selection of the physician or surgeon. In other words, the appellant would be liable only, if at all, for its negligence in the employment, in the first instance, of an incompetent person, and not for his negligence or tortious acts in the treatment of its servants who had accepted his professional services. When this duty is voluntarily assumed by a corporation such as appellant is shown to be, it is only bound to exercise reasonable care and diligence, and is not required to select a physician of the highest skill and longest experience in the practice of medicine. If it exercised this required care and diligence, its duty terminated, and it was not liable for the subsequent malpractice or wrongs of the physician, committed in or about the treatment of its servant. This principle of law is firmly settled

and sustained by a long line of decisions of the higher courts of other states, of well-recognized authority, and also by the adjudications of our federal courts. This, we think, is the correct rule, and the one to which we yield our approval and adherence. It is not shown in any way that appellee was under any obligations to accept the services of Dr. Fertich. He was, so far as it appears, wholly free and at liberty, from a legal standpoint, to reject the same, and call to his aid a physician of his own choice and selection; but this right he did not exercise, but, as it appears, willingly accepted the services of the physician in question. Hence, in accordance with the rule stated, if it is not shown that appellant was guilty of negligence in the employment of its surgeon, and that he was incompetent, appellee, under the law, will not be permitted to call upon appellant to respond in damages for the negligence or wrongs of which he complains. There are no allegations of facts in the complaint to show that the appellant violated this rule, which enjoined upon it the duty to exercise ordinary diligence in the selection or employment of the physician in controversy. Therefore it follows, when tested by the principle of law above mentioned, the complaint in the case at bar must be held insufficient to constitute a cause of action. The following cases fully support and sustain the conclusion we have reached. *Laudheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228, and cases cited; *Eighty v. Union Pac. R. Co.* (Iowa) ante, 296; *McDonald v. Massachusetts Gen. Hos-*

pital, 120 Mass. 432, 21 Am. Rep. 529; *Second v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. Rep. 221; *Union Pac. R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. Rep. 885, 23 L. R. A. 581; *Fire Ins. Patrol of Philadelphia v. Boyd*, 120 Pa. 642, 1 L. R. A. 417; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329; *Haas v. Missionary Soc. of Most Holy Redeemer*, 6 Misc. 281; *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620, and cases cited in note; *Allan v. State S. S. Co.* 132 N. Y. 91, 15 L. R. A. 166; *South Florida R. Co. v. Price*, 32 Fla. 46.

We have examined the authorities cited by appellee, but, under the facts in this case, they do not sustain his contention. The case of *Terre Haute & I. R. Co. v. McMurray*, supra, where it is held that, under a certain emergency or necessity, a railroad company may be held liable for the services of a physician employed by its agent to attend one of its wounded servants, lends no support to the theory of appellee's action. It follows that the court erred in overruling the demurrer to the complaint; and, as the special verdict of the jury substantially finds and states the same facts as are alleged in the complaint, the law is with the appellant, and the court erred in not sustaining appellant's motion for judgment in its favor, upon the special verdict.

The judgment in favor of appellee is reversed, with costs, and the trial court is directed to sustain appellant's motion for judgment in its favor upon the finding of the jury.

NORTH CAROLINA SUPREME COURT.

R. E. LEAVELL

v.

WESTERN UNION TELEGRAPH CO.,
App't.

(.....N. C.)

A telegraph company which has a continuous line between points in the same state over which it might transmit a message received for that purpose, but which passes through another state on the route, cannot claim that the message is interstate commerce and therefore exempt from state authority limiting the charge for transmission, although the company does not in fact transmit the message the whole distance but delivers it at an intermediate point in another state to another company because its own line for the remainder of the distance was fully occupied by other business.

(April 2, 1895.)

APPEAL by defendant from a ruling of the board of railroad commissioners subjecting it to the penalty for violating the prescribed rates for transmission of telegraph messages. *Affirmed.*

NOTE.—For similar question as to shipment on railroads, see *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 17 L. R. A. 443, and note. 37 L. R. A.

The facts are stated in the opinion.

Mr. Robert Stiles for appellant.

Mr. Frank L. Osborne, Atty-Gen. for appellee.

Clark, J., delivered the opinion of the court: In *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 18 L. R. A. 393, 4 Inters. Com. Rep. 294, this court affirmed the constitutionality of the act (chapter 320, Acts 1891) establishing the railroad and telegraph commission. In *Mayo v. Western U. Teleg. Co.*, 112 N. C. 843, it sustained the power of such commission, under section 26 of said Act, to establish rates for telegraph companies. In *State v. Western U. Teleg. Co. (Albee's Case)* 118 N. C. 213, 22 L. R. A. 570, the court held that telegraphic messages transmitted by a company from and to points in this state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by Fuller, *Ch. J.*, in *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87. To the same purport, *Campbell v. Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L. R. A. 443. In the present case the commission find as a fact that "the defendant has a continuous line by

which messages may be transmitted from Wilson to Edenton and other adjacent points in North Carolina, but this line traverses a part of the state of Virginia, passing through the city of Norfolk;" and it properly holds, upon the evidence, "that the telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that, as the defendant could have sent the message the whole distance over its own line, it cannot be heard to say that it did not do what it ought to have done, and thus collect fifty cents for the message, instead of twenty-five, as allowed by the commission tariff. The defense set up, that in fact it only carried the message to Norfolk, and then paid another company to forward it to Edenton, cannot be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton, and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employé. It is not a mere private business, but a public duty, which the defendants, by their franchise, are authorized to discharge. It is further to be noticed that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville, and Hertford, on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer, and against the public at large, as was intimated in *State v. Western U. Teleg. Co. (Albea's Case)*, 118 N. C. 226, 23 L. R. A. 570. The findings of fact and evidence are fuller, and present a somewhat different and stronger case against the defendant, than in *State v. Western U. Teleg. Co. (Albea's Case)*. By section 11 of the defendant's contract with the railroad company, the defendant remains owner of the telegraph line to Edenton, N. C., and its belongings, which are to remain "part

of its general telegraph system," and "to be controlled and regulated by the telegraph company." Section 8 of the contract gives the railroad messages precedence over commercial business, but stipulates that, when railroad business shall require the exclusive use of one wire, the telegraph company shall, on sixty days' notice, furnish material for a second wire, which second wire shall be used for railroad business exclusively, and such commercial business as can be done without interfering with railroad business. Section 6 provided that, where the railroad company shall open offices, the operators, "acting as agents of the telegraph company," shall receive such commercial and public telegrams as may be offered, collecting rates prescribed by the telegraph company, and render monthly statements, and pay over the receipts to the telegraph company. Section 7 provides that, whenever the volume of business at any point justifies it, the telegraph company shall put in an additional operator. It will be thus seen that the line to Edenton is an integral part of the defendant's general telegraph system. It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot subtract itself from obedience to the rates prescribed by the authority of the state, acting through the commission, by a contract giving one customer—the railroad—preference in business, and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common knowledge does not exceed \$10 per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the commission was established to prevent. In *State v. Western U. Teleg. Co. (Albea's Case)*, *supra*, no commercial message was tendered, and the point now decided was not presented by the record.

The ruling of the commission is in all respects affirmed.

GEORGIA SUPREME COURT.

SOUTHERN HOME BUILDING & LOAN
ASSOCIATION, *Plff. in Err.*,

v.

HOME INSURANCE CO. of New Orleans.

(.....Ga.....)

"The so-called 'New York Standard Mortgagee Clause' in a policy of fire in-

Headnote by SIMMONS, J.

NOTE.—As to the rights given by the attachment of the mortgagee clause to an insurance policy, see note to *Phoenix Ins. Co. of Brooklyn v. Omaha Loan & T. Co. (Neb.)* 25 L. R. A. 679.
27 L. R. A.

surance, which declares, in substance, that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with making the proof of loss stipulated for in the policy, and within the time stipulated. If the mortgagee would not have the right in all cases to furnish the proof, he certainly would have in a case in which the mortgagor refused, but in every case, unless waived by the underwriter, it must be furnished by one or the other.

(July 16, 1894.)

ERROR to the City Court of Savannah to review a judgment in favor of defendant

in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. B. Whitley and Robert L. Sibley for plaintiff in error.

Messrs. Denmark & Adams, for defendant in error:

The contract required that the insured, "within sixty days after the fire shall render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured, and of all others in the property."

Regulations like these are valid and binding.

See Ga. Code, § 2818; *Underwriters' Agency v. Sutherland*, 55 Ga. 266; 2 Wood, Fire Ins. §§ 488 et seq. *981 et seq.; 2 May, Ins. § 589; *Perry v. Phoenix Assur. Co.* 8 Fed. Rep. 645; *Richards, Ins.* § 160, *178, 179.

This New York mortgagee clause does not make unnecessary the furnishing of these proofs of loss.

Richards, Ins. § 158, p. 176; *Johnson v. Phoenix Ins. Co.* 113 Mass. 49, 17 Am. Rep. 65.

Simmons, J., delivered the opinion of the court:

The Southern Home Building & Loan Association sued the Home Insurance Company upon a policy of insurance issued by the defendant insuring Rosa Tutty upon certain property for one year from December 17, 1892, to an amount not exceeding \$1,000, "loss, if any, payable to the Southern Home Building and Loan Association, as their interest may appear." Attached to the policy was what is called the "New York Standard Mortgagee Clause," in which it was stated that loss under the policy should be payable to the Southern Home Building & Loan Association, as mortgagee, as its interest might appear, and that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor or owner of the property. The declaration alleged that while this policy was in force, on June 4, 1893, a fire occurred in the premises covered by the policy, by which the property insured was entirely destroyed; that immediately after the fire occurred notice was given the insurance company of the loss, and afterwards during August, the usual "proof of loss" was made out by Prioleau, adjuster of the defendant, showing the premises insured under the policy to be of the value of \$1,948.80, but, failing to obtain the signature of the assured, Rosa Tutty, to the proof of loss, the defendant refused in consequence to pay over the loss to petitioner; that petitioner demanded payment of the loss as required by the policy, but the defendant refused to pay, etc. The defendant demurred to the declaration on the ground that it did not set forth any cause of action against defendant. In the argument upon the demurrer the defendant urged that the demurrer should be sustained, because the declaration did not aver that any proof of loss had been submitted to defendant, as required by the contract or policy of insurance, or that any effort had been made by plaintiff to make such proof, or comply in any way with this

requirement of the policy. The demurrer was sustained, and the plaintiff excepted. The policy, a copy of which was attached to the declaration, contained a stipulation that if fire occurred the insured should give immediate notice of any loss thereby in writing to the insurance company, and should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, etc. Under this stipulation, it was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company, and within the time stipulated. If the mortgagee failed or refused to comply with the condition, it was incumbent upon the mortgagee to comply with it. If the mortgagee would not have the right in all cases to furnish the proof, he would certainly have that right in a case in which the mortgagor refused to do so. In every case, unless waived by the insurance company, it must be furnished by one or the other. See *Richards, Ins.* § 158, and cases cited. It was contended that, so far as the mortgagee was concerned, this requirement was dispensed with by the stipulation in the "mortgagee clause" that the insurance, as to the interest of the mortgagee, should not be invalidated by any act or neglect of the mortgagor or owner of the property. We do not think so. We think this refers to acts or neglect in connection with the property while the risk is subsisting, and which, under the terms of the policy, would invalidate the insurance, such as conduct increasing the hazard, and not the omission, after a fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss. It is apparent from a reading of this clause, which, in addition to the stipulation referred to, contains others enumerating various acts which shall not invalidate the insurance as to the mortgagee, that the object of the clause was to afford protection to mortgagees against conduct beyond their control on the part of the mortgagor or others which, under the terms of the policy, would invalidate the insurance. We see no reason for holding that it was intended also to relieve a mortgagee, where loss occurred, from proving the loss as a condition precedent to collecting his claim against the insurance company,—a condition which, as we have shown, the policy required the mortgagee himself to comply with, unless the mortgagor should do so. The declaration failing to show that the insured or the mortgagee complied or attempted to comply with this condition, or that there was any waiver thereof on the part of the insurance company, the court below was right in sustaining the demurrer. The allegation that the adjuster of the company made out a proof of loss does not of itself show a waiver on the part of the company. If he made it out on behalf of the insured, it does not appear that she authorized or adopted it, for it is alleged that he failed to obtain her signature thereto.

We affirm the judgment of the court below,

with direction that the plaintiff may, if it can, make good its declaration by alleging the facts necessary to show its interest as mortgagee, and the amount thereof, and by alleging also that the proof of loss was waived, and

how and when waived, or else that it was made within due time, and how and when made; these amendments to be filed not later than the time of entering in the court below the remittitur from this court.

IOWA SUPREME COURT.

STATE of Iowa

v.

BELVEL, *Appt.*

(.....Iowa.....)

1. The right to object to the panel of the grand jury because the required number of jurors were not drawn for it is waived by filing a plea of guilty to the indictment.
2. An indictment is not void because presented by a jury of five persons in a county where the statute requires seven, especially where all concur, and under the statute five of the seven could present a valid indictment, and failure to make timely objection will waive the irregularity.
3. An abuse of discretion of the trial court in denying a change of venue for prejudice is not shown where affidavits are filed showing that there is nothing to prevent a fair trial, where the indictment was found.
4. Affidavits in opposition to a motion for continuance may be received for purposes other than to contradict statements as to what the testimony of absent witnesses will be.

5. A continuance because of absence of witnesses should be denied when not made in good faith, as shown by the fact that the applicant made efforts to prevent the attendance on behalf of the state of one of the absent witnesses, and used no diligence to procure the testimony of the others.

6. A fine of \$500 for the publication without provocation of a grossly offensive libel will not be reduced on appeal as excessive.

(October 16, 1898.)

A PPEAL by defendant from a judgment of the District Court for Taylor County convicting him of the publication of a libel. *Affirmed.*

The facts are stated in the opinions.

Messrs. John F. Martin, Charles Thomas, Mark Atkinson, Charles Mackenzie and Dale & Brown for appellant.

Messrs. John Y. Stone, Atty. Gen., and Thomas A. Gheshire for the State.

Robinson, Ch. J., delivered the opinion of the court:

The indictment on which defendant was convicted was presented by the grand jury

NOTE.—Number of grand jurors necessary or proper to act.

Unless the statute is mandatory as to the number acting, the excusing or absence of some of the panel will not affect the indictment if enough remain to concur. *State v. Miller*, 3 Ala. 343; *Tanner v. State*, 92 Ala. 1; *People v. Hunter*, 54 Cal. 65; *People v. Butler*, 8 Cal. 425; *People v. Gatewood*, 20 Cal. 147; *People v. McDonnell*, 47 Cal. 124; *State v. Ostrander*, 18 Iowa, 425, overruling *Norris's House v. State*, 3 G. Greene, 513; *State v. Shelton*, 64 Iowa, 533; *State v. Billings*, 77 Iowa, 417; *State v. Causey*, 43 La. Ann. 897; *Com. v. Wood*, 2 Cush. 149; *State v. Williams*, 35 S. C. 844; *State v. Clayton*, 11 Rich. L. 531; *Pybos v. State*, 3 Humph. 49; *Watts v. State*, 22 Tex. App. 572; *Drake v. State*, 25 Tex. App. 206; *Jackson v. State*, Id. 814; *Trevino v. State*, 27 Tex. App. 372; *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 618; *United States v. Wilson*, 6 McLean, 604.

But a greater number present than allowed by the statute will invalidate an indictment. *People v. Thurston*, *infra*; *Keesh v. State*, 15 Fla. 591; *Downs v. Com.* 92 Ky. 605; *Wells v. Com.* 15 Ky. L. Rep. 179; *Box v. State*, 34 Miss. 614; *Miller v. State*, 33 Miss. 356, 69 Am. Dec. 361; *Com. v. Lelsenring*, 2 Pearson (Pa.) 466; *Com. v. Salter*, Id. 461; *Texas cases*, *infra*; *United States v. Reynolds*, 1 Utah, 226.

Objections, however, to an improper number must be made in time and in proper manner. *Tanner v. State*, *supra*; *Kirby v. Territory* (Ariz.) Feb. 7, 1891; *Ex parte Wilson*, 140 U. S. 575, 35 L. ed. 513; *Shropshire v. State*, 13 Ark. 190; *Wilson v. People*, 3 Colo. 323; *Reynolds v. State*, 33 Fla. 301; *Veatch v. State*, 56 Ind. 564, 36 Am. Rep. 44; *Hall v. State*, 4 G. Greene, 73; *State v. Scarborough*, 55 Md. 345; *State v. Pate*, 67 Mo. 438; *Conkey v. People*, 27 L. R. A.

1 Abb. App. Dec. 418, 5 Park. Crim. Rep. 31; *State v. Davis*, 24 N. C. 158; *Young v. State*, 6 Ohio, 425; *Türk v. State*, 7 Ohio, pt. 2, p. 240; *Rex v. Marsh*, 1 Nev. & P. 187, 6 Ad. & El. 236, 2 H. & W. 363, W. W. & D. 150.

If the statute is mandatory, the number required must be impaneled and act. *State v. Hawkins*, 10 Ark. 71; *Harding v. State*, 22 Ark. 210; *Gladden v. State*, 12 Fla. 562; *Brannigan v. People*, 3 Utah, 433; *Fitzgerald v. State*, 4 Wis. 335.

The number required to make a panel depends on the local statutes of the several states.

Power of legislature to change number of grand jurors required at common law.

A question of much importance is that of the power of the legislature to change the common-law number of grand jurors. In several states the general provision of the constitution for indictment by grand jury is held to require a grand jury substantially like that required by common law. Thus in Florida it is held that a constitutional provision "for indictment by a grand jury" means that the grand jury shall be that which existed at common law numbering not less than twelve and of whom at least twelve must concur to find an indictment. Therefore it is held that the legislature cannot so change the common-law organization of the grand jury as to make the concurrence of eight sufficient for an indictment. *Donald v. State*, 31 Fla. 255; *English v. State*, Id. 340.

Likewise in North Carolina it is decided that, as a grand jury had a well-understood meaning at the adoption of the declaration of rights, and one of its most essential features was that the concurrence of twelve of its members was necessary to

of Taylor county on the 5th day of March, 1892. It charges that on or about the 18th day of February, 1892, in the county named, the defendant "unlawfully and maliciously, to injure the good name and character of G. L. Finn, and to expose him to public hatred and contempt, and deprive him of public confidence, and to bring him into public scandal and disgrace, did on the said 18th day of February, 1892, write and publish and cause to be written and published in said county, in the Southwest Democrat, a newspaper published in said county, a false, scandalous, malicious, and defamatory libel, in the form of a letter. . . ." The matter alleged to be libelous is set out at length, and the sense in which it was written and published is specified. On the 27th day of April, 1892, the defendant filed a demurrer to the indictment, which was overruled. The defendant then petitioned for a change of the place of trial on the ground of excitement and prejudice on the part of the people of Taylor county. The petition was supported by affidavits, and was overruled. A motion for a continuance was made, based on the absence of certain witnesses. It was supported by affidavits, and was resisted by counter-affidavits. A motion of defendant to strike the counter-affidavits from the files on the ground that they are not allowable was overruled. Some of the persons whose affidavits were used were examined in open court, and the application for a continuance was overruled on the 5th day of May, 1892. Thereupon the defendant entered the plea of

guilty, and judgment was rendered as has been stated. On the 28th day of the same month an appeal was taken to this court. On the 11th day of April, 1893, the defendant filed in the district court a paper entitled a "motion and petition to vacate judgment," in which he asked that the judgment rendered be vacated, that he have leave to withdraw his plea of guilty, and that the indictment be quashed. The application was based upon the following grounds: (1) An official bulletin of the superintendent of the federal census, issued on the 21st day of July, 1891, showed that the population of Taylor county was more than 16,000 inhabitants. (2) The law requires that in counties having more than 16,000 inhabitants the grand jury shall be composed of seven members, and, for the purpose of selecting them, that twelve jurors shall be drawn. (3) The grand jury which returned the indictment in question was composed of but five members, and for the purpose of selecting them but eight jurors were drawn. On the 25th day of April, 1893, the state and defendant having been duly represented by attorneys, the motion was overruled. The petition was dismissed, and judgment was rendered against the defendant for costs. Two days later he took an appeal from that judgment. The two appeals are submitted together for the determination of this court.

1. Section 231 of the Code, as amended by chapter 42 of the Acts of the 21st General Assembly, provides that in counties having more than 16,000 inhabitants, the grand jury

the finding of a presentment or indictment, an act of the legislature making the concurrence of nine sufficient is not authorized by the constitution. *State v. Barker*, 10 L. R. A. 50, 107 N. C. 913. See further note to *State v. Hartley* (Nev.) 28 L. R. A. 33, as to number of grand jurors necessary to concur.

In Wisconsin the court pursued somewhat similar reasoning in *Brucker v. State*, 16 Wis. 334, although the decision was that the legislature could change the number "within the limits prescribed by the common law," and therefore a statute providing for a grand jury of from fifteen to seventeen was not unconstitutional since it left the number between twelve and twenty-three as at common law.

In Georgia the power of the legislature to provide for an indictment by nine grand jurors for an offense triable in corporation courts was sustained under the constitutional provision giving those courts jurisdiction of minor offenses under rules and regulations fixed by the legislature. This case manifestly does not touch the question of the construction of the general constitutional provision for indictment by grand jury, but turns on its express grant of legislative power over proceedings in these courts in respect to minor offenses. *Thurman v. State*, 25 Ga. 220.

No decisions have been found directly in conflict with those preceding as to the interpretation of the general provision of a state constitution for "indictment by grand jury." But it has been decided that the provision of the Federal Constitution for "due process of law" does not require that a grand jury finding an indictment shall be composed as at common law with the common-law number of grand jurors. *Parker v. People*, 4 L. R. A. 803, 18 Colo. 155.

This case is based upon the decision of the 27 L. R. A.

United States Supreme Court in *Hurtado v. California*, 110 U. S. 516, 23 L. ed. 233, which decided that due process of law in criminal cases did not make any grand jury necessary but might be satisfied by information even in cases of felony.

Substantially to the same effect is the decision in Virginia that a provision for a special grand jury not less than six in number is not contrary to the 5th or 14th Amendment to the United States Constitution. *Hausenfuok v. Com.* 85 Va. 702.

If the Federal Constitution does not limit the power of the state in respect to the number of grand jurors the provision of a state constitution must clearly control no matter how many or few may be the prescribed number. So in Iowa the constitution as shown in *STATE V. BELVEL* has reduced the number from that required at common law to such number between five and fifteen as the legislature may prescribe. The legislature is authorized to fix the number between these limits and as shown in *STATE V. BELVEL* has prescribed a number varying according to the population of the county.

In Montana the constitution has fixed the number of the grand jury at seven of whom five must concur, and this is held in *State v. Ah Jim*, 9 Mont. 167, to be a self-executing provision.

In several other states, as in Oregon, the number has been reduced below that required at common law, and the change seems to have been acquiesced in without challenge.

Rule in various states.

Alabama.

Under Ala. Dig., 206, § 6, providing that not less than thirteen nor more than eighteen shall be drawn, the absence of one will not invalidate the indictment. *State v. Miller*, 3 Ala. 343 (pl. abate.).

shall be composed of seven members. Section 241 of the Code, as amended, provides that when the grand jury is to be composed of seven members, twelve jurors shall be drawn from which to select them. The population of Taylor county, as shown by the federal census of the year 1890, is 16,884, and it is not disputed that the grand jury which presented the indictment in question should have been composed of seven members, and that twelve jurors should have been drawn for it. See *State v. Braskamp*, 87 Iowa, 588. The record submitted shows that it was in fact composed of but five members, and that but eight jurors were drawn for it. The state contends, however, that, as the defendant failed to make the objections now presented before the judgment on his plea of guilty was rendered, they were waived, and that the first appeal deprived the district court of jurisdiction to determine the motion and petition on their merits. The defendant contends that the defect goes to the jurisdiction of the district court, and that want of jurisdiction cannot be waived, but will be considered at any time when it comes to the knowledge of the court, even though not urged by either party. That the general rule is as claimed by defendant has been settled by numerous decisions. *Lansing v. Chicago, M. & St. P. R. Co.* 85 Iowa, 215; *Orcutt v. Hanson*, 71 Iowa, 517; *Cerro Gordo County v. Wright County*, 59 Iowa, 485; *Groves v. Richmond*, 53 Iowa, 570; *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa, 880; *Viola Dist. Twp. v. Audubon Dist. Twp.* 45 Iowa, 104; *Walters*

v. The Mollie Dozier, 24 Iowa, 199, 95 Am. Dec. 722; *Burlington University v. Stewart*, 13 Iowa, 442; *Dicks v. Hatch*, 10 Iowa, 884. In most of the cases cited it appeared that the trial court did not have jurisdiction of the subject-matter of the action, but that is not true in this case. The district court had jurisdiction of the offense charged in the indictment and of the defendant. The real question we are required to determine is whether the fact that the grand jury was composed of but five members, and the further fact that but eight jurors were drawn for it, were defects so serious that they could not be waived.

Section 4260 of the Code authorizes a challenge to the panel before indictment when the jurors were not appointed, drawn, or summoned as prescribed by law. The defendant was not held to await the action of the grand jury by the order of any committing magistrate, and had no opportunity to object to the grand jury until after the indictment had been presented. But subdivision 5 of section 4337 of the Code provides for a motion to set aside an indictment, and requires that it be sustained when it appears "that the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law." Section 4339 of the Code provides that the ground stated shall not be allowed to a defendant who has been held to answer before indictment, thus in effect clearly providing for a waiver of the right of challenge when founded upon any of the defects contemplated by the subdivision

A local act of Alabama, February 13, 1879, reducing the number of grand jury to fifteen, is not retroactive but prospective. *Marler v. State*, 68 Ala. 580 (obj.); *Creamer v. State*, 70 Ala. 13. (mo. ar.); *Thompson v. State*, 70 Ala. 26 (mo. ar.).

And under an act requiring fifteen, where the panel was filled to make fifteen, and fourteen only were sworn, but no objection was made until in the supreme court, the objection would not avail, under Ala. Code, section 4445, providing no objection can be made for organization except that they were not drawn in the presence of officers. *Tanner v. State*, 22 Ala. 1 (obj.)

Arizona.

And under Arizona statute, providing that the grand jury shall be not less than seventeen nor more than twenty-three, the objection that the grand jury was fifteen only will not avail where the same does not appear in the case and is made in the supreme court for the first time. *Kirby v. Territory (Ariz.)* Feb. 7, 1891.

And this objection cannot be made collaterally by habeas corpus, where a sufficient number indicted. *Ex parte Wilson*, 140 U. S. 575, 35 L. ed. 513 (hab. corp.)

Arkansas.

But under Ark. Dig., chap. 52, § 64, and Ark. Dig., chap. 98, providing that the grand jury shall be sixteen, an indictment must be by that number or it will be void. *State v. Hawkins*, 10 Ark. 71 (pl. abate.); *Harding v. State*, 22 Ark. 210 (pl. abate.)

But an objection to meet this must be by plea in abatement. *Shropshire v. State*, 13 Ark. 190 (obj.)

California.

In California in 1856, a statute provided for seventeen to twenty-three, and in 1876, Cal. Code, section 27 L. R. A.

242, provided for thirteen, fourteen or fifteen, respectively, and Cal. Code of Civ. Proc., section 192, provided for nineteen, but the change in the number did not change the rule as to the effect of the absence of any of the grand jury at the finding, and an objection to the formation cannot be made on a motion to set aside as the death of one or more will not affect the indictment found by twelve. *People v. Hunter*, 54 Cal. 65 (mo. set aside).

This followed *People v. Roberts*, 6 Cal. 215, holding that if twelve concur it is not fatal that less than seventeen, the minimum number, were present.

So if the statutory number has been reduced by challenge but there remain twelve who concurred in the indictment the same is valid. *People v. Butler*, 8 Cal. 435 (obj.); *People v. Gatewood*, 20 Cal. 147 (obj.); *People v. McDonnell*, 47 Cal. 124 (mo. new tr.; mo. set aside).

And under Cal. Code Civ. Proc., §§ 204-211, there is no distinction in the selection of grand or trial jurors and an order designating the number need not separate the number of each class. *People v. Crowley*, 56 Cal. 36 (mo. new tr.)

But where the number is limited to twenty-three an indictment found by a grand jury of twenty-four is void. *People v. Thurston*, 5 Cal. 60 (obj.)

Colorado.

Under Colo. Rev. Stat., 380, providing that a grand jury shall be from sixteen to twenty-three, an indictment by twenty-one is sufficient. *Mackey v. People*, 2 Colo. 13 (chal.).

Under Colo. Const., art. 1, § 23, limiting the grand jury to twelve, although nineteen were summoned, it will be presumed only twelve acted or that they were convened as a special grand jury under common law and the objection must be by plea. *Wilson v. People*, 3 Colo. 225 (mo. ar.).

quoted. *State v. Gibbs*, 39 Iowa, 319; *State v. Hart*, 39 Iowa, 369. Electors of the state only are qualified to act as jurors. Code, § 227. But a person held to await the action of the grand jury waives his right to object to an indictment presented against him by a grand jury of which an alien was a member by failing to challenge the alien before the jury was sworn. *State v. Gibbs*, *supra*. In *State v. Reid*, 20 Iowa, 423, it appeared that the grand jury had submitted its final report, and been discharged. Afterwards, but during the same term of court, it was again summoned and impaneled, and it then found the indictment on which the defendant was convicted. It was objected that the court had no power thus to organize a grand jury. This court held that it had, and also that the objection was not taken in due time, because not made before a plea to the indictment was entered. It is clear, under the statute and the decisions, that the defendant waived his right to object to the panel because a sufficient number of jurors were not drawn for it.

It is more difficult to determine what effect should be given to the acts of a grand jury composed of but five jurors when seven are required by law. Section 11, art. 1, of the Constitution of this state provides that no person shall be held to answer for any criminal offense higher than those in which the punishment does not exceed a fine of \$100, or imprisonment for thirty days, "unless on presentment or indictment by a grand jury. . . ." Section 15 of article 5 of the Con-

stitution adopted in the year 1884 is as follows: "The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury." Acting under that section, the general assembly amended section 231 of the Code, and provided that in counties having more than 16,000 inhabitants "the grand jury shall be composed of seven members." The defendant contends that this provision is mandatory, and that his right to have his case considered by a grand jury of seven members is guaranteed by the Constitution. It is true that the right is guaranteed as claimed, but the obligation to provide a grand jury of seven members in certain cases is no greater than is that to furnish a trial jury of twelve. The Constitution provides that "the right of trial by jury shall remain inviolate." Section 9, article 1. That means a jury of twelve persons; and the general assembly cannot require the parties to an action to accept a jury containing a smaller number, excepting in inferior courts. *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296; *Kelah v. Dyersville*, 68 Iowa, 187. It was said in *Cowles v. Buckman*, 6 Iowa, 163, that a party may waive his right to a trial by jury of twelve persons, and consent to a trial by one containing a less number. See also *State v. Grooms*, 10 Iowa, 315. And in civil actions he may wholly waive a jury. Code, § 2814.

Florida.

Under Florida Act, February 20, 1875, providing that the grand jury shall be not less than twelve nor more than fifteen, an indictment found by sixteen is invalid. *Keeob v. State*, 15 Fla. 591 (mo. qu.).

And where a statute required fifteen, an indictment where only fourteen are drawn and impaneled is invalid. *Gladden v. State*, 13 Fla. 562 (pl. abate.).

And Fla. Rev. Stat., 2302, providing for twelve grand jurors and a concurrence of eight is valid as to twelve but void as to the eight, under the Bill of Rights, section 10. *English v. State*, 31 Fla. 340 (pl. abate.); *Donald v. State*, Id. 255 (pl. abate.).

But the motion in arrest cannot reach an objection that the indictment was found by a grand jury of only twelve, and that less than that number concurred. *Reynolds v. State*, 33 Fla. 501 (mo. ar.).

Georgia.

Under Georgia Const., art. 3, providing that corporation courts may have such jurisdiction as the legislature may direct, the number of grand jurors in such courts may be reduced to twelve with a provision that nine may concur. *Thurman v. State*, 26 Ga. 220 (exception).

Where the court told the grand jury that if there were twenty-four to excuse one and to strike the last man off the list and come back and be sworn, there was no error. *Ridling v. State*, 56 Ga. 601 (cert.).

Idaho.

In Idaho a grand jury may be composed of seven under the territorial statute, and this is not contrary to article 5, Amendment of the United States Constitution.

27 L. R. A.

Illinois.

Under Ill. Stat., chap. 73, § 16, providing twenty-three persons should be summoned and sixteen should be sufficient to constitute the grand jury, an indictment found by nineteen is valid, where no objection was made to quash the indictment or to challenge the array. *Barron v. People*, 73 Ill. 256 (mo. ar.).

And a grand jury of twenty-two is valid. *Beasley v. People*, 89 Ill. 571 (mo. qu.).

Indiana.

Objection by an attorney of one not under prosecution that the panel was less than the statutory number of eighteen will not avail, as twelve may act. *Hudson v. State*, 1 Blackf. 317 (chal.).

And Indiana Act 1875, p. 54, providing for a grand jury of six did not take effect until the March session of 1875 and until then the prior statute controls and the grand jury of twelve summoned prior to that time may indict afterwards. *Meiers v. State*, 56 Ind. 336 (chal.: mo. qu.); *State v. Myers*, 51 Ind. 145 (pl. abate.); *State v. May*, 60 Ind. 170 (obj.).

And that the grand jury was twelve instead of six will not be considered in a motion in arrest. *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44 (mo. ar.).

Iowa.

In *Norris's House v. State*, 3 G. Greene, 513 (pl. abate.; mo. set aside), it was held that under Iowa Code, section 1642, providing that the number of grand jurors must be fifteen, and one was excused for drunkenness, an indictment found by fourteen was invalid.

But this case was overruled in *State v. Ostrander*, 18 Iowa, 435 (mo. set aside), attempting to make a distinction that in the *Norris House Case* one of the jurors was discharged but in the *Ostrander Case* one of the jurors being challenged was not present

In *Wilkena v. Treynor*, 14 Iowa, 393, it was said that "the right of trial by jury, guaranteed by the Constitution, may be lost or waived by the act or covenant of a party. This right is not an attribute, or inalienable in its nature and character, but rather a privilege that may be waived or forfeited." It was therefore held that a party in default, who nevertheless had the right to appear in the case, had lost his right to demand a trial by jury. See also *Olute v. Hazleton*, 51 Iowa, 859; *Henny Buggy Co. v. Patt*, 73 Iowa, 489; *Re Hooker's Assignment*, 75 Iowa, 380. A jury may be waived by failing to demand it at the proper time. *Davidson v. Wright*, 46 Iowa, 383. See also *Hawkins v. Rice*, 40 Iowa, 437. It was held by a majority of this court in *State v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741, that a defendant in a criminal action triable on indictment cannot waive a trial by jury; and that decision was followed in *State v. Larrigan*, 66 Iowa, 426. But in *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, it was said to be the settled doctrine of this state that a defendant in a criminal action may waive a statute enacted for his benefit, and it was held to be competent for him to consent to a trial by eleven jurors. The case of *State v. Ostrander*, 18 Iowa, 438, was decided under a statute which fixed the number of persons required to constitute a grand jury at fifteen, and required the concurrence of twelve to find an indictment.

The defendant, before pleading, had filed a motion to quash the indictment, because found by a grand jury consisting of only fourteen members. It appears that a challenge to one member of the panel had been sustained, and that but fourteen members had acted upon the indictment. It was held that the indictment was good. The court made prominent the fact that, although more than twelve persons were required to constitute a grand jury, yet "from the earliest authorities down it is shown that a presentment by twelve is good, although no more than twelve be impaneled, or, if more are impaneled, although all the other jurors dissent." See also *State v. Shelton*, 64 Iowa, 335. The case of *Norris's House v. State*, 3 G. Greene, 514, in which this court held an indictment presented by a grand jury of fourteen members, one having been discharged, to be illegal, was referred to, and apparently doubted, although it was not overruled. In that case objection was made to the indictment by answer. It had been urged that it was made too late, because not made before the grand jury was sworn, under a statute which provided that no objection could be interposed by a defendant to a grand jury for any cause of challenge after they were sworn. In commenting upon that provision, this court said that it must be confined to such defendant as had an opportunity to interpose the objection therein allowed, but that persons who had

and took no part in the indictment and also on the ground that objection must be made before plea of not guilty.

So where three of fifteen were excused on a challenge and the court refused to add more and the twelve concurred, the indictment was valid. *State v. Shelton*, 64 Iowa, 333 (chal.).

Iowa Const. Amendment 1884, provides for a grand jury from five to fifteen. *State v. Salts*, 77 Iowa, 198 (dem.).

And the main case, *STATE v. BELVEL*, decides that under Iowa Code, section 231, as amended, providing that in counties of certain population the grand jury should be seven, of whom five must concur, and that twelve should be drawn from which to select them, where only eight were drawn in such a county and only five acted but all concurred, on failure of the defendant to object before plea, the indictment was a waiver of the objection.

And where the grand jury should be composed of five and one was challenged the indictment by the remainder will be valid. *State v. Billings*, 77 Iowa, 417 (obj.).

And the court will take judicial notice of the federal census before its announcement, where it determines the number of grand jurors. *State v. Braskamp*, 87 Iowa, 588 (mo. set aside).

And under Iowa Constitution of 1884, the number of grand jurors need not be uniform throughout the state. *State v. Standley*, 76 Iowa, 215 (mo. set aside).

A plea in abatement should not impeach the record to show that less than fifteen grand jurors may be impaneled under the Iowa law. *Hall v. State*, 4 G. Greene, 73 (pl. abate.).

Kentucky.

Under the new Kentucky Constitution of 1891, providing that the grand jury shall be twelve, it cannot exceed that number. *Downs v. Com.* 93 Ky. 605 (mo. set aside); *Wells v. Com.* 15 Ky. 27 L. R. A.

L. Rep. 179 (obj.); *Sanders v. Com.* 13 Ky. L. Rep. 820 (obj.).

Louisiana.

That one of the sixteen grand jurors was disqualified at the time of the drawing and was excused on objection of accused, will not render the indictment invalid. *State v. Causey*, 43 La. Ann. 397 (mo. qu.).

The object of the statute fixing the number of grand jurors at sixteen was only to make definite what was before an indefinite number between twelve and twenty-three, and the statute does not make an indictment for which twelve concur invalid because only thirteen were present. *State v. Swift*, 14 La. Ann. 839.

And the Louisiana Act of 1853, requiring the grand jury to be impaneled on the first day of the term, is only directory, and where of the sixteen names drawn there was one who had been previously appointed foreman, and there were but sixteen, the panel was valid. *State v. Davis*, 14 La. Ann. 689 (mo. qu.).

Maine.

Less than twelve cannot act to find an indictment. *State v. Symonds*, 36 Me. 123.

That less than twelve acted may be shown by the accused when arraigned, there being nothing on the face of the indictment to show the number. *Low's Case*, 4 Me. 439, 16 Am. Dec. 271.

Maryland.

A plea that only twenty-two persons acted is insufficient as one of the panel may have been excused for cause, and the plea must show that the panel was never more than twenty-two. *State v. Scarborough*, 55 Md. 325 (pl. abate.).

Massachusetts.

And Mass. Rev. Stat., chap. 136, providing for a venire of twenty-three, is merely directory and twenty-two may act. *Com. v. Wood*, 2 Cush. 14 (pl. abate.).

been held to await the action of the grand jury, by failing to make their objection before it was sworn, would be "forever barred from objecting afterwards." In *People v. Petrea*, 93 N. Y. 143, it was held that no constitutional right of the defendant was invaded by holding him to answer to an indictment presented by a grand jury not selected in pursuance of a valid law, but selected under color of law and semblance of legal authority. It was said that "an indictment was found by a body drawn, summoned, and sworn as a grand jury, before a competent court, and composed of good and lawful men. This, we think, fulfilled the constitutional guaranty." In *State v. Feller*, 25 Iowa, 71, it was said that "courts do not favor objections based on irregularities respecting preliminary matters and proceedings, while they will sedulously guard all rights secured to the accused while undergoing the ordeal of a trial which is to be decisive of issues momentous and weighty alike to the defendant and to the state." Section 231 of the Code, as amended, provides that the grand jury in counties having a population not exceeding 16,000 shall be composed of five members, and that in counties having a greater population it shall be composed of seven members. Section 241 provides that when the grand jury is to be composed of five members only, eight jurors shall be drawn for it, and that when it is to be composed of seven members the number of jurors

drawn shall be twelve. Section 4291 provides that an indictment cannot be found without the concurrence of four grand jurors when the grand jury is composed of five members, and not without the concurrence of five grand jurors when it is composed of seven members. When it is required to consist of five members, and a challenge to one has been sustained, a valid indictment may be presented by the remaining four. *State v. Billings*, 77 Iowa, 421. In this case the indictment was presented by a grand jury which would have fully met the requirements of the law had the population of the county been 400 less. It was presented by five jurors acting as the grand jury, or by as many members as would have been required in any event to concur in the finding of the indictment. No constitutional guaranty was violated by impaneling a grand jury of five persons. The defendant could have interposed the objections he now urges before pleading to the indictment, and no reason for his failure to do so is shown. We are of the opinion that under these circumstances the indictment cannot be regarded as void, and that the defects of which defendant now complains were waived by a failure to take advantage of them before pleading to the indictment. The court had jurisdiction of the case, and the defendant had an opportunity to make defense on the merits to the charge against him.

2. Complaint is made of the refusal of the

Mississippi.

The Mississippi Act March 1, 1854, providing that the grand jury shall be not under thirteen nor over eighteen is mandatory, and indictment by nineteen is void. *Box v. State*, 34 Miss. 614 (pl. abate.); *Miller v. State*, 33 Miss. 356, 69 Am. Dec. 361 (mo. ar.).

It will be presumed that the proper number was summoned. *Easterling v. State*, 35 Miss. 210 (mo. qu.); *Weeks v. State*, 31 Miss. 490 (mo. new tr.).

Missouri.

An objection that there were only sixteen grand jurors instead of eighteen, as required by statute, is too late when made in the supreme court for the first time and should be made before they are sworn. *State v. Pate*, 67 Mo. 482.

A grand jury of twelve only was held good in *State v. Green*, 66 Mo. 631, citing *State v. Dearing*, 65 Mo. 530, as deciding the same point.

Montana.

Montana Const., art. 3, § 8, changed a grand jury panel from sixteen to seven and was self executing. *State v. Ah Jim*, 9 Mont. 167; *State v. King*, Id. 445 (chal.).

New York.

It is error to swear twenty-four persons on a grand jury. *People v. King*, 2 Cal. Cas. 93, Col. & Cal. Cas. 364.

But it is too late after trial to object that there were twenty-four grand jurors. *Conkey v. People*, 1 Abb. App. Dec. 418, 5 Park. Crim. Rep. 31 (obj.).

North Carolina.

North Carolina Rev. Stat., chap. 31, § 34, providing for eighteen grand jurors, is directory only, and after pleading to an indictment, objection cannot be made that the grand jury was only twelve. *State v. Davis*, 24 N. C. 158 (mo. ar.).
27 L. R. A.

Ohio.

The presumption is that the statutory number composed the panel where the record says "the grand jury impaneled." *Young v. State*, 6 Ohio, 435 (mo. ar.).

And in *Turk v. State*, 7 Ohio, pt. 2, p. 240 (mo. qu.; pl. abate.), it was held that a plea that only fourteen acted instead of fifteen as required by the statute, cannot contradict the record.

Pennsylvania.

An indictment found by twenty-four under a statute providing for twenty-three, is invalid. *Com. v. Leisenring*, 2 Pearson (Pa.) 468 (mo. qu.); *Com. v. Salter*, Id. 461 (mo. qu.).

Rhode Island.

If the minute books and indictment show that fifteen were summoned as required, it will by R. I. P. L. chap. 536, be sufficient. *State v. O'Brien*, 18 R. I. 96 (mo. ar.).

South Carolina.

Although the number required by South Carolina statute is eighteen yet if twelve were present the indictment will be valid. *State v. Williams*, 35 S. C. 344 (pl. abate.); *State v. Clayton*, 11 Rich. L. 561 (mo. new tr.; mo. ar.).

Tennessee.

Under Tennessee Act 1779, chap. 4, providing first eighteen drawn shall be grand jurors, and Act 1811, chap. 72, providing that not more than thirteen shall be drawn, the statutes are only directory as to the minimum number, and twelve can indict. *Pybos v. State*, 3 Humph. 49 (mo. qu.).

Texas.

Under Tex. Const., art. 5, § 8, providing for a grand jury of twelve, a panel of a greater number is invalid. *Williams v. State*, 19 Tex. App. 265 (obj.); *Ralney v. State*, Id. 479 (obj.); *Ex parte Swain*, Id. 323 (hab. corp.); *McNeese v. State*, Id. 48 (obj.);

district court to change the place of trial on the application of defendant. It is erroneously stated in argument that no affidavits were filed on the part of the state denying the existence of the prejudice alleged. There was a showing to the effect that there was but little discussion in Taylor county in regard to the merits of the case, and that there was neither prejudice nor excitement against defendant, nothing to prevent him from having a fair trial in the county. Applications of the nature of that under consideration are to be decided by the trial court, in the exercise of a sound discretion. Code, § 4374. We think the action of the court in denying the change asked is fully supported by the counter-showing made by the state.

8. It is said the court erred in not sustaining the motion of defendant to strike from the files the affidavits filed by the state in resistance of the application for a continuance. Affidavits cannot be used to contradict statements contained in affidavits filed in support of an application for a continuance as to what the testimony of the absent witnesses will be. *State v. Dakin*, 52 Iowa, 395. But counter-affidavits for other purposes—as, to show want of diligence to procure the testimony desired—are permissible. *State v.*

Murphy, 81 Iowa, 605; *State v. Rainsberger*, 74 Iowa, 199. Portions of some of the affidavits sought to be stricken out were objectionable, but there was no attempt to designate those portions. The motion was based upon the theory that counter-affidavits were not permissible for any purpose. Each of the affidavits at which the motion was aimed contained something which it was proper to urge against the application, and the motion was therefore rightfully overruled.

4. We are also of the opinion that the action of the district court in overruling the motion for a continuance is fully justified by the record presented. The motion was based on the absence of certain witnesses, whose testimony was alleged to be material for the defendant. Counter-affidavits showed in regard to one of those witnesses that defendant not only did not attempt to secure her attendance in good faith, but that by himself and his attorney he made extraordinary and unjustifiable attempts to prevent it after she had been required to appear by the state. She was present at court before the continuance was denied, and defendant then relied upon the absence of six witnesses, whose names are given, as ground for a con-

Lott v. State, 28 Tex. App. 37 (mo. ar.); *Wells v. State*, 21 Tex. App. 594 (bail bond); *Harrell v. State*, 22 Tex. App. 602 (bail bond).

But the excusing or removal of one of the grand jurors reducing the panel to eleven will not invalidate. *Watts v. State*, 22 Tex. App. 572 (pl. abate.); *Drake v. State*, 25 Tex. App. 293 (mo. qu.); *Jackson v. State*, Id. 814 (mo. qu.); *Trevino v. State*, 27 Tex. App. 372 (mo. set aside).

Utah.

Under Utah Statute, Grand Jury Act, chap. 33, § 5, requiring the grand jurors to be twenty-four, an indictment by seventeen is invalid. *Brannigan v. People*, 3 Utah, 488 (pl. abate.).

So Under Utah Statute requiring the grand jury to be fifteen, an indictment by grand jury of twenty-three is invalid. *United States v. Reynolds*, 1 Utah, 226 (pl. abate.).

And a grand jury of fifteen may indict. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

In *People v. Green*, 1 Utah, 11, the court declared that a grand jury in the district court of the United States in Utah must consist of twenty-three men. The point in question was whether a territorial statute requiring the grand jury to be drawn from the county, was applicable. The statute also fixed the number at fifteen of whom twelve must concur, but the controversy does not seem to have been over the number, but over the locality from which the grand jurors were to be drawn.

Vermont.

Under Vermont Rev. Laws, § 284, providing for eighteen, the absence of one or more will not invalidate where twelve indicted. *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 618 (pl. abate.).

Virginia.

The Virginia Code, § 3977, providing that the special grand jury may not be less than six, is not contrary to the 5th or 14th Amendment, U. S. Const. *Hausenfluck v. Com.* 85 Va. 702 (mo. qu.; me. new tr.).

And an indictment found by a special grand jury 27 L. R. A.

of six is valid. *Mesmer v. Com.* 26 Gratt. 976 (mo. qu.).

And so where the special grand jury is seven. *Lyles v. Com.* 88 Va. 396 (mo. qu.).

A special grand jury of eight was held to be lawfully drawn during the same term in which a grand jury had been dismissed for incompetency of a member. *Shinn v. Com.* 22 Gratt. 899.

Such a special grand jury may indict for a murder. *Lyles v. Com.* *supra*; *Robertson v. Com.* (Va.) Nov. 8, 1894.

A statute providing that twenty-four grand jurors or any sixteen of them shall be a grand jury does not require more than twelve to concur. *Com. v. Sayers*, 3 Leigh, 722.

Wisconsin.

Under Wis. Rev. Stat., chap. 97, § 12, providing that the grand jury shall not be less than sixteen nor more than twenty-three, an indictment by twelve is invalid. *Fitzgerald v. State*, 4 Wis. 366 (obj.).

Under Wis. Const., art. 1, § 8, providing that a person shall not be held to answer for a crime except on presentment or indictment, does not prevent a statute fixing the number at not less than fifteen nor more than seventeen. *Brucker v. State*, 16 Wis. 384 (pl. abate.).

Where fifteen grand jurors were impaneled, the absence of one will not invalidate. *United States v. Wilson*, 6 McLean, 604 (mo. qu.).

English cases.

Where after a plea to the indictment, a motion to quash was made because the number was twenty-eight, and twenty-five were in the grand jury room, but there were no data to make the record show that fact, the motion to quash should be overruled. *Rex v. Marsh*, 1 Nev. & P. 157, 6 Ad. & El. 236, 2 H. & W. 368, W. W. & D. 150 (mo. qu.).

It was said in *Clyncard's Case*, Cro. Eliz. 654, that the indictment was "clearly bad" because "it appeared not that it was per sacramentum 12."

For matters about the organization of grand juries in general, see *note* to *State v. Noyes* (Wis.) ante, 776.

L. T.

tinuance. It appears that the defendant and others were examined in open court in regard to the diligence used to obtain the attendance or testimony of those witnesses. That examination and the affidavits filed disclosed facts which justified the court in concluding that the application for a continuance was not made in good faith, and that defendant had not used due diligence to procure the testimony which he claimed to need. Therefore there was no sufficient reason shown for granting the application.

5. It is said that the fine imposed is excessive. The libel was grossly offensive, and, so far as the record shows, was without any provocation which can justly be urged in mitigation of the punishment. We cannot say that the amount of the fine exceeds the demands of justice. We have examined the entire record with care, but without finding any ground for interfering with either of the judgments of the district court. They are therefore affirmed.

Kinne, J., dissenting:

I concur in the opinion of the majority of the court, except as to the holding that the indictment was not void, and that defendant has waived his right to object thereto. As to these conclusions I dissent. I am not unmindful that it is the policy of our law, as is evidenced by statute and the decisions of this court, to require that mere irregularities and informalities touching the manner of impaneling the grand jury and the like must be taken advantage of before pleading to the indictment. I cannot agree, however, that the original organization of a grand jury, composed of a less number of persons than the constitution and laws require, is such an irregularity as is contemplated, or as may be waived by any act of the defendant. It is conceded that in this case the grand jury which found the indictment was composed, when it was impaneled, of but five persons, whereas in the county of Taylor it required seven persons to constitute a legal grand jury. It will be observed that this is not a case where the grand jury was, in the first instance, made up of the legal number, and afterwards refused by challenge or otherwise. A grand jury originally composed of a less number of persons than is provided by the constitution and laws is in fact not a grand jury at all. Such a body possesses no more power than any other five men who should assume to act as a grand jury. Nor can it be said that the fact that they are impaneled by the lawfully constituted authorities will validate their illegal organization. The jurisdiction of the trial court is obtained only by virtue of an indictment found and returned by a grand jury. If, then, there is a fatal defect in the organization of the body which must find the indictment, it renders void all subsequent proceedings. It is not a mere irregularity which can be cured or waived, but an essential matter which avoids an indictment found by the body thus illegally constituted. This question has never been decided in this state. It is an important one. If the doctrine of the majority opinion is to prevail, what is to prevent the finding of an

indictment under color of law by any body of men greater or less than is provided for by our constitution and laws, and the trial of a defendant thereon in case he fails to make timely objection thereto? Thus may the absolute guaranty of the constitution and the protection which the law affords to the citizen charged with crime be abrogated and annulled because of a failure of defendant to insist upon his legal rights. Such a doctrine carries the law of waiver, as applied to persons on trial for a crime, to an unwarranted extent. The statutes of Florida require that fifteen persons shall be drawn to serve as grand jurors. In *Gladden v. State*, 13 Fla. 566, it appeared that only fourteen persons were thus drawn. No error was assigned by the plaintiff. The court said: "From a careful inspection of the first page of the record we find only fourteen persons were drawn to serve as grand jurors during the term at which the indictment was found. The statute regulating the organization of grand juries cannot, by any known rule of construction, be held to authorize this; and, while no such error is assigned by the plaintiff, yet it is apparent upon the record, and, this being a capital crime, the court cannot pass it by without notice. No man should be tried for a capital crime upon an indictment of this character." It was held that there must be fifteen grand jurors on the panel as originally drawn, and that the error vitiated all the subsequent proceedings in the case. In *Brannigan v. People*, 8 Utah, 489. It was held that, where a grand jury of seventeen men was impaneled, and the statute required that the grand jury should consist of "twenty-four eligible men to serve as grand jurors," and that "said twenty-four men shall constitute a grand jury," an indictment returned by a grand jury organized with seventeen members was void. It was also held that it was not too late after the verdict to look into the record when the indictment by which the prisoner was charged was found by an unlawful grand jury. In *Finley v. State*, 61 Ala. 205, it is said: "But if its records affirmatively disclose that a body of men has been organized as a grand jury, in violation of the statutes which prescribe the mode of organizing such a jury, clothed with the powers of making presentments which operate as criminal accusations against the citizen, all the acts of that body must be pronounced void; no solicitation or laches on the part of the accused can cure the illegality. It would be ground of motion in arrest of judgment, and, if no such motion is made, of assignment of error in an appellate tribunal; and, if not assigned, it is of that class of errors this court must notice in obedience to the statute, and render such judgment on the record as the law demands." As the indictment proceeded from and was the act of a body of men organized as a grand jury in violation of law, the judgment of conviction was reversed. In *Lott v. State*, 18 Tex. App. 627, an indictment for burglary found by a grand jury composed of thirteen instead of twelve persons was held by the lower court not such an error as could be taken advantage of by a motion in arrest of judgment. The

court of appeals, while holding that the ground of the motion was one not provided by the statute, said: "This exclusion of other ground could not, however, extend to the extent of depriving the defendant of a constitutional right, nor to the extent of conferring jurisdiction inhibited by the constitution."

If he is tried in a court having no jurisdiction, he may interpose this objection to the proceeding at any stage thereof, and in any form. . . . Our conclusion is that the matter presented by the motion in arrest of judgment is fundamental, and reaches to the very foundation of the prosecution. It shows that the court in which this trial and conviction were had was without any jurisdiction of the case. . . . Such being the case, it matters not in what manner, or at what stage of the proceedings, this want of jurisdiction is presented. If presented for the first time on this appeal, it would be held fatal to the conviction; or, if it affirmatively appeared from the record that the defendant had been convicted of a felony without being indicted therefor by a grand jury, we would set aside the conviction and dismiss the pro-

secution for want of jurisdiction in the trial court, although the defendant had not, in any manner, made the objection."

It is not profitable to pursue this inquiry further. The importance of the question presented seemed to justify, on my part, a brief statement of the grounds of my dissent. I am of the opinion that the failure to impanel a legal grand jury was an error fatal to the jurisdiction of the trial court, and that it was an error of a grave character, and as to a matter absolutely essential to jurisdiction, and hence could not be waived by any act, or failure to act, on part of the defendant. Inasmuch as the jurisdiction of the trial court can only be based upon an indictment found by a grand jury legally organized, and as the indictment in this case was not found by such a body, no conviction can be based thereon; and the question of the court's jurisdiction in such a case can be raised at any time, and in any manner; and when such want of jurisdiction appears, no matter how, it is fatal. For the reasons given the judgment below should be reversed.

NEBRASKA SUPREME COURT.

GLOBE PUBLISHING CO. *et al.*, *Plffs. in Err.*,
v.

STATE BANK OF NEBRASKA, at
Crete, *et al.*

(41 Neb. 178.)

*1. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit.

2. A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in another. The effect, and not the form, of the statute, is to be considered; and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character.

3. When a law prescribes what the liability of a stockholder in a corporation to the creditors thereof shall be,—as that the shareholder shall be liable for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his stock subscription,—such law is one prescribing the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt of the corporation whatever.

4. When such a statute so prescribes and fixes the amount for which a stockholder in a corporation shall be liable, it is in-

*Headnotes by RAGAN, C.

NOTE.—For partnership liability of stockholders in case of defective or illegal incorporation, see note to *Rutherford v. Hill* (Or.) 17 L. R. A. 549, also the recent case of *Wechselberg v. Flour City Nat. Bank* (C. C. App. 7th C.) 28 L. R. A. 470.
27 L. R. A.

tended to be a limitation upon the stockholder's exemption from liability for the debts of the corporation, which, but for the law, he would enjoy.

5. When such a statute is in force, and persons organize themselves into a *de jure* corporation, such statute is incorporated into, and becomes a part of, the charter of such corporation; and the stockholders thereof impliedly assent and agree that their liability for the debts of the corporation shall be as fixed by such law.

6. Such a statute, and the rights of creditors acquired, thereunder, are contractual in their nature.

7. Where a statute provides that, until certain things are done by persons forming a corporation,—such as the filing of its articles of incorporation in the office of a public officer,—the stockholders of such corporation shall be liable for the debts thereof, such a statute is declaratory of the common law.

8. Until the requirements of such a statute have been complied with, a *de jure* corporation does not exist, and the stockholders thereof are jointly and severally liable for the debts contracted by such voluntary unincorporated association of persons; and such a statute, and the rights of creditors acquired thereunder, are contractual in their nature.

9. Where a law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressed to the stockholders of corporations *de jure*; and when such statute declares that all the stockholders thereof shall be liable for the debts of the corporation in case it fails to comply with the requirements of the statute, then the law is designed as punishment of the stockholders for a violation of the law, and is penal.

10. *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 418, and *White v. Blum*, Id. 555, reaffirmed. *Howell Bros. v. Roberts*, 29 Neb. 438, and *Coy v. Jones*, 30 Neb. 738, 10 L. R. A. 653, overruled.

11. Where persons attempt in good

faith to incorporate themselves into a valid corporation, and such a corporation actually enters upon the discharge of corporate functions, and so continues for a considerable time, unchallenged by the state, persons who contract with such a corporation cannot hold the stockholders thereof liable on such contract because it transpires that, by some mistake or oversight, the corporation had never become a technical *de jure* corporation.

12. Section 136 of chapter 11, Gen. Stat. 1873, repealed by an act approved April 6, 1891, was penal.

13. The word "ascertained," in section 4, article 13, of the Constitution, means "judicially ascertained;" and to "judicially ascertain" the amount due from a corporation to a creditor thereof means to have the finding and judgment or decree of a court as to such amount.

14. The creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment and until execution issued upon such judgment has been returned wholly or in part unsatisfied.

15. Such a creditor's cause of action does not accrue until the return, unsatisfied in whole or in part, of an execution issued on a judgment rendered in his favor against the corporation for the corporate debt.

(June 6, 1894.)

ERROR to the District Court for Saline County to review a judgment in favor of plaintiff in an action brought to enforce the individual liability of stockholders in defendant corporation for a corporate debt. *Reversed in part.*

The facts are stated in the opinion.

Mr. Robert Ryan, with Messrs. James W. Dawes and Abbott & Abbott, for plaintiffs in error:

The note declared upon was signed "Globe Publishing Company, by S. L. Andrews, president, L. I. Abbott, M'gr.," and recited that, "we promise to pay."

The note does not bind the Globe Publishing Company.

Zoller v. Ide, 1 Neb. 489; *Gregory v. Lamb*, 16 Neb. 207; *Boyt v. Thompson*, 5 N. Y. 820; *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. 180; *Delta Lumber Co. v. Williams*, 73 Mich. 86; *McOulough v. Moss*, 5 Denio. 575; *Columbus Co. v. Hurford*, 1 Neb. 161; *First Nat. Bank of Central City v. Lucas*, 21 Neb. 280; *Herman, Estoppel*, 1448; *Anderson v. Hubble*, 98 Ind. 570, 47 Am. Rep. 894; *Bigelow, Estoppel*, 699; *Robbins v. McGee*, 76 Ind. 881; *Cole v. Lafontaine*, 84 Ind. 446; *Gilbreath v. Jones*, 66 Ala. 129; *Texas Bkg. & Ins. Co. v. Hutchins*, 58 Tex. 61, 37 Am. Rep. 752.

Section 4 of article 13 of the Constitution provides that "in all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained."

This has the meaning of definitely or conclusively fixed by trial (*State v. Boyd*, 81 Neb. 734) for the same reason that in creditor's bill proceedings it is universally required that by a judgment shall be indisputably fixed the amount to be collected.

Well v. Lankins, 8 Neb. 884; *Weinland v. 37 L. R. A.*

Cochran, 9 Neb. 480; *Crowell v. Horacek*, 12 Neb. 622; *Brooks v. Stone*, 19 How. Pr. 895.

Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution thereon returned unsatisfied.

Baines v. Babcock, 95 Cal. 581, 588; *Baines v. Story* (Cal.) Sept. 28, 1891; *Potter v. Dear* (Cal.) Aug. 10, 1892; *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.* 4 Allen, 248.

The Globe Publishing Company was sued upon its alleged note. As to the Globe Publishing Company the action was *ex contractu*; as to the remaining defendants, the action was for failure to comply with the statute; it was *ex delicto* and these causes of action should not be joined.

Brugman v. Burr, 30 Neb. 406; *Hardy v. Miller*, 11 Neb. 897; *Bliss*, Code Pl. § 412, note 1; *Wiles v. Suydam*, 64 N. Y. 178; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 986; *Chase v. Curtis*, 118 U. S. 458, 28 L. ed. 1041.

Plaintiff must by competent affirmative evidence establish the failure to publish or the stockholders are not liable for the alleged failure to publish.

Patillo v. Smith, 61 Ga. 265; *Goddard v. Rawson*, 180 Mass. 97; *Connell v. Hill*, 30 La. Ann. 251; *Givens v. Tidmore*, 8 Ala. 750; *Gillen v. Riley*, 27 Neb. 158.

The debt arose as early as the fore part of 1884.

The amended petition alleged a failure during the years 1888 and 1889 to publish annual notice of the debts of the Globe Company, and in *Smith v. Steele*, 8 Neb. 118; *Cady v. Smith*, 12 Neb. 628; *Howell Bros. v. Roberts*, 29 Neb. 486; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. ed. 786,—a right of action founded upon sections 136 and 139 of chapter 16, Compiled Statutes, is in no sense founded upon contract. Such actions are penal, and a repealing statute extinguishes all rights of action founded upon a penal statute.

Bennet v. Hargus, 1 Neb. 419; *Butler v. Palmer*, 1 Hill, 825; *People v. Livingston*, 6 Wend. 526; *Dash v. Van Kleeck*, 7 Johns. 477; *Trott v. Warren*, 11 Me. 234; *Macnaulhoe Plantation v. Thompson*, 86 Me. 365; *Johnson v. Hahn*, 4 Neb. 146; *Key v. Goodwin*, 4 Moore & P. 341; *Providence Steam-Engine Co. v. Hubbard*, *supra*; *Veeder v. Baker*, 88 N. Y. 156; *Gadsden v. Woodward*, 108 N. Y. 242; *Cady v. Smith*, 12 Neb. 680; *Hanson v. Donkersley*, 37 Mich. 184.

Messrs. Charles Offutt and Charles S. Lobingier, for defendants in error:

Section 186 of chapter 16 of the Compiled Statutes of 1889:

1. Was not remedial;
2. Did not provide for the recovery of a penalty;
3. Is a part of the charter of the Globe Publishing Company; and is,
4. Rather a part of the contract by virtue of which the shareholders were permitted by the state to do business as a corporation; compliance therewith was the condition on which the shareholders were to escape personal liability, and by incorporating under the laws of Nebraska and accepting the stock of the corporation, every shareholder agreed — con-

tracted—to accept the terms of this section; hence,

5. The repealing act could not affect the rights of creditors which had accrued before the repeal.

Howell Bros. v. Roberts, 29 Neb. 488; *Coy v. Jones*, 10 L. R. A. 658, 80 Neb. 798; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; *Smith v. Steele*, 8 Neb. 118; 1 *Morawetz, Priv. Corp.* § 818; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Doolittle v. Marsh*, 11 Neb. 244; *State v. Cathers*, 25 Neb. 260; *Cook, Stock & Stockholders*, 2d ed. p. 515; *Hathorn v. Calif.*, 69 U. S. 2 Wall. 10, 17 L. ed. 776; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401.

A distinction should be noticed at the outset between the usual liability imposed upon stockholders for the corporate debts and the liability occasionally imposed upon the officers of a corporation for its debts, because of their failure or neglect to perform some duty with which they are charged.

Thompson v. Reno Sav. Bank, 19 Nev. 108; *Flash v. Conn.*, 109 U. S. 871, 27 L. ed. 966; *Chase v. Curtis*, 118 U. S. 452, 28 L. ed. 1038.

Neither the statute nor the authorities warrant the interpretation that the original basis of the indebtedness sued upon must have been incurred during the time of default. The language of the statute is: "All debts of the corporation then existing and for all that shall be contracted before such notice is given."

Smith v. Steele, 8 Neb. 118; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Fisher v. Marvoin*, 47 Barb. 159; *Miliken v. Whitehouse*, 49 Me. 527; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 684.

The burden was upon defendants below to prove publication of indebtedness as required by the statute.

1 *Greenl. Ev.* § 79; 1 *Whart. Ev.* § 367; *Blann v. Beal*, 5 Ala. 857; *Van Etten v. Eaton*, 19 Mich. 187; *Huggins v. Ward*, 21 Week. Rep. 914; *Toole v. State*, 68 Ala. 158; *Nash v. Hall*, 4 Ind. 444; *Gillen v. Riley*, 27 Neb. 158; 25 Am. L. Rev. 808; *Muller v. Dows*, 94 U. S. 445, 24 L. ed. 207; *Legal Idea of Corporations*, 19 Am. L. Rev. 144.

The note is sufficient in form.

Liebacher v. Kraus, 5 L. R. A. 496, 74 Wis. 887; *Latham v. Houston Flour Mills*, 68 Tex. 127; *Heffner v. Brownell*, 70 Iowa, 591.

The note was signed by the proper officers. *Whitaker v. Kilroy*, 70 Miss. 635; *Topeka Primary University of Builders Assn. v. Martin*, 39 Kan. 750; *Sealey v. San Jose Independent Mill & Lumber Co.* 59 Cal. 22; *Kraft v. Freeman Printing & Pub. Assn.* 87 N. Y. 628; *Poole v. West Point Butter & Cheese Assn.* 30 Fed. Rep. 518; *National Park Bank of New York v. German-American Mut. Warehousing & Secur. Co.* 21 Jones & S. 387; *Morrell v. Long Island R. Co.* 15 Daly, 127; *Siemens Regenerative Gas Lamp Co. v. Horstmann*, 24 W. N. C. 896.

Since the corporation was insolvent, the action was properly brought against both it and the stockholders simultaneously; and the question of misjoinder does not arise in the case.

Cropey v. Wiggenhorn, 3 Neb. 115; *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.* 4 Allen, 243; *Smith v. Steele*, 8 27 L. R. A.

Neb. 115; *Howell Bros. v. Roberts*, 29 Neb. 483; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; *White v. Blum*, 4 Neb. 555; *Cook, Stock & Stockholders*, 2d ed. 219; *Morgan v. Lewis*, 46 Ohio St. 1; *Sleeper v. Goodwin*, 87 Wis. 585; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Richards v. Beach*, 23 N. Y. S. R. 296; *Walton v. Coe*, 110 N. Y. 109.

The creditor need not wait for a return of *nulla bona* against the corporation if the latter is insolvent and has ceased to do business.

Shellington v. Howland, 53 N. Y. 371; *Kinoid v. Duvinelle*, 59 N. Y. 543; *Flash v. Conn.*, 109 U. S. 871, 27 L. ed. 966; *Munger v. Jacobson*, 90 Ill. 849; *Toucey v. Bowen*, 1 Biss. 81; *Turner v. Althaus*, 6 Neb. 84; *Simpson v. Greeley*, 8 Kan. 586; *Finley v. Hayes*, 81 N. C. 363; *Field v. Hurst*, 9 S. C. 277; *Wiles v. Suydam*, 64 N. Y. 173; *Brugman v. Burr*, 30 Neb. 406.

There has been no release of the stockholders' liability, as the latter is primary and not that of sureties.

Hanson v. Donkersley, 87 Mich. 187; *Coleman v. White, supra*; *Shaffer v. Moriarty*, 46 Ind. 9; *Brown v. Herr*, 21 Neb. 113.

Petition for rehearing.

The repealing of the Act of April 6, 1891, is in violation of the Federal Constitution in that it impairs the obligation of contracts, because—

The previous decisions of this court holding that the liability imposed by section 136 of the Corporation Act of Nebraska was contractual had become and were a rule of property in Nebraska when the Act of 1891 was passed; this court cannot divest rights acquired in reliance upon the rules of property announced by those decisions (whether the decisions were right or wrong is immaterial), and the legislature must be presumed to have enacted the repealing statute with respect to this rule of property and the adjudged construction of the act which they repealed.

Howell Bros. v. Roberts, 29 Neb. 483; *Coy v. Jones*, 10 L. R. A. 658, 80 Neb. 798; *Smith v. Steele*, 8 Neb. 118; *Doolittle v. Marsh*, 11 Neb. 244.

The decisions now overruled formed a rule of statutory construction which cannot be changed without impairing vested rights.

Douglass v. Pike County (Mo.) 101 U. S. 677, 25 L. ed. 968; *Inland Revenue Comrs. v. Harrison*, L. R. 7 H. L. 9; *Sutherland, Stat. Constr.* p. 394, § 810; *Bates v. Relyea*, 23 Wend. 841; *Fisher v. Horicon Iron & Mfg. Co.* 10 Wis. 355; *Smith v. Steele, supra*; *Godman v. Converse*, 88 Neb. 657.

The decisions now overruled laid down a rule of property or business which cannot now be changed without destroying vested contractual rights acquired thereunder.

21 Am. & Eng. Encyclop. Law, p. 439; *Allen v. Fairbanks*, 45 Fed. Rep. 445; *Chase v. Curtis*, 118 U. S. 452, 28 L. ed. 1038; *Kearny v. Buttes*, 1 Ohio St. 362; *Kneeland v. Milwaukee*, 15 Wis. 455; *Fearne, Contingent Remainders*, p. 264; *Weich v. Sullivan*, 8 Cal. 188; *Hihn v. Courtis*, 81 Cal. 402; *Grignon v. Asdor*, 43 U. S. 2 How. 843, 11 L. ed. 292; *Sutherland, Stat. Constr.* § 833.

The liability imposed by section 136 is con-

tractual because a part of the charter of every business corporation in Nebraska and a condition upon which shareholders in corporations are permitted to do business as a corporation without any risk to their private fortunes; hence, the right to recover under this section had become invested in the defendant in error when the repealing act was passed, and the repeal could not affect rights of action which had become complete before the enactment of the repeal.

California v. California Pac. R. Co. 127 U. S. 41, 32 L. ed. 157; *Horne Ins. Co. of New York v. New York*, 184 U. S. 599, 33 L. ed. 1029; *Paul v. Virginia*, 75 U. S. 8 Wall. 181, 19 L. ed. 360; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773.

A penal statute in the sense that its repeal destroys the right of action for acts done or prohibited to be done prior to its repeal, is a statute which imposes a liability solely for the purpose of punishment, and to deter others from offending in like manner, without any idea of reparation to the party aggrieved; and statutes are not penal in the sense named which imposes a liability for certain acts, primarily as a preparation to the party injured, and not for the sole purpose of punishing the one who violates the law. Under statutes of the latter class, the right of recovery under the statute is vested as soon as the act prohibited is committed, and a repeal of the statute after the action accrues cannot affect that right.

Sutherland, Stat. Constr. § 808; *Huntington v. Attrill*, 146 U. S. 666, 36 L. ed. 1127; *Cook, Stock & Stockholders*, 2d ed. § 223; *Com. v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 305; *Bennet v. Hargus*, 1 Neb. 419; *Streubel v. Milwaukee & M. R. Co.* 12 Wis. 74; *United States v. Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403; 2 *Morawetz*, Priv. Corp. § 379.

In determining whether the liability imposed by statutes, such as section 136, is contractual or penal, we find that where the liability for failure to comply with the requirements of the corporation law is imposed upon the corporate officers, it is penal; where it is imposed upon the entire body of stockholders, it is contractual.

Cook, Stock & Stockholders, 2d ed. § 223; 2 *Morawetz*, Priv. Corp. 2d ed. p. 849, § 377; *Queenan v. Palmer*, 117 Ill. 627; *Breitung v. Lindauer*, 37 Mich. 217; *Wiles v. Suydam*, 64 N. Y. 173.

Every case relied upon or cited by the commissioner to show that the Nebraska statute was penal, but one (and that one did not involve the effect of a repeal), was a case imposing a liability on officers, either directors or trustees.

The tests of penal liability as intimated in the commissioners' opinion are contrary to the authorities.

This liability is not in the nature of a penalty for a breach of duty.

Aspinwall v. Sacchi, 57 N. Y. 331; *Flash v. Conn*, 16 Fla. 428, 26 Am. Rep. 721; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966; *Terry v. Calnan*, 13 S. C. 220; *Carrol v. Green*, 92 U. S. 510, 23 L. ed. 738; *Hathorn v. Culef*, 69 U. S. 2 Wall. 10, 17 L. ed. 776; *Hodg-* 37 L. R. A.

son v. Cheever, 8 Mo. App. 319; *Bullard v. Bell*, 1 Mason, 298; *Central Agricultural & Mechanical Assn. v. Alabama Gold L. Ins. Co.* 70 Ala. 134; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401.

The apparent distinction between limited and unlimited liability, making the former alone contractual, is opposed by the authorities.

Conant v. Van Schaick, 24 Barb. 98; *Corning v. McCollough*, 1 N. Y. 47, 49 Am. Dec. 287; *Allen v. Sewall*, 2 Wend. 327; *Lowry v. Inman*, 46 N. Y. 126; *Kennedy v. California Sav. Bank*, 97 Cal. 93; *Dennis v. Los Angeles County Super. Ct.* 91 Cal. 548; *Carver v. Braintree Mfg. Co.* 2 Story, C. C. 450.

Ragan, C., filed the following opinion:

The State Bank of Nebraska at Crete, Neb., sued the Globe Publishing Company and the stockholders thereof in the district court of Saline county to recover the amount of a promissory note owing by said Globe Publishing Company to the said State Bank. Both the bank and the Globe Publishing Company were domestic corporations, having their principal places of business in said Saline county. The bank had a verdict and judgment, and the stockholders of the publishing company bring the case here for review.

The liability of the stockholders of the publishing company for the debt due from it to the bank was based on the failure of the publishing company to publish an annual notice of its existing debts, as provided by section 136, chap. 11, Gen. Stat. 1873, in force at the time the debt sued for here was contracted. That section is as follows: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county or counties in which the business is transacted; and in case there is no newspaper printed therein, then in the nearest newspaper in the state, of the amount of all the existing debts of the corporation; which notice shall be signed by the president and a majority of the directors; and, if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given." After this suit was brought, but before judgment was rendered therein, the legislature repealed this section 136, without a saving clause. The argument of counsel for plaintiffs in error now is that the repeal of said section abated this action. Whether this is true depends upon the nature of the statute repealed. If it was a statute contractual in its nature; if the right of action acquired by the bank against the stockholders of the publishing company by virtue of said statute, and the corporation's violation thereof, was a vested right,—then the repeal of the statute could not and did not take it away. But if the statute repealed was penal in its nature, then its repeal abated the action.

1. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit. *Bennet v. Hargus*, 1 Neb. 419; *Knox v. Baldwin*, 80 N. Y. 610; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 97 N. Y. 651; *Gregory v.*

German Bank of Denver, 8 Colo. 332, 25 Am. Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217; *Yeaton v. United States*, 9 U. S. 5 Cranch, 281, 8 L. ed. 101; *Norris v. Crooker*, 54 U. S. 18 How. 429, 14 L. ed. 210.

2. Was this a penal statute? This question must be answered by the authorities.

In 1948 the legislature of New York enacted a statute governing manufacturing corporations. Section 12 of that Act was as follows: "Every such company shall annually within twenty days from the first day of January, make a report which shall be published in some newspaper in the town, city, or village, or if there be no newspaper published in said town, city, or village then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of the capital and the portion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees and shall be verified by the oath of the president or secretary of such company and filed in the office of the county where the business of the company shall be carried on; and if any such company shall fail so to do all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made." A New York corporation organized under this law failed to give the annual notice of its indebtedness, as provided by said section 12, and during such default became indebted to a bank. The bank then sued the trustees of the corporation for the amount of the debt. The court of appeals of New York, in *Merchants' Bank of New Haven v. Bliss*, 85 N. Y. 412, discussing said section 12 and another section, said: "The liability of the trustees under said section 12, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but, upon failure to file a report, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted. These provisions appear to be severally punitive, inflicted, on grounds of public policy, for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporation. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute. There never was any such remedy or cause of action, in whole or in part, at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 13 of the General Act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained. But those elements have nothing to do with the actions given by these sections, nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes

place. The right of action is given to the creditors, and they must be held to be the parties aggrieved. For these reasons, I am satisfied that sections 12 and 13 impose a penalty." The question of the nature of this section 12 arose again, and was discussed and decided by the court of appeals of New York, in *Miller v. White*, 50 N. Y. 137, and the court said: "It will be observed that this is a highly penal act, extremely rigorous in its provisions." In *Wiles v. Suydam*, 64 N. Y. 173, the statute was again before the New York court of appeals. In that case the Imperishable Stone Block Pavement Company, a domestic corporation, became indebted to Wiles *et al.* Suydam was a stockholder in the corporation, and indebted to it on his stock subscriptions. He was also a trustee of the corporation. The suit was brought by Wiles *et al.* against Suydam to recover the amount of the debt owing them by the pavement company; and Wiles set out in his petition against Suydam two causes of action, viz., his indebtedness on his stock subscription to the stone Pavement Company, and the failure of that corporation to publish annually the statement of its existing debts. The court held that the indebtedness of Suydam on his unpaid subscription constituted one cause of action against Suydam, and in discussing the other right of action of Wiles against Suydam, originating by the failure of the corporation to publish its annual statement, said: "The allegations against the defendant as trustee also constitute a distinct and perfect cause of action. Here the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty, in not filing a report showing the situation of the company." The nature of this section 12 has been before the New York court of appeals, and the construction placed upon said section in the leading case (*Merchants' Bank of New Haven v. Bliss*, *supra*); and reaffirmed in the following cases: *Easterly v. Barber*, 65 N. Y. 252; *Knos v. Baldwin*, 80 N. Y. 610; *Vceder v. Baker*, 83 N. Y. 156; *Pier v. Hanmore*, 86 N. Y. 95; *Stokes v. Stickney*, 96 N. Y. 323; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, *supra*. And in *Gadsden v. Woodward*, 103 N. Y. 242, the nature of said section 12 was again before the New York court of appeals, and the court said: "This action is brought against the defendant to recover a debt due by a manufacturing corporation, of which he was a trustee, and he is sought to be made liable therefor on the ground that he failed to make the annual report required by the general manufacturing law. The action is not to recover a debt which he owes, but to impose upon him, as a penalty for his default, the payment of the debt of the corporation. We have repeatedly held that such an action is for a penalty or forfeiture. The penalty sought to be enforced against the defendant does not arise out of any contract obligation, but is imposed by the statute for disobedience of its requirements." This section 12 of the New York law was construed by the Supreme Court of the United States in *Chase v. Curtis*, 113 U. S. 452, 38 L. ed. 1038, the court saying of said section 12: "But, as we have already seen, the statute involved in this discussion is not a remedial statute, to be

broadly and liberally construed, but is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability." Section 15 of chapter 18 of the Revised Statutes of 1868 of the state of Colorado is a copy of section 12 of the New York Act. The nature of this section 15 of the Colorado Act was before the supreme court of that state in *Gregory v. German Bank of Denver*, 3 Colo. 532, 25 Am. Rep. 760, and of that statute that court said: "This statute is, in its nature, penal. It prescribed a determinate penalty for neglect of a duty imposed by law upon the trustees of corporations organized under our general incorporation act. The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract but arises from misconduct in office." This case was reaffirmed by the supreme court of Colorado in *Larsen v. James*, 1 Colo. App. 818.

A statute of Michigan required annual reports of certain corporations to be filed, and provided that, if the directors neglected to file such reports, they should be liable for all the debts of the corporation contracted during the period of such neglect. Construing that statute, the supreme court of that state held that the liability imposed was in the nature of a penalty, and conferred no contract obligation, upon which creditors could rely.

A statute of Connecticut provided that, in the case of every corporation, certificates showing their condition should be filed annually by the president and secretary with the town clerk, and that in case of neglect those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The supreme court of that state, construing this statute in *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146, said: "We do not see how it is possible to construe this statute as creating, or attempting to create, any relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or, in other words, to make the debt of one person the debt of another. There was no privity between Hotchkiss and the plaintiff. They had no transaction with each other, and the former owed the latter no private duty, from which a promise might be implied." This Connecticut statute came before the Supreme Court of the United States, and its nature was construed by that court, in *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. ed. 786, and that court held that the Connecticut statute was penal, and must be strictly construed.

The supreme court of Illinois, in *Diversey v. Smith*, 108 Ill. 378, 42 Am. Rep. 14, defines a "penal statute" thus: "A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in the other. The effect, and not the form, of the statute, is to be considered; and if its object is clearly to inflict a punishment on a party for doing what is prohibited or failing to do what

is commanded to be done, it is penal in its character."

Cook on Stock and Stockholders, 2d ed. § 223, in discussing the enforcement of the statutory liability of stockholders in the courts of a state other than the one in which said corporation was created, uses this language: "In general, when the courts of one state are asked to enforce the statutory liability of stockholders in a corporation created by another state two things are to be considered: First, Is the statutory liability itself a contract liability, or a mere penalty? The law is clear that the courts of one state will not enforce penalties imposed by another state. But the usual statutory liability of stockholders is not a penalty. The ordinary statutory liability of stockholders is a contract liability, and will be enforced as such by the courts of all the states. A different rule prevails as to the statutory liability of corporate officers for failure to file reports, or give certain notices or make certain contracts. Such liability is generally construed to be penal, and will not be enforced by the courts of other states."

The section of the Nebraska statute under consideration is almost a literal copy of the eighteenth section of the first article of the corporation act of the state of Missouri, approved March 19, 1845; the section of the Missouri law being in the following words: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county where the corporation is established, and in case no paper is printed therein then in the nearest paper, of the amount of all the existing debts of the corporation; which notice shall be signed by the president and a majority of the directors; and if any of the said corporations shall fail to do so all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given." A corporation of that state having failed to publish an annual notice of its existing debts, and during such default having become indebted, an action was brought against all the stockholders of the corporation for the debt so contracted, on the ground of the default in publishing the annual notice required by the section just quoted. The right of the creditor to maintain the action against the stockholders depended upon whether the statute was in its nature penal; and the supreme court of the state of Missouri, in *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214, decided that the statute in question was a penal one. The court said: "Our opinion in this case is based entirely upon the penal character of the statute we are called upon to construe. The corporation is required to publish an annual notice of its condition, for the information of the public; and the failure to do so renders the stockholders liable for a specified class of demands, existing prior to, or at the time of, such publication. This liability in the event of there being no required publication does not depend upon the actual injury which the failure to publish may have occasioned in a case, but is absolute, depending only on the proof of publication or no publication. Such a statute can be regarded in no other light than a penal one."

Thus far, we have been reviewing authorities which show that the Nebraska statute under consideration (and statutes like it) is a penal one. We now direct our attention to the argument of counsel for the defendants in error—and the authorities cited by them—that section 136 of the Nebraska statute is, in its nature, contractual; in other words, that the right of action given thereby to the creditors of a corporation against its stockholders for the failure of the corporation to publish the annual statement of its indebtedness is a right of action arising by contract, and therefore a vested right, and one that the legislature could not take away by repealing the statute. It is contended that, as section 136 was in force at the time of the organization of the Globe Publishing Company, it became a part of its charter, and that the stockholders thereof, by virtue of such statute, and the organization of such corporation while it was in force, impliedly contracted and promised that, in case the corporation failed to publish its annual statement they (the stockholders) would pay all the debts that the corporation contracted during the period of such default. But counsel loses sight of the distinction between the liability of a member of a voluntary unincorporated association for the debts thereof, as it existed at common law, and as fixed by statutes declaratory thereof, and the statutory liability of a stockholder of a corporation *de jure*. When the law prescribes what the liability of a shareholder shall be,—for instance, that such shareholder shall be liable to the creditors of the corporation for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his subscription to the stock of such company,—the law is then speaking of, and fixing, the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt whatever of such corporation. And, when a statute so prescribes and fixes the amount for which the stockholders in a corporation shall be liable, such a law is intended to be a limitation upon the stockholder's exemption from liability for the debts of the corporation, which he would otherwise enjoy; and persons who organize themselves into a *de jure* corporation when such a statute is in force incorporate it into, and it becomes a part of, their charter, and they impliedly agree and assent that their liability for the debts of the corporation shall be as fixed by such a law. Where a statute provides that until certain things are done by persons forming a corporation,—such as the filing of its articles of association in the office of a public officer,—the stockholders in such corporation shall be liable for the debts thereof, such a statute is only declaratory of the common law. Until the requirements of the statutes have been complied with, a *de jure* corporation would not exist, and the parties thereof would be jointly and severally liable for all the debts contracted by such voluntary unincorporated association of persons. At least, since the time our Norse ancestors settled on the shores of the Baltic sea, it has been the law that, where two or more persons engaged in a common enterprise, each one was liable for the act of the others,

and for the debts incurred by the others, to aid of the common object for which the association was formed, or the enterprise undertaken. It is evident that the statute which makes all the stockholders of a corporation liable for the debts thereof until the requirements of the statute have been complied with, necessary to make such a corporation one *de jure*, cannot be considered a penal statute, as such statute adds nothing to the liability of such parties, nor takes away any right which a creditor of such parties might have had. But where the law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressing itself, not to *de facto* corporations or copartnerships or unincorporated associations, but to corporations *de jure*, and the stockholders of such corporations; and, when such a statute declares that all the stockholders of such a corporation shall be liable for all the debts of the corporation if it fails to comply with the requirements of the statute, then such a law is designed as a punishment of the stockholders, and is penal.

Among the authorities relied upon by the eminent counsel for the defendants in error to sustain their argument that the section of the Nebraska statute under consideration was contractual in its nature is the case of *Hathorn v. Caley*, 69 U. S. 2 Wall. 10, 17 L. ed. 776. An examination of that case, however, discloses that it does not by any means sustain the contention of counsel. A statute of Maine, passed in 1836, provided that the shares of the individual stockholders of a corporation should be liable for the debts of the corporation, and, in case of deficiency of attachable corporate property or estate, the individual property rights and credits of the stockholder should be liable for the corporation's debts, to the amount of the stockholder's stock. A corporation organized under this law became indebted, and soon after the debt was contracted the legislature of the state repealed the law making the stockholder of a corporation individually liable to a creditor thereof. The creditor, however, sued the stockholder, alleging that the statute referred to was contractual in its nature, that the right of action he had acquired against the stockholder was a vested right, and that it was not within the power of the legislature of Maine to take that power away by repealing the statute. This contention the Supreme Court of the United States sustained in the case just cited. Another case relied on by counsel to support this argument is *Flash v. Conn*, 169 U. S. 371, 27 L. ed. 966. The tenth section of the corporation law of the state of New York provided that all the stockholders of every company incorporated under the act should be severally and individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them in such corporation. A corporation having become indebted the creditors sued its stockholders for the debt, under the section just quoted; and the Supreme Court of the United States, in construing said section 10, held that the liability created thereby was contractual in its nature. With the doctrine announced by the two cases last cited we entirely agree. The statute of the state of Maine, which fixed the liability of

a stockholder of a corporation for the debts thereof at the amount of the stock held by him in such corporation, was contractual; and whoever became a stockholder in a corporation while that law was in force impliedly assented and agreed that he would be liable for the debts of the corporation, to an amount equal to the stock held by him therein. It was a fixed, ascertained, and determined liability at the time he became a member of the corporation. It was a law addressing itself to stockholders of *de jure* corporations, and a law of limitation upon the exemptions that such stockholders would have otherwise enjoyed, but for such statute. And the same may be said of section 10 of the New York Law, construed by the supreme court in *Flash v. Conn.* But it is said that this court is committed to the doctrine of the contractual nature of the statute under consideration; and, to sustain this contention, we are cited to *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; and *White v. Blum*, Id. 555. But these cases decide, and decide only, that where persons have attempted to form a corporation, until they shall have complied with the requirements of the statute for that purpose, they are jointly and severally liable for the debts of such association. This conclusion is right and we adhere to it. But the conclusion reached in these cases resulted not alone from the statute, but could and would have been the same had no statute on the subject existed. Until the statute had been complied with, the Omaha Smelting Company and the Midland Pacific Railroad Company did not become corporations *de jure*; and until they had become such corporations the parties organizing them were simply members of voluntary unincorporated associations, and as such were liable, both at common law and under the statute, for the debts of such associations, contracted by a member thereof within the scope of his authority, and for the purposes for which the associations existed. But we do not mean by anything said here to deny the correctness of the doctrine, expressed in many cases, that where persons attempt, in good faith, to incorporate themselves into a valid corporation, and, in such corporation's name, actually enter upon the discharge of corporate functions, and so continue for a considerable time, unchallenged by the state, persons who contract with such corporation cannot hold the stockholders thereof liable on such contract because it transpires that, by some mistake or oversight, the corporation had never become a technical *de jure* corporation. On the contrary, we approve of that rule.

It is conceded by counsel for defendants in error that section 12 of the New York Act, construed in the cases cited above, was and is penal; but it is said that, as that act made the trustees of the corporation liable for not publishing a notice of the corporation's existing debts, a distinction exists between the nature of that act and section 186 of the Nebraska Act, wherein the liability is made to attach to all the stockholders of the corporation. We have reflected much upon this argument, and confess our inability to comprehend the distinction which counsel would draw. We have been unable, after a patient search, to find any decided case or any text-writer supporting the

counsel's argument. It may be that the directors of a corporation would be liable for fraud or deceit practiced by them in the name of the corporation upon another; and it may be that they would be liable for any damage which another should sustain, in dealing with such corporation, by the failure of such directors to comply with the law in force, governing the corporation. But, if such liability exists, it is not a statutory liability, but a common-law liability, and in either of the cases supposed the liability of the directors would be measured by the damages sustained. If section 12 of the New York Act is penal, because it compels the directors to pay the debts of the corporation because they (its managing officers) did not comply with the requirements of the law, it would seem that a statute which makes all the stockholders of a corporation liable for the default of the corporation's directors would also be penal. If the section of the Nebraska statute under consideration is not a penal one, we are at a loss to know how the legislature could frame a penal statute. It certainly is not a statute of rewards. True, the punishment inflicted is pecuniary, but by the provisions of this statute a stockholder who owns \$10 of stock in a corporation may, under certain contingencies, be compelled to pay a debt of \$10,000 that he did not owe—that he did not contract,—and suffer that liability because of the default of another. True enough, the object of the statute was to annually notify to the world the financial condition of the domestic corporations of the state, that parties having transactions with them might have a basis upon which to do their business safely. But this is not the only object of the statute. It is the exercise by the state of its police power. It is based upon principles of public policy, and it was intended as an incentive to stockholders of corporations to see to it that the law of the state was obeyed, and, if they neglected their duty in that regard, to punish them for such neglect. We cannot recognize the argument that persons were induced to give the corporations of the state credit because of the existence of this section 186, for this would be to concede that the creditors parted with their property upon the understanding that when they did so the officers of the corporation would violate the law which it was their duty to obey.

But, again, counsel for defendants in error say that the nature of the statute under consideration is no longer an open question in this court, as we have decided that the statute was not penal, but contractual. In *Hovell Bros. v. Roberts*, 29 Neb. 483, and again in *Coy v. Jones*, 30 Neb. 798, 10 L. R. A. 658, we did so decide. A somewhat extensive re-examination of the subject, however, constrains us to say that the conclusion reached by us in those cases was wrong, and they must be overruled. We did say, in those cases, that said section 186 of the Nebraska statute was contractual in its nature. We were mistaken. The rule we announced in those cases is not supported by the weight of authority, nor, indeed, is it supported by any authority that we have been able to find. We conclude, therefore, that said section 186 was a penal statute, and that all rights of action which accrued thereunder to the creditors

of a corporation against the stockholders thereof, and which had not been reduced to judgment, were abrogated by the repeal of said section.

This suit was brought against the Globe Publishing Company and the stockholders thereof jointly. Was the action against the stockholders prematurely brought? We think it was. Cook on Stock & Stockholders, sec. 219, thus lays down the rule: "Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets." We have no doubt but that this is the general rule, and the better practice, especially in the absence of a statute which authorizes a different procedure, but we are not concerned with what the rule may be in other states and courts. Section 4, article 12, of the Constitution, provides that: "In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." The word "ascertained," in this provision, we take to mean "judicially ascertained," and to "judicially ascertain" the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. Such an ascertainment of a debt due from a corporation could then be ascertained, and ascertained only, within the meaning of this constitution, in a suit brought by a creditor of a corporation against it; not against the

stockholders thereof, nor against the stockholders and corporation jointly. The expression in the constitutional provision just quoted above, "that after the corporate property shall have been exhausted," means "exhausted by judicial proceedings;" that is, when executions issued on judgments or decrees rendered against corporations shall be returned unsatisfied. This constitutional provision is the supreme law of the land, and we are not at liberty to, or desirous of, evading it or construing it away. We think, therefore, that the creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued upon such judgment has been returned wholly or in part unsatisfied. It follows from this that a creditor's cause of action against the stockholders of a corporation under said section 136 would not accrue until such creditor had sued the corporation for the corporate debt, obtained a judgment thereon, and an execution issued on such judgment had been returned, at least in part, unsatisfied. The judgment of the district court is affirmed as to the Globe Publishing Company and reversed as to all stockholders who prosecuted error, and the action as to them is dismissed.

Judgment accordingly.

Norval, Ch. J., concurs in the judgment solely on the ground last stated in the above opinion.

Ryan, C., having been of counsel, took no part in the decision.

Rehearing denied.

OHIO SUPREME COURT.

John M. MORGAN, Plff. in Err.,

v.

Isalah HUDNELL.

(62 Ohio St. —)

***1. The owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity.**

***2. But if the animal breaks into the close of another, and there damages the real or personal property of the one in possession, the owner of the trespassing animal is liable without reference to whether or not such animal was vicious and without reference to whether such propensity was known to the owner.**

* Headnotes by the Court.

NOTE.—The doctrine of the above case to the effect that *scienter* of the vicious character of an animal is unnecessary to render the owner liable for injuries committed by the animal when trespassing, is fully supported by the very few decisions. 27 L. R. A.

3. One tenant in common of a pasture field may maintain an action against the owner of a domestic animal which breaks into the field and injures the live stock of such tenant rightfully grazing therein; and the other tenants are not necessary parties to such action.

(April 28, 1895.)

ERROR to the Circuit Court for Ross County to review a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the killing of plaintiff's horse by one of defendant's horses. *Affirmed.*

Statement by Spear, J.:

The action below was for the unlawful killing of Hudnell's horse by a horse belonging to plaintiff in error. The evidence at the trial tended to show that Hudnell's horse was rightfully in a pasture field belonging

to which have been rendered upon the question. They are mostly comprised in the brief list cited in the opinion of the court. As to the liability for acts of such animals on the owner's premises, see note to Conway v. Grant (Ga.) 14 L. R. A. 198.

to one Houser; "that under a contract with said Houser, plaintiff had the right to keep the horse in question in Houser's pasture field on pasture, and that on the night he was killed, the said horse was in said pasture field under said contract, along with horses belonging to other parties who had like contracts, and who, as well as the plaintiff, paid a certain price per month for said right, and plaintiff offered other testimony tending to prove that defendant's horse had broken over the part of said fence to be kept up by defendant's wife, into the field of said Houser, and had while in said field, attacked and killed plaintiff's horse, and testimony tending to show that defendant's horse was breaching and that he knew it, and tending to show that defendant's horse was vicious and that he knew it, and testimony was offered by defendant tending to show to the contrary."

The court charged the jury among other instructions the following:

"(1.) If the defendant's horse was at the time trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month, for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant is liable for the injury, whether he knew or not of the vicious propensity of his horse.

"(2.) If the jury find that the defendant's horse was in pasture on his wife's premises, and while there broke over her part of the partition fence, separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not."

A verdict for plaintiff followed and judgment thereon, to reverse which this proceeding in error is brought.

Messrs. Mayo, Yapple & Phillips for plaintiff in error.

Mr. John C. Entrekin for defendant in error.

Spear, J., delivered the opinion of the court:

The contention of the plaintiff in error is that the charge of the court is wrong, and that there should have been no recovery in favor of Hudnell, because, (1) the owner of domestic animals cannot be held liable for injuries committed by them unless the owner has notice of their vicious propensities, and (2) the plaintiff below, not being in possession of the lot where his horse was being pastured, could not maintain an action of trespass.

Undoubtedly it is settled law that the owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, 37 L. R. A.

and that the owner had notice of such vicious propensity.

But we regard it as equally well settled that if the animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the trespassing animal is liable without reference to whether such animal was vicious and without reference to whether such propensity was known to the owner, for the law holds a man answerable not only for his own trespass but for that of his domestic animal. The natural and well-known propensity of horses, as well as other cattle, is to rove, and the owner is bound to confine them on his own land; so that, if they escape and do mischief on the land of another under circumstances where the other is not at fault, the owner ought to be liable. *Beckwith v. Shoredike*, 4 Burr. 2092; *Angus v. Radin*, 5 N. J. L. 815, 8 Am. Dec. 626; *Dolph v. Ferris*, 7 Watts & S. 387, 42 Am. Dec. 246; 3 Bl. Com. 211.

The question, then, in this case, is whether or not Hudnell was in possession of the pasture field in such sense as to authorize him to maintain the action.

It is the duty of this court to give such construction to the record as will sustain the judgment of the court below if it can be reasonably done.

Looking to the bill of exceptions we find that the plaintiff "had the right to keep the horse in question in Houser's pasture-field on pasture," and "paid a certain price per month for such right." That is, Hudnell, the plaintiff, was keeping the horse there; Houser, the owner of the land, was not keeping the horse there. It does not appear that he was keeping any animal there. Other persons who had like right with plaintiff had their horses in the same field on pasture. It does not appear that Houser reserved any right to use the field for his own stock, nor for the stock of others. Indeed, the circumstances are consistent with the idea that Houser had, for the time these contracts remained in force, given up the possession to those who had thus hired the pasture. In this view they were, then, the owners of the growing herbage. The rule that tenants so in possession may maintain trespass against even the owner of the fee, seems to rest on reason and abundant authority. *Crosby v. Wadsworth*, 6 East, 602; *Tompkinson v. Russell*, 9 Price, 287; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; 1 Addison, Torts, 371, 372. It would follow from this that had damage to the herbage been the ground of complaint, the tenants might have maintained a joint action for trespass.

If the conclusion just stated is justified, and we think it is, the only question remaining is as to the right of one of several tenants in possession, holding by separate contracts, to maintain an action in trespass, where the damage for which he seeks to recover is to his own individual property rightfully in the close, by virtue of his rental contract. That the damage is to personality will not, according to the authorities, stand in the way of a recovery. True, such damage is treated by many authorities as an incident, and in the

nature of aggravation. But this distinction seems to have arisen from a desire to preserve the common-law form of action, and at the same time not deny the injured party a remedy. The old action for trespass *quare clausum fregit* was strictly an action for damages to the land following a unlawful entry, and hence could not be resorted to for the purpose of a recovery for damages to personalty only. But forms of action not being important in this state, since the adoption of the code, we need not be embarrassed by any such distinction. The question in every case is not, What is the proper form of action? but, Has the party a right of action?

Upon this phase of the inquiry we do not find authorities. But, upon principle, why should not one of several tenants in common have such an action? Had he been in exclusive possession no doubt would exist. Why should the mere fact that others are interested in the growing herbage bar a recovery? They are not concerned in the special damage suffered by plaintiff; and holding, not by virtue of a joint contract, but by separate several contracts, are not necessary or proper parties. It cannot prejudice the defendant that others having the same right of pasture do not join in the action, for they have no concern with it. If the claim were for damage to the herbage, the case would be different, inasmuch as it might be urged that the defendant's entire liability should be determined in one action, and hence all should be parties. In Virginia and Vermont it is held that even in that case one alone may maintain the action, though it appears that the trend of authority is the other way. Probably the latter view would prevail in this state. And yet, if it were attempted to recover in one action for damages to the real estate suffered by all and for damages to the personalty of one alone, a vexed question of

misjoinder would arise, because all the parties would not be interested in each ground of action. To hold, therefore, that one tenant could have no standing to recover for damages to his personalty save by joining with him the other tenants, is practically to refuse him any relief whatever. And this would in effect be to say that the law will take cognizance of a claim for damage to real estate, though it may amount only to a few cents, and refuse a hearing to a claim for destruction of personal property under like facts which may reach hundreds of dollars. It would be to say farther that a party suffering injury to his personalty by an animal trespassing upon premises of which he has sole possession may be made whole, but if it happens that the possession is shared by others he is without remedy. Such a result would cast discredit on the power of the law to work out justice.

To deny the right of the injured party to maintain action for damage to his separate personalty upon any of the grounds referred to would, we think, be to interpose a technicality for the purpose of defeating justice. It is the duty of courts, as we understand it, to override mere technicalities where they stand in the way of doing justice between man and man.

Stated in brief, the case is this: The plaintiff's horse was in a close were the owner, having rightful enjoyment, had a right to keep him; he had a right in the field; the defendant's horse, by breaking the fence which his landlord was bound to maintain, became a trespasser, and while thus unlawfully invading the close as a trespassing animal inflicted the damage to plaintiff's property. For such wrong we think the law should, and does, afford a remedy.

In this view the charge of the court was right, and *the judgment will be affirmed.*

37 L. R. A.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1894, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES.
- VI. TORTS; NUISANCE; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Common law.

That the common law of one of the states in this country may include the practice which has grown up there and was never known in England, is the doctrine of a Pennsylvania case which recognizes the right to give judgment by default on indictment of a corporation for a misdemeanor, although no precedents were found in criminal cases. (Pa.) 281.

Curative statute.

Invalid county warrants are held to be made valid by a subsequent statute so as to defeat a plea of *ultra vires*. (N. Dak.) 696.

Plumbers.

The constitutionality of a statute making it unlawful to do business as an employing or master plumber without examination and certificate of competency, and compliance with regulations of the board of inspectors as well as the board of health, is sustained as an exercise of police power. (N. Y.) 718.

Tenement house.

A statute compelling owners of tenement houses on order of the board of health to provide water on every floor is sustained as constitutional. (N. Y.) 710.

Privileges of citizen.

The constitutional privileges and immunities of a citizen of Indian blood are held not to be infringed by a statute prohibiting the sale or giving of intoxicating liquors to any Indian. (Cal.) 158.

Garbage monopoly.

Restricting the business of scavengers to clean cess-pools, privy vaults, and remove garbage, by making it unlawful for any except licensed appointees of the mayor to do such business, is held to be an unconstitutional attempt to create a monopoly. (Kan.) 545.

A municipal contract giving the exclusive right to the removal of garbage is upheld against a claim that it violates the constitutional provision against local or special laws granting an exclusive privilege or franchise. (Neb.) 540.

27 L. R. A.

Vested defense.

The right to a complete defense under the statute of limitations is held to be one of the rights protected by the constitution against subsequent change of law. (Ky.) 560.

Cattle guards.

A statute requiring railroads to build cattle-guards on demand of adjacent land owners is held constitutional. (Ala.) 268.

Use of public money.

The use of the money of a city or county to pay the expense of treatment and cure of an impecunious habitual drunkard is upheld under a Maryland statute. (Md.) 648.

The rule that taxes can be levied only for public purposes is enforced in a Maryland case where a statute authorized a county to issue bonds in aid of a railroad company which was in the hands of a receiver, with a provision for first payment from the proceeds of claims due to residents of that county. (Md.) 73.

Taxes.

Real estate mortgages owned by a nonresident are held not to be "property in the state" for purposes of taxation, in the absence of any express provision of statute for taxing. (Mont.) 797.

The Pennsylvania limited partnership is held in New Jersey to be a corporation for the purpose of taxation. (N. J.) 634.

Interstate commerce.

A tax on a foreign pipe-line company by way of license, being based on gross receipts for transportation in the state, which is taken to be such proportion of its gross receipts from the whole line as the length of that part in the state bears to the length of the whole line, is held not to be an unconstitutional burden on commerce. (N. J.) 684.

There are several interesting questions as to interstate traffic in intoxicating liquors in an Iowa case, arising before the Wilson Bill was passed, which holds, among other things, that the protection of the original package is not lost by taking a small quantity therefrom as a

test for the purpose of exercising an option as to rejecting the purchase. (Iowa) 219.

A claim that a telegram was interstate commerce although sent between points in the same state where the telegraph company at an intermediate point in another state delivered it to another company on the ground that its own line was occupied with other business, is denied. (N. C.) 848.

License of tow boats.

A state restriction on commerce is condemned in case of an attempted license tax for the operation of tow-boats between different states on navigable waters. (La.) 414.

Fisheries.

Absolute prohibition of the taking of fish otherwise than by hook and line, with certain specified exceptions, is held within the police power. (Minn.) 76.

Voters.

A Maryland case denies the necessity of any particular place as a home to entitle a person to vote, where he resides within the limits of the state and district, in the sense of having no other home. (Md.) 830.

The use of a paster covering the whole right-hand column of an official ballot is held illegal under a statute which provides no mode for voting for persons not named on the official ballot except by inserting their names in blank spaces provided in that column. (Pa.) 284.

Navy yard.

The manufacture of cannon in a navy yard of the United States, although a patent may be infringed thereby, will not be restrained even when the United States is not made a party, since the work of the government would thereby be embarrassed. (C. C. App. 4th C.) 67.

Court records.

The right to obtain a copy of the proceedings in a divorce suit for publication is denied in Rhode Island, in the absence of any statutory provision on the subject. (R. I.) 82.

Municipal corporations.

The power of the legislature over municipal corporations is sustained to the extent of upholding a statute for the annexation of other municipalities to cities without consent of the authorities or inhabitants of such municipalities. (Ohio) 737.

Non-contiguous territory is held beyond the power of the legislature to annex to a city. (Colo.) 751.

The attempt of a city to evade a statutory requirement for letting municipal contracts to the lowest bidder by acting through a water board is held ineffectual. (Pa.) 802.

The question whether or not a contract to pay an annual sum for the use of water for a term of years constitutes a debt for the whole amount that may ultimately become due within the meaning of a restriction on city indebtedness is decided in the negative in a Missouri case. (Mo.) 769.

A case which is likely to be an important precedent is decided by the circuit court of appeals in respect to the purchase of waterworks by a city on the expiration of a franchise under a statute providing therefor. The "fair and equitable value" to be paid is held to include not merely the costs of reproducing the plant

but also the value of the existing connections with buildings; and the value of the connections is not merely the cost of making them, but includes something for the effort and inducements required to obtain the consent of property owners. (C. C. App. 8th C.) 827.

Streets and roads.

The control of streets by municipal authorities is held to include the power to prohibit by ordinance the beating of any drum in a street without special permission from the president of the board of trustees. (Cal.) 529.

The right of a gas company to take up and repair its pipes laid in streets acquired by accepting an ordinance, is held to be protected against a subsequent ordinance prohibiting any street to be cut or dug without consent of the aldermen and common council. (Ind.) 514.

A grant of permission for the use of a public road for a street railway nominally made to a company not yet having legal existence is held ineffective on its subsequent incorporation as against a company previously chartered but obtaining a later grant of permission to use the road, the statute allowing not more than one franchise on the same highway. (Pa.) 383.

The power of a city to vacate a strip upon each side of a street to make it narrower is sustained where this was done in the interest of the public and not of private owners. (Ill.) 580.

Eminent domain.

Denying that an ordinance selecting the site of a court house and authorizing condemnation of property thereon in case of failure to agree with the owners, constitutes the beginning of condemnation proceedings, it is held that this, with mere delay in acquiring property, gives no right of action for damages. (Md.) 648.

Additional servitude.

An electric railway over a country road between distant places is held to constitute an additional servitude requiring the consent of the owner of the land notwithstanding consent of the town authorities. (Pa.) 766.

The question of injury to abutting owners by a structure in a street is presented in a Virginia case, which holds that an elevated approach to a bridge over railroad tracks is not an additional burden and gives no right to damages where access to his premises can still be had. (Va.) 551.

Control of hackmen.

The effect of an ordinance excluding hackmen from depots at train time is held not to be limited by a prior contract between the railroad company and a hackman giving him the exclusive right to enter the depot for soliciting passengers, whatever may be the rule as to the validity of his contract. (Ala.) 436.

Public improvements.

A South Carolina case denies the constitutionality in that state of assessments on abutting owners for the cost of highway improvements, except those for sidewalks and sewers, which are upheld because recognized prior to the adoption of the constitution. (S. C.) 284.

Lots on one side of a street are held to abut on the improvement made by widening the street on the other side. (Ohio) 588.

Judgment.

Judgment against a city in an action against

a railway company is held to bar proceedings on the same cause by quo warranto in the name of the attorney-general. (Mich.) 211.

An order in a divorce suit for the execution of a mortgage on land in another state to secure the payment of alimony will not be enforced in equity by the courts of the state where the land lies, because the action was *in personam* and the decree can be enforced only by the court that made it. (N. J.) 213.

Judicial sale.

The right of a purchaser at a sale for a special assessment or tax to recover back his money on failure of title is denied on an extensive review of the authorities. (Neb.) 121.

Execution.

Due process of law in the enforcement of the liability of members of a limited partnership is held to exist in an execution against them for unpaid subscriptions, after execution against the association returned unsatisfied, where they have a right to judicial investigation of the amount unpaid. (Mich.) 577.

Mandamus.

The secretary of state is held subject to a writ of mandamus to compel him to affix the great seal to a commission issued by the governor on the ground that such act is merely ministerial. (Wyo.) 45.

Officer's liability.

A mayor's honest attempt in good faith to

enforce an ordinance not yet judicially declared invalid is held not to be at the peril of an action for malicious prosecution. (Tenn.) 680.

The question whether or not a justice of the peace is liable for judicial acts in excess of jurisdiction is decided in his favor with a declaration that it is unreasonable and unjust to hold him liable and hold superior court judges exempt from such liability. (Iowa) 92.

Board.

The claim that the disqualification of two members prevents any lawful organization of a board of fifteen freeholders elected under the California constitution to prepare a city charter, is denied in accordance with the rule that a majority may organize where a majority may act after organization. (Cal.) 203.

Ayes and noes.

The provision for recording the ayes and noes on a motion to employ a teacher is held mandatory and failure to comply therewith fatal to an election of a teacher although it was by unanimous vote. (Ohio) 77.

Schools.

While a committee empowered to hire and discharge teachers is held incompetent to engage as teacher himself, where he did so without objection, and the district had the benefit of his services as a basis for drawing public money, it was held liable to pay for the services. (Vt.) 583.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

As to interstate commerce, see *supra*, 1.

A bailee for hire is held not liable for destruction of the property without his fault. (Iowa) 738.

Deed.

A condition is held not to be created by an habendum clause stating that land is to be kept as a public highway, where the granting clause absolutely conveys a portion of a larger tract acquired for public use and which was immediately devoted to use as a public square. (Md.) 543.

Carrier's contract.

A new application of the general doctrine denying carriers the right to contract against their own negligence is found in a decision denying effect as to negligence of a condition that the shipper shall insure his goods for the carrier's benefit, which he fails to do. (Pa.) 228.

Telegraph.

The dissimilarity of conditions justifying difference in telegraph rates is held to exist in case of a morning and evening paper receiving exactly the same report at the same time, but one of which required the report earlier than the other to the hindrance of other business. (Neb.) 622.

Surety.

The refusal to resort to security held which is ample is held not a defense to a surety where no prejudice to him is shown. (N. Dak.) 257.

Composition with creditors.

The effect on a composition with creditors of a secret agreement for a preference is dis-

cussed, with a review of English and American authorities, in a New York case which denies that the whole composition is thereby made void. (N. Y.) 83.

Payment in gold.

An agreement to give notes and mortgage in the usual form of a broker procuring a loan is held not to bind the borrower to a provision for payment in gold according to the usual custom of the broker. (Ill.) 822.

Sale.

The question of acceptance of property purchased by using it after opportunity to inspect it, is held to depend on the existence of a warranty, and a provision that it shall answer to certain specifications does not constitute an implied warranty. (Mich.) 96.

A so-called renting of articles to be paid in installments is held to constitute a sale and not a lease and the person traveling from place to place making such contracts is held to be a peddler. (Pa.) 388.

Bills and notes.

The usury law is held to apply to a promissory note for the purchase price of real estate. (S. C.) 569.

The claim of usury in a note was rejected where the agreement for interest was merely a form of expressing the difference between the cash and the credit price on a sale of property. In the same case it is held that the payment of a principal debt pending suit on a note held as collateral subjects the note to all defenses which existed against the pledgeor although the suit need not be dismissed. (Tenn.) 535.

RÉSUMÉ OF DECISIONS.
(CORPORATIONS AND ASSOCIATIONS.)

The negotiability of a draft payable "with exchange" is denied in a case which reviews the conflict of decisions on the subject. (Iowa) 222.

For transferring a note in order to impose a liability on a prior indorser in favor of a bona fide holder for the ultimate benefit of the transferrer, who knew of the infirmity of the indorsement, the latter was held liable to the indorser for the damages. (Tenn.) 519.

The rights of assignees of different notes in a series, all of which are secured by mortgage or vendor's lien, are considered, where an express assignment of the security to a portion of the notes in preference to the others had been made, and this is held to give them a preference. (Tenn.) 668.

Checks.

The duty of a depositor in respect to discovering the forgery of checks and giving notice thereof to the bank is discussed in a case which declares it his duty to examine returned vouchers and report forgeries, and that if he intrusts this duty to a clerk he takes the risk of the honesty of the clerk. (Ala.) 426.

Against strong dissent the Minnesota supreme court follows the general doctrine that a drawee of a forged check after payment to a bona fide holder cannot recover back the amount. (Minn.) 685.

Sending a bank check directly to the drawee for payment is held to be negligence on the part of the collecting bank. (Kan.) 248.

The necessity of diligence in collecting a substituted check taken by one who held a check for collection does not make the holder liable to the drawer of the original check because of delay in presenting the new check if both checks were worthless and no amount of diligence could have obtained payment. (Md.) 882.

Insurance.

A contract of insurance made by mail with

a foreign corporation is held to be made at the place where the policy was executed and mailed. (Wis.) 862.

But a contract of insurance made by mail with a foreign company was not upheld for the purpose of collecting an assessment, where the company was prohibited from doing business in the state directly or indirectly. (Wis.) 556.

The provision in a policy that no person "unless authorized in writing" shall be deemed the agent of the insurer is held insufficient to prevent the company from being bound to recognize as its agent a person whom it sends out to solicit business. (Wash.) 86.

The mortgagee clause providing that the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, etc., is held to make a new and separate contract with the mortgagee, which is not affected by false statements of the mortgagor not known to the mortgagee, whereby the insurance never became valid as to the mortgagor. (C. C. App. 8th C.) 614.

But such a clause is held not to relieve the mortgagee from the necessity of proof of loss by one of them within the specified time. (Ga.) 844.

Technical warranties as well as representations are held to be included in the misrepresentations mentioned in the Massachusetts statute restricting the effect to those intended to deceive, or material to the risk. (Mass.) 396.

A wound causing tetanus is held the proximate cause of death, where a person in the consequent delirium and agony cut his throat. (C. C. App. 8th C.) 629.

The period of one year for bringing action on a life and accident policy is held to begin at the date of the injury and death and not at the time when cause of action on the policy accrues. (Wyo.) 48.

III. CORPORATIONS AND ASSOCIATIONS.

An interesting point of corporation law is decided in a Massachusetts case holding that an agreement permitting a corporation to take the shares of any subscriber in case of any transfer at its election and at a value appraised by the directors is not invalid and may be specifically enforced. (Mass.) 271.

The rights of the holders of preferred stock are involved in a case which holds that such stockholders are not creditors, and that until a dividend is declared, although there are net profits available for that purpose, an action at law cannot be maintained against the corporation, and that equity will not compel the dividend unless the withholding of it is plainly in disregard of the rights of such stockholders. (Mass.) 186.

The forfeiture of shares in an unincorporated joint stock company is held to depend for its validity on a strict compliance with the conditions provided, and publication of notice in Philadelphia only, when the articles provide for publication in Detroit also, is fatal. (Pa.) 805.

The effect of forfeiture of stock on liability of stockholders is involved in case of a foreign

corporation, and it is held that the articles of association substantially repeating the provision of a statute which it had refused to adopt could not give the right to enforce a liability for a deficiency after forfeiture. (Ill.) 313.

The statutory liability of stockholders for failure to publish notice of corporate debts is held, overruling prior decisions, to be penal, and therefore unenforceable in a suit which was pending when the statute was repealed. (Neb.) 854.

Minority stockholders on successfully maintaining a suit to preserve the property of the corporation are held entitled to have the corporation pay their necessary expenses, including reasonable attorney's fees. (Tenn.) 93.

The power of the secretary of a loan association to indorse a check is implied in his power to collect it. (Mo.) 401.

The mere insolvency of a corporation known to a creditor is held not to preclude a valid attachment. (Wis.) 857.

The continued existence of a corporation for the purpose of being sued is denied where by judicial sales it had been divested of its property and franchises for the operation of a rail-

road which it was organized to run, and a new company had acquired and operated the road for many years. (Wis.) 869.

A corporation is held to be in itself an illegal combination where its purpose is to control the price of food products. (Ill.) 298.

Foreign corporation.

The taking of a single mortgage for a past-due debt is held not to be the doing of business by a foreign corporation. (Ark.) 505.

Receiver.

An unusual case of the appointment of a receiver of a corporation is that where the winding up of the company is not asked, but where charges of fraud on the part of the majority stockholders and managers are being investigated in a suit by the minority stockholders. (Mont.) 892.

The receiver of the property of a foreign corporation is held to have no title to debts due from nonresidents of the state as these were payable at the domicile of the company. (Ill.) 824.

Partnership.

Another of the cases in which a partnership is held to exist notwithstanding the agreement is called something else, is a case in which a so-called lease is held to create a community of interest in the capital, or a part of it, as well as in the profits. (Fla.) 126.

See *supra*, I., for taxation and levy of execution in case of limited partnership.

See *infra*, VII., for partnership real estate.

VI. TORTS; NUISANCE; NEGLIGENCE; INJURIES.

A Louisiana case sustains the broad doctrine that malicious injury to the rights of another is an actionable wrong. The case was one where employes were compelled to withhold patronage from a dealer. (La.) 416.

Arrest of passenger.

A question, on which decisions are not in harmony, as to a carrier's liability for the act of an agent in causing the arrest of a passenger is presented in a Maryland case, which holds that there is no implied authority of a superintendent of a street railway company to cause such an arrest for giving counterfeit money to pay fare. (Md.) 68.

Nuisance.

The liability for continuing a nuisance on the part of one who did not create it is held, following a long line of authorities, to be conditioned on prior request and notice from the person injured. (C. C. App. 8d C.) 181.

Vicious animals.

The doctrine of *scienter* in respect to vicious animals is denied application to injuries committed by a vicious animal while trespassing. (Ohio) 862.

Dangerous premises.

Liability for dangerous premises attractive to children is enforced in case of a dangerous pit filled by water on vacant lots owned by a city. (Ill.) 208.

Disapproving the doctrine of a number of cases respecting turntables, the New York court of appeals denies that they are such dangerous. 37 L. R. A.

IV. Domestic relations.

A claim that a wife was liable for the injuries of a domestic who fell from a ladder while obeying her orders in trying to get into a pigeon loft for pigeons, is rejected on the ground that she was acting simply as an agent for her husband. (Mo.) 441.

Following what is coming to be a clear majority of the decisions, the Nebraska court sustains an action by a wife against those who have caused her abandonment by her husband, on the ground that he is her property. (Neb.) 120.

An action in the nature of crim. con. by a married woman against another woman is held unsustainable in Minnesota, without deciding as to the right of action for enticing away a husband. (Minn.) 685.

The question of public policy is raised in respect to a contract for a money consideration by which a mother agrees to allow her child to live with his grandfather until of age. But the claim that this was a mere sale of the child is denied and the contract upheld as for the benefit of the child. (Pa.) 56.

V. Fiduciaries.

A judgment against an administrator is held to have no binding force or effect against another administrator of the same estate in another state. (Mont.) 101.

A donation to aid the building of a hotel near trust property is sustained in a case where comprehensive powers were given to the trustees under a will, and the gift was for the benefit of the trust estate. (Mo.) 653.

gerous and enticing machines that a railroad company must use active vigilance to keep children from playing with them. (N. Y.) 724.

Following the Indiana decision in 23 L. R. A. 198, it is again held in Rhode Island that the owner of a building is not liable for its condition to firemen who enter by license of law. (R. I.) 512.

Electricity.

One of the most important cases yet decided respecting the conflict of telephone and street railway companies as to the use of electricity is a Tennessee case which decides among other things that an electric street-car company which so charges the earth for half a mile on each side of its line as to destroy the use of the ground circuit of a telephone company must pay the expense of substituting return wires for the telephone plant. (Tenn.) 286.

The liability of a trolley railway company for injury to a person from contact with a broken telephone wire lying across the trolley wire where no guard wires intervene, is held a question for the jury and to depend on the question of negligence and proximate cause. (Wis.) 865.

Shipping oil.

The burning of a mill by oil escaping from a tank car into the furnace room of the mill is held not to result from negligence of the shipper in failing to have a valve in the tank outlet as the proximate cause, and the oil is not regarded as a dangerous agency within the rule

that it must be so guarded that no one can be injured by it. (C. O. App. 7th C.) 588.

Injury to passenger.

Riding on a freight train by permission of the conductor, knowing it to be against the rules of the road, is held to prevent recovery for an accident. (Tenn.) 549.

Injury to servant.

The law as to providing a safe place for workmen is held not to apply to a scaffold built by carpenters employed by a shipbuilder, whose negligence causes the injury of other workmen using the scaffold. (Mich.) 266.

Negligence of physician.

The liability of a corporation which gratuitously furnishes the services of a physician to employes is again held not to extend to liability for tortious or negligent acts of the physician, at least if due care in his selection was exercised. (Ind.) 840.

Negligence of physicians in a hospital gratuitously maintained for employes is held to create no liability on the part of the employer. (Iowa) 296.

Acts of servant.

The liability of the master for prohibited acts by an employe is denied in case of a child injured while riding on a hand-car contrary to the rule of the company. (Ark.) 190.

The scope of employment of a servant leading a colt to his stall is held not to include an invitation to a boy to ride it. (N. H.) 178.

Deviation of a servant driving a team from his direct course on an errand of his own is held insufficient to relieve the master from liability for his negligence in driving the team. (Conn.) 161.

The wanton and malicious conduct of an engineer and fireman in blowing the whistle of a railroad locomotive to frighten a horse is held to be within the scope of their employment so as to make the employer liable. (C. C. App. 5th C.) 179.

Negligence of contractor.

One of the exceptions to the rule that a person is not liable for the acts of an independent contractor is furnished in a case that holds persons having a franchise to lay pipes in a street liable for the negligence of an independent contractor in doing the work, where injury to a traveler results. (Cal.) 590.

Discharge of water.

Bringing water in large quantities to a brewery and then discharging it on the surface of the ground to the injury of adjoining proprietors, is held actionable. (Md.) 294.

Proximate cause.

The proximate cause of the drowning of a horse which breaks the guard-rail on a ferry-boat when frightened by a whistle is held to be the defect in the rail and not in the whistle. (Pa.) 390.

Obstructing a highway by an excursion train is held not to be the proximate cause of injury to travelers on the highway by misconduct of passengers on the train, or by jumping from the buggy after dark on a rough road, which was caused by the delay. (Ky.) 680.

Injury on highway.

A man playing with a dog on a sidewalk is denied the right to recover for injuries caused by defects therein. (Miss.) 527.

A peculiar distinction as to right of action for injuries on highways appears under the Michigan statutes in the denial of a recovery against a city for loss of services of a wife and expenses incurred, because the statute provides for recovery only by the person injured or by the owner of property injured. (Mich.) 572.

The liability of a city for injuries caused by a cow running at large is held to be sufficiently charged in a complaint which alleged that the running at large of such stock had become a common nuisance and danger and no attempt was made by the city to stop it. (Md.) 728.

VII. PROPERTY RIGHTS; GIFTS; WILLS.

A novel case of bailment holds that a check given to a customer by a bath-house keeper for a watch and other valuables is not sufficient to show right to the property, and that if wrongfully obtained will not justify delivery of the property to the holder where the bailee knew both the owner and the property. (Ark.) 502.

Descent and distribution.

An antenuptial contract made in a foreign country is denied effect as against the laws of descent and distribution of property. (Ill.) 791.

A transfer of title to corporate stock by placing it in the name of the owner's sons with the purpose of defeating the wife's distributive share therein at his death, is held fraudulent as to her. (N. H.) 799.

Dower.

A right of dower is held to attach to land purchased by the husband but conveyed by an invalid naked trust to another for his benefit. (Ind.) 523.

The inchoate dower interest of the wife of a partner in partnership real estate is considered
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in a Minnesota case, which holds that this interest is cut off by a sale under order of court in winding up the partnership. (Minn.) 840.

The provision of the statute that dower in land aliened by the husband during his life, and afterwards enhanced in value, shall be estimated as at the time of alienation, is construed to mean that the value of improvements made by the alienees shall be deducted, but that in other respects the value shall be taken as at the time of assigning dower. (Neb.) 252.

Partnership property.

What constitutes a partnership interest in real property used by a firm is involved in a case which holds that property paid for by individual funds on the purchase of undivided interests therein is not firm property, although used by a partnership of which the purchasers become members, and that the holder of the record title of an interest therein can convey his interest to a bona fide purchaser, even if it were in fact partnership property. (Ill.) 449.

Entering individual real estate on partnership books as partnership property is held in-

sufficient as against individual creditors to make it so. (Md.) 476.

Trade-name.

The question of trade-names is well illustrated in a New York case which denies the right of a New Jersey corporation to use the name "Higgins Soap Co." where this name has been previously used to some extent as that of the "Chas. S. Higgins Co." which manufactures various kinds of soap known as "Higgins Soap." (N. Y.) 42.

Waters.

The right to prevent the overflow of river banks by flood water is discussed in the case of a railroad embankment where it is said that such an embankment if built with due regard to the rights of adjacent and proximate owners will not create a liability for resulting damages by overflow, and that flood water of a stream which in time of ordinary floods extends to railroads, cities, and numerous farms, cannot be within the strict rule against obstructing streams. (Miss.) 762.

Timber.

Forfeiture of timber by failure to remove it within a reasonable time is denied where the

conveyance of the timber specified no time for removal. (Ala.) 434.

Mortgage.

The interest of a vendee in a conditional sale of goods is held to pass under a mortgage of all his stock so that the mortgagee can maintain replevin for the goods against an insolvency receiver. (Mich.) 558.

Gift.

A gift *causa mortis* is held not to defeat the donor's seisin or possession within the meaning of a statute giving his wife a share of the property of which he died seised. (Ark.) 507.

Wills.

A gift to churches to buy coal for their poor is sustained as a direct gift and not a trust for indefinite beneficiaries. (N. Y.) 423.

Distinguishing the case from a spendthrift trust a condition in a devise that the land shall never be subject to debts or liabilities of the devisee, is held void. (Wis.) 778.

Signature by mark of a witness to a will is held insufficient unless the witness himself makes the mark or at least touches the pen with which it is made. (Tenn.) 662.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

A novel decision as to the right to reach proceeds of goods obtained by fraud and resold to bona fide purchasers upholds the right as against a general assignee for creditors, where the proceeds received for the goods and claims for unpaid purchase money thereon can be identified. (N. Y.) 757.

The conflicting doctrines as to the right of a discharged employé to successive actions for installments of wages are considered in a case which allows such actions. (Minn.) 409.

Equity.

Equitable jurisdiction to decree the rescission of an executed contract for land is denied where there is no other ground shown except mutual mistake as to the title. (Wash.) 335.

Garnishment.

The garnishment of a debt due to a nonresident is sustained in a Missouri case. (Mo.) 651.

The garnishment of a foreign corporation under a statute providing that only a person who resides in the state shall be summoned as trustee, cannot be maintained merely because the corporation operates a road which extends into that state. (Vt.) 511.

Attachment.

Attachment of the property of an insolvent bank is denied under the California statute providing for the winding up of such banks by commissioners. (Cal.) 562.

Account stated.

A single item consisting of a right of action
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for breach of contract is held not to be the basis of an account stated. (Or.) 811.

Exemption.

The proceeds of insurance on exempt property are held within the exemption. (Wash.) 808.

Notes in renewal of others outstanding when a homestead was acquired are held unaffected by the homestead exemption. (Vt.) 303.

Execution.

Mere consent by a creditor to the postponement of a sale on an execution is held to defeat his priority of lien as against a junior execution coming into the hands of the sheriff pending the postponement, even when the motive of the consent was kindness to the debtor. (Ill.) 874.

Limitation of actions.

A novel question of the effect of payment by heirs to interrupt the statute of limitations as against purchasers from their ancestor of part of the land mortgaged by him, is decided against such power. (N. Y.) 418.

Presumption of negligence.

Presumption of negligence under the maxim *res ipsa loquitur* is applied in a Maryland case to the falling of cross-ties from a railroad car striking a person walking near the right of way. (Md.) 154.

The running and kicking of a team on a public carriage and the inability of the driver to control them makes a prima facie case of negligence as to a passenger who is injured in consequence. (Or.) 279.

IX. CRIMINAL LAW AND PRACTICE

Several important questions of criminal procedure are decided in a murder case which holds that a statute providing that a trial judge may call in another judge on affidavit of his bias and prejudice is mandatory, and that an attorney from another state employed by private persons may be allowed to aid the prosecuting attorney on his request. (N. Dak.) 868.

The constitutional guaranty of trial in the "county district" is held not to entitle a person to trial in the judicial district in which the indictment was found, or prevent a change of venue to another district in which the adjoining county is included, on motion of the accused. (Ohio) 584.

The statutory right of the state to appeal after an acquittal for a new trial on account of errors of law is upheld in Connecticut as not in violation of the common law of that state. (Conn.) 498.

Disapproving if not overruling an earlier decision in 15 L. R. A. 441, the Virginia supreme court holds that a right to a jury trial in a criminal case may be satisfied by the right to a jury on appeal; especially where there is a right to elect to be tried first in either court. (Va.) 676.

The necessity of disclosing the name of or identifying the principal where an infant is sold intoxicating liquors for others, is sustained where he claimed to be buying it for two sick teachers in a college whom he did not name. (Ark.) 508.

Forgery.

The materiality of a second initial of a name which gives only initials except for the surname is declared by holding the change of the second initial to be forgery (Minn.) 74.

Obscenity

The mere sitting for the negative of an obscene picture is held insufficient to show a purpose to exhibit, loan, and circulate it contrary to statute. (Mich.) 448.

Indictments.

An indictment for libel is held to charge but 27 L. R. A.

one offense where it states a libel on more than one person by a single writing. (Minn.) 412.

Grand jury.

An indictment presented by five grand jurors all of whom concur, while the statute requires seven to act and five to concur, is sustained in the absence of timely objection to the irregularity. (Iowa) 846.

The fact that a grand jury was impaneled for the term prior to that at which the indictments were found is held sufficient to make the indictments invalid, and the court refuses to inquire into the legality of a de facto grand jury upon habeas corpus. (Wis.) 776.

Sentence.

An escaped convict sentenced under another name to the same penitentiary is held lawfully retained after serving the later sentence to complete his original sentence. (Ohio) 290.

Suspension of a sentence in a criminal case after it has been pronounced is held void in a case which distinguishes it from the mere postponement of sentence, and an attempt to enforce the sentence after the expiration of the time named in it is therefore held void. (Wis.) 356.

Labor.

Requiring prisoners imprisoned for non-payment of fine, imposed for violating an ordinance, to work on streets or other places, with a credit of \$1 a day on the fine is held not to violate constitutional provisions against slavery or involuntary servitude. (Kan.) 593.

Pardons.

A board of pardons with power to investigate facts and report with recommendations is held to constitute no infringement of the executive power to pardon. (Mich.) 573.

Witnesses' fees.

The claim of expert witnesses for the state to compensation beyond ordinary witness fees is denied in an Arkansas case. (Ark.) 609.

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his contract. *McMullan v. Dickinson Co.* (Minn.) 409

2. The secretary of a defunct corporation against which process has been served by publication may be allowed to intervene and inform the court of the facts which work the dissolution and death of the corporation. *Combes v. Milwaukee & M. R. Co.* (Wis.) 869

3. One tenant in common of a pasture field may maintain an action against the owner of a domestic animal which breaks into the field and injures the livestock of such tenant rightfully grazing therein; and the other tenants are not necessary parties to such action. *Morgan v. Hudnell* (Ohio) 863

4. An abuse of discretion of the trial court in denying a change of venue for prejudice is not shown where affidavits are filed showing that there is nothing to prevent a fair trial where the indictment was found. *State v. Bevel* (Iowa) 846

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ANIMALS. See also MUNICIPAL CORPORATIONS, 19-22.

1. The owner is not in general liable for an injury committed by a domestic animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity. *Morgan v. Hudnell* (Ohio) 863

2. If an animal breaks into the close of another, and there damages the real or personal property of the one in possession, even if it is by viciously attacking another animal, the owner of the trespassing animal is liable without reference to whether or not such animal was vicious, and without reference to whether such propensity was known to the owner. *Id.*

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APPEAL AND ERROR. See also **PRINCIPAL AND SURETY.**

1. The jurisdictional amount for an appeal exists where a judgment for the necessary amount is rendered consistently with the pleadings, although it includes exemplary damages. *Thompson v. Jackson* (Iowa) 92

2. A statutory right of appeal by the state in a criminal case to obtain a new trial for errors of law after an acquittal is not in violation of the fundamentals of the common law of Connecticut, or inconsistent with the principle that enforces the conclusiveness of a valid and final judgment. *State v. Lee* (Conn.) 498

3. After acquittal by a jury, as well as after trial by the court, an appeal may be taken by the state, under Conn. Gen. Stat. § 1687, authorizing the state to appeal in the same manner and to the same effect as the accused on questions of law. *Id.*

4. A stay of an order of discharge in a habeas corpus case may be made by the appellate court without fixing any terms, under Ohio Rev. Stat. § 8725, providing for a stay of execution of a judgment or final order on such terms as may be prescribed. *Henderson v. James* (Ohio) 290

5. A final order of discharge on habeas corpus, of a person imprisoned for crime, may be reviewed and reversed on error by a higher court. *Id.*

6. The finding of facts by the presiding judge for the purpose of an appeal is sufficient evidence as to permission to appeal, although formal permission should appear on the record. *State v. Lee* (Conn.) 498

7. The requirement of a distinct statement of errors complained of is not made by four or five pages of claims consisting mostly of argumentative comments as to errors in the charge of the court. *Id.*

8. An assignment of cross-errors is essential to the review, on an appeal by plaintiff, of the decision upon a motion by defendants to suppress a deposition. *Long v. Hess* (Ill.) 791

9. It is too late to say that a decree for performance of a contract is not responsive to pleadings, where for three years the complainant has placed itself in the attitude of asking for such a decree, and has never dismissed its bill or withdrawn its prayer; but any formal defect in this particular is subject to amendment, even in the appellate court. *National Waterworks Co. v. Kansas City* (C. C. App. 8th C.) 827

10. Striking a paragraph from a complaint on motion is not reversible error, if it was not sufficient to authorize a recovery. *Braithwaite v. Harvey* (Mont.) 101

11. An objection that defendant was not given time to demur to an amended complaint after the allowance of the amendment is not available on appeal, if it is not fairly included in the assignments of error, and it nowhere appears that an offer to demur was made, or the right to do so questioned or denied. *Ritchie v. Waller* (Conn.) 161

12. An instruction in an action on an insurance policy, that the jury should be satisfied by

a "clear" preponderance of proof that plaintiff burned the buildings, before finding the fact, is not misleading in connection with an instruction that the action is a civil one, and it is not required to establish the facts beyond a reasonable doubt, but only by a fair preponderance of proof. *Hart v. Niagara F. Ins. Co.* (Wash.) 86

13. A fine of \$500 for the publication, without provocation, of a grossly offensive libel, will not be reduced on appeal as excessive. *State v. Belvel* (Iowa) 846

APPROACH. See **EMINENT DOMAIN**, 2, 3.

APPROPRIATIONS. See **BONDS; PUBLIC MONEY.**

ARMY AND NAVY. See **INJUNCTION**, 1.

ARREST. See **CARRIERS**, 2, 3.

ASSAULT.

The marshal and policemen of a city, and any persons aiding and abetting them, are liable in damages for unnecessary cruelties and indignities inflicted by them on prisoners in their charge. *Topeka v. Boutwell* (Kan.) 593

ASSESSMENT. See **PUBLIC IMPROVEMENTS.**

ASSIGNMENT. See **MORTGAGE**, 2-4; **VENDOR AND PURCHASER.**

ATTACHMENT. See also **CONTEMPT**, 2, 4; **CORPORATIONS**, 21.

An attachment of property of an insolvent bank which has failed and closed its doors cannot be allowed under the California Bank Commissioners' Act, § 11, which fully provides for the winding up of insolvent banks by commissioners, and takes them out of the operation of the insolvent Act applicable to other corporations. *Orans v. Pacific Bank* (Cal.) 562

ATTORNEY GENERAL. See **JUDGMENT**, 8.

ATTORNEYS.

A lien for counsel fees attaches to the property recovered in a suit by minority stockholders to recover corporate property wrongfully conveyed by the corporate officers at the instance of the majority stockholders. *Grant v. Lookout Mountain Co.* (Tenn.) 98

ATTORNEYS' FEES. See **COSTS AND FEES.**

BAILMENT.

1. Lack of care by a bailor in keeping a check for his property, given him by the bailee, will not prevent recovery for wrongful surrender of the property by the bailee to one who presented the check, but who had no right to it, if the bailee could have avoided the loss by the exercise of reasonable care. *Tombler v. Koelling* (Ark.) 502

2. Possession of a check for a watch and other valuables, given by the keeper of a bath-house to a patron as a means of identifying his property, is not proof of a right to the property, and will not justify its delivery to one who has no right to the check, where the custodian knows both the bailor and the property and would have known that the person presenting the check was not entitled to the property if he had looked at him. *Id.*

3. A hirer of personal property under an agreement to return it at the expiration of the lease in as good condition as when taken, usual wear excepted, is not liable for its loss by fire without his fault. *Seevers v. Gabel* (Iowa) 733

BALLOT. See VOTERS AND ELECTIONS, 2.

BANKS. See also ATTACHMENT; CHECKS, 1, 2; ESTOPPEL, 1; SET-OFF AND COUNTERCLAIM.

1. A collecting bank is chargeable with the loss, where it sends a check directly to the drawee bank, with instructions to remit in exchange upon another place, and the drawee, although having a deposit against which the check was drawn and continuing to do business for one whole day after receiving it, mails back the check at the close of that day with the statement, "No funds," and immediately suspends business. *Anderson v. Rodgers* (Kan.) 248

2. A bank on which a check is drawn, after payment to a bona fide holder, cannot recover back the amount. *Germania Bank v. Boutell* (Minn.) 635

3. A bank depositor owes to the bank the duty of examining returned vouchers and reporting forgeries to the bank. *First Nat. Bank v. Allen* (Ala.) 426

4. In case a bank depositor fails to notify the bank of forged checks returned in his vouchers, the bank is entitled to hold him liable for damages caused to it by such failure. *Id.*

5. A bank depositor who entrusts the duty of examining vouchers to a clerk who has forged his employer's name on checks is charged with the clerk's knowledge of the forgery. *Id.*

6. A bank depositor will be held responsible to the bank for failure to impart to it knowledge of forgeries of checks possessed by his clerk, if he entrusts to his clerk the duty of examining the vouchers, although the clerk deceives him and keeps him in ignorance of the forgeries. *Id.*

7. In balancing an account between a bank and its depositor, whose clerk has forged checks which were cashed by the bank, when the vouchers are lost so that the stubs of the checks are relied on to show the amount for which the checks were drawn, the court is not authorized to charge the bank for the whole amount of a check for which there is a stub corresponding in number but not in amount, unless it is shown that the depositor did not owe money or draw checks for the amount expressed in the stubs. *Id.*

8. That a mortgage to cover advances by a
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bank runs to the cashier individually, and not to the bank, will not prevent its enforcement in favor of the bank, if no one will be prejudiced by the fact that it was taken in that form. *Chafey v. Mathews* (Mich.) 558

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BIDDERS. See MUNICIPAL CORPORATIONS, 9-11.

BILLS AND NOTES. See also BANKS; CONFLICT OF LAWS, 1; MORTGAGE, 4, 5; VENDOR AND PURCHASER.

1. An assignee of negotiable notes is not a bona fide purchaser as between himself and a prior assignee of other notes secured by the same mortgage or vendor's lien, with respect to rights in such security. *Nashville Trust Co. v. Symthe* (Tenn.) 663

2. The transfer of a negotiable note, by which an indorser is made liable to a bona fide holder for the ultimate benefit of the transferrer, who knows the indorsement is ultra vires and void, makes him liable to such indorser for the damages thereby sustained. *Nashville Lumber Co. v. Fourth Nat. Bank* (Tenn.) 516

3. The words "with exchange," in a draft, destroy its negotiability. *Culbertson v. Nelson* (Iowa) 222

4. Statutes providing that negotiable notes should be for "any sum of money," or for "a sum of money in property or labor," do not change the common-law rule as to the certainty of amount. *Id.*

5. Payment of a principal debt pending suit on a note held only as collateral security leaves it subject to any defense that existed against the pledgor, although the suit may be continued. *First Nat. Bank v. Mann* (Tenn.) 565

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Bills and notes; drawee's duty to know signature of drawer:—(I.) duty of banks; (a) in general; (b) negligence or fault of party obtaining payment; (II.) duty of other parties. 635

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BOARDS. See also MUNICIPAL CORPORATIONS, 5; OFFICERS, 1.

1. The consent of supervisors to the construction of a street railway over a road must be given when they are together and acting in their official character, and should appear upon the township books kept by the town clerk. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* (Pa.) 766

2. A majority may organize and act where a majority of the body may act after organization. *People, Hoffman, v. Hecht* (Cal.) 203

3. The disqualification of two out of fifteen freeholders elected to prepare a city charter under Cal. Const. art. 11, § 8, which does not in terms require the joint action of all the members of the board, but does provide that it shall be signed by the members or a majority of them,—does not prevent the lawful organization and action as a board by the other members. *Id.*

BONA FIDE HOLDER. See BANKS, 2; BILLS AND NOTES, 1, 2.

BONDS.

An unconstitutional attempt to tax the citizens of a county for the benefit of certain residents thereof is made by a statute authorizing the issue of county bonds for the benefit of an insolvent railroad company in the hands of a receiver, with a provision that from the proceeds thereof proper and legal claims held by bona fide residents of the county should be first paid. *Baltimore & E. S. R. Co. v. Spring* (Md.) 72

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BOYCOTT.

Compelling employes to withhold their patronage from a merchant as a condition of their employment may be an actionable wrong when done solely from motives of malice. *Graham v. St. Charles Street R. Co.* (La.) 416

BRIDGE. See EMINENT DOMAIN, 2, 2.

BROKERS. See EVIDENCE, 11.

BUILDING AND LOAN ASSOCIATIONS.

The power to indorse a check which the secretary of a loan association, who is its general financial agent, has authority to collect, is implied in the power given him to collect its securities and pay the money for them to the treasurer. *Gate City Bldg. & L. Assn. v. National Bank of Commerce* (Mo.) 401

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BUILDINGS. See also NEGLIGENCE, 2.

One place of water supply on each floor of a tenement house, fairly accessible to all occupants of the floor, is all that can usually or reasonably be required for health and fire protection, and therefore all that the board of health has power to order under N. Y. Laws 1887, chap. 84, amending § 663 of the New York City Consolidation Act. *Health Department v. Trinity Church* (N.Y.) 719

BY-LAWS. See CORPORATIONS, 12.

CARRIERS. See also EVIDENCE, 5; HACKS, 1, 2.

1. A passenger on a freight train with the conductor's permission, but knowing that he is violating the rules of the road, assumes the risk of accidents. *Louisville & N. R. Co. v. Hasley* (Tenn.) 549

2. The superintendent of a street-railway company has no implied authority to cause the arrest of a passenger for placing in the fare box a counterfeit coin in payment of fare, so as to make the company liable for false imprisonment in case of such arrest, without proof of precedent authority or subsequent ratification of his act. *Central R. Co. v. Breuer* (Md.) 63

3. Ratification of the act of a street railway superintendent in arresting a passenger for putting counterfeit coin in the box for his fare is not shown by the fact that the president of the company, the superintendent, and the driver of the street car, gave evidence against the person arrested. *Id.*

4. A condition in a bill of lading, that the shipper shall insure the goods for the carrier's benefit, cannot protect the carrier against the consequences of his own negligence. *Willock v. Pennsylvania R. Co.* (Pa.) 226

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CHARITIES.

1. A residuary bequest to certain churches according to the number of members, to buy coal for the poor of the churches, is a direct gift to the churches, and does not create a trust for unascertained or indefinite beneficiaries. *Bird v. Merkle* (N. Y.) 423

2. A corporation which voluntarily provides a physician for injured or sick employes, whose services they are free to reject or accept, is liable only, if at all, for negligence in the selection of the physician, and not for his negligent or tortious acts in the treatment of those who accept his services. *Pittsburgh, O. C. & St. L. R. Co. v. Sullivan* (Ind.) 840

3. A railroad company is not liable to employes for negligence of physicians and surgeons in a hospital which it voluntarily maintains for the gratuitous accommodation of injured employes to whom the company owes no statutory or contractual obligation in the matter. *Highmy v. Union P. R. Co.* (Iowa) 296

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CHECKS. See also BAILMENT, 1, 2; BANKS, 1-7; BUILDING AND LOAN ASSOCIATIONS; SET-OFF AND COUNTERCLAIM.

1. The payee of a check who fails to make presentment within a reasonable time assumes the risk of loss occasioned by the insolvency of the drawee occurring in the mean time. *Anderson v. Rodgers* (Kan.) 248

2. It is negligence in the holder of a check to send it directly to the drawee, residing in a distant place, for payment; and the holder is responsible for any loss occasioned by adopting such course. *Id.*

3. Sending a check by an indirect route will not constitute negligence in presenting it, if it reaches its destination as soon as if sent direct, taking the full time allowed by law for mailing it. *First Nat. Bank v. Buckhannon Bank* (Md.) 832

4. Taking a substituted check from the drawee of a worthless check who cannot cash it, and then failing to use due diligence in presenting the new check, on which no amount of diligence could have obtained payment, will not create any liability to the drawer of the original check. *Id.*

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1. The operation of towboats on navigable waters between different states under a federal license cannot be subjected to a state license tax. *Frere v. Von Schoeler* (La.) 414

2. The peddling of the separate articles after the package in which they were shipped from 27 L. R. A.

other states has been broken may lawfully be regulated under the police power of a state. *Com. v. Harmel* (Pa.) 883

3. Sales of intoxicating liquors shipped to another state in the original packages before the passage of the Wilson Bill are not subject to the laws of that state respecting the recovery of money paid on such sales. *Wind v. Her* (Iowa) 219

4. The drawing of a bung in a barrel in which intoxicating liquors were shipped from another state, in order to obtain a small quantity for testing the article to determine an option to reject the purchase, does not destroy the nature of the original package. *Id.*

5. A telegraph company which has a continuous line between points in the same state over which it might transmit a message received for that purpose, but which passes through another state on the route, cannot claim that the message is interstate commerce and therefore exempt from state authority limiting the charge for transmission, although the company does not in fact transmit the message the whole distance, but delivers it at an intermediate point in another state to another company because its own line for the remainder of the distance is fully occupied by other business. *Leavell v. Western U. Teleg. Co.* (N. C.) 843

COMMON LAW.

1. The common law of England, though adopted and accepted as the law of the state, and though unchanged by statute, is not under all circumstances and conditions to be applied as the local common law. *Kansas City, M. & B. R. Co. v. Smith* (Miss.) 762

2. The practice of rendering judgment by default on defendant's failure to appear, which apparently originated in usage, has been sanctioned by frequent statutory recognition, and has been extended in its operation from time to time by judicial application, must be recognized as part of the common law of Pennsylvania. *Com. v. Lehigh Valley R. Co.* (Pa.) 281

3. The common law of one of the United States includes the long-recognized judicial practice of that state, whether it was ever known in England or not. *Id.*

COMPOSITION WITH CREDITORS.

A composition with creditors is not made entirely void so as to defeat a recovery on notes given in furtherance thereof, merely because of a secret agreement giving to that creditor a preference by way of security for other notes given him under the composition. *Hanover Nat. Bank v. Blake* (N. Y.) 83

NOTES AND BRIEFS.

Composition with creditors; effect of giving one creditor a secret advantage in a composition:—(I.) effect on the composition; (II.) action on original claims; (III.) contracts to induce assent to a composition; (IV.) action for balance; (V.) reservation of part of the original claim from the composition; (VI.) liability of creditor on obtaining a fraudulent preference; (VII.) composition not general. 83

CONDITION. See DEED.**CONFLICT OF LAWS. See also CORPORATIONS, 12.**

1. The fact that in using a blank form a note is on its face dated at a certain place and made payable there does not prevent it from being considered a contract of another state in which it was delivered, when such was the intention. *First Nat. Bank of Johnson City v. Mann* (Tenn.) 565

2. An antenuptial contract made in a foreign country, by which the children of a former marriage of the wife are adopted by the husband and the property settled upon them and the children of the marriage, approved by the courts, is not applicable to real property acquired by the husband in Illinois after his emigration to this country, so as to prevent his disposition thereof by deed or will. *Long v. Hess* (Ill.) 791

3. An antenuptial contract made in a foreign country, by which children of a former marriage of the wife were adopted as heirs of the husband, will not prevent disposition of real property subsequently acquired in Illinois after his emigration thereto, although such children are infants at the time of such emigration incapable of consenting to a change of domicile, or of waiving any rights, as, if they acquire the status of heirs, their inheritance must be in accordance with the laws of Illinois, by which the husband has an absolute right to dispose of his property by will to the exclusion of natural or adopted children. *Id.*

4. The liability of stockholders in foreign corporations must be determined by the law of the state under which such corporations were created. *Mandel v. Swan Land & C. Co.* (Ill.) 818

5. The liability of a stockholder to the corporation for calls made, though dependent upon the phraseology of the statute creating it, is contractual, and will ordinarily be enforced by the courts of another jurisdiction, unless a wrong or injury will be done to the citizens of such jurisdiction, or the policy of its laws will be contravened or impaired. *Id.*

6. The right of a corporation to recover in another jurisdiction the amount of calls made upon its stock does not depend upon any principle of comity, but upon the right to enforce a contract validly entered into. *Id.*

7. The Illinois statute providing that foreign corporations doing business in the state shall be subject to the liabilities, restrictions, and duties imposed upon domestic corporations, and have no other or greater powers, does not relieve a citizen becoming a stockholder in a foreign corporation from a liability for calls made upon stock forfeited for nonpayment of such calls, imposed by the statute under which such corporation was organized, as the term "doing business" has no relation to the by-laws of the company, or its relations to its own members, or its resort to the Illinois courts to enforce such liability. *Id.*

NOTES AND BRIEFS.

Conflict of laws; effect of foreign antenuptial contract. 794

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CONSPIRACY.

An incorporated milk exchange which constitutes a combination of milk-dealers and creamery men to fix and control the price of milk to be paid by them, thus putting them in position to control the market, is illegal and may be dissolved at the suit of the attorney general. *People v. Milk Exchange* (N. Y.) 437

CONSTABLE. See OFFICERS, 2.**CONSTITUTIONAL LAW. See also CRIMINAL LAW, 7; INDICTMENT, 1; MUNICIPAL CORPORATIONS, 2; TRIAL, 1.**

1. Prior laws and decisions not directly or by mere necessary implication denied in a new constitution, survive with full force and effect. *Mauldin v. Greenville* (S. C.) 284

2. The vested right to a defense under the statute of limitations after bar of a cause of action is complete is protected against subsequent changes in the law by the constitutional provision that all "rights" shall continue valid. *Lawrence v. Louisville* (Ky.) 560

3. The law of the land, within the meaning of a constitutional restriction upon interference with private rights, means the common law and the previously existing statute law. *Mauldin v. Greenville* (S. C.) 284

4. A statute authorizing execution to issue against individual members of a limited partnership to the extent of the unpaid portions of their subscriptions, if execution against the association has been returned unsatisfied, does not violate the constitutional provision requiring due process of law, where it allows a judicial investigation as to the amount remaining unpaid on such subscriptions. *Rouse, H. & Co. v. Donovan* (Mich.) 577

5. Compelling expense to improve property by the exercise of police power does not deprive the owner of his property without due process of law, if the exaction is not unreasonable either with reference to the nature or cost. *Health Department v. Trinity Church* (N. Y.) 710

6. Due process of law does not require notice to the owner of premises before the board of health under statutory authority can order him to furnish water in tenement-houses, where he is entitled to a trial in any attempt to enforce a penalty or punishment for non-compliance. *Id.*

7. A statute requiring water to be furnished on each floor of every tenement-house is a valid exercise of the police power with respect to health, and also with respect to public safety regarding fires and their extinguishment. *Id.*

8. A statute cannot impose an absolute liability on railroad companies for damages caused by its trains in killing stock, irrespective of the railroad company's negligence or fulfillment of the requirements of the statutes, but may impose a liability for negligence or failure to construct cattle guards required by statute. *Birmingham Mineral R. Co. v. Parsons* (Ala.) 263

9. A statute requiring railroads to build cattle-guards whenever demand for them is

made by the owners of land through which the road runs is not unconstitutional on the ground that the land owner is made the sole judge of the necessity for them, since the statute might require the company to construct them in every case. *Id.*

10. The power of the legislature over a subject is not limited by the constitutional provision against local or special laws granting special or exclusive privilege, immunity or franchise, but this is rather a limitation in respect to the manner of the exercise of the power. *Smiley v. MacDonald* (Neb.) 540

11. The exclusive privilege of removing garbage, given by a municipal contract, is not an exclusive franchise within Neb. Const. art. 8, § 15, prohibiting local or special laws granting "any special or exclusive privilege, immunity, or franchise," but is a mere sanitary arrangement within the police power. *Id.*

12. An ordinance making it unlawful to engage in the business of a scavenger without having a license, and giving to licensed scavengers, two or more of whom shall be appointed by the mayor, the exclusive privilege of cleaning privy vaults and cesspools and removing garbage from private premises as well as from streets, is unconstitutional as an attempt to create a monopoly of a lawful calling,—especially where the constitution provides that special privileges or immunities shall not be granted by any tribunal or agency except the legislature. *Re Lowe* (Kan.) 545

13. An ordinance making it unlawful to beat a drum upon any traveled street without special permit from the president of the board of trustees, which he may grant whenever in his judgment it shall not conflict with the purposes of the ordinance, is not an unconstitutional denial of individual rights. *Re Flaherty* (Cal.) 529

14. A statute making it unlawful to do business as an employing or master plumber without a certificate of competency obtained from an examining board, and registration with the board of health, and requiring compliance with the regulations of both boards, but having no application to plumbers who do not employ others,—is a constitutional exercise of the police power to protect health. *People v. Nechameus, v. Warden of City Prison* (N. Y.) 718

15. Unfair or oppressive action of the board of examiners authorized to grant the required certificates of competency to master plumbers will not render unconstitutional a statute which, as framed, provides for an impartial board. *Id.*

16. A statute prohibiting the taking of fish, with certain specified exceptions, in any other manner than angling for them with hook and line, is a valid exercise of the police power. *State v. Mrocinaki* (Minn.) 76

17. A citizen of Indian blood is not deprived of any constitutional privileges and immunities by a statute prohibiting the sale or giving of intoxicating liquors to any Indian. *People v. Bray* (Cal.) 158

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NOTES AND BRIEFS.

See also CRIMINAL LAW.

Constitutional law; as to regulation of business. 719

Extent of police power to require improvement of building. 711

Equal privileges of Indiana. 159

CONTEMPT.

1. Interference with the property of a corporation of which a receiver has been appointed, by attaching it, is a civil contempt. *Holbrook v. Ford* (Ill.) 824

2. Previous knowledge on the part of one attaching property in another state in violation of the rights of a receiver, of the appointment of the receiver or of the insolvency of the debtor, is necessary to cause the court to enjoin the suit or commit the plaintiff for contempt. *Id.*

3. The contempt of a resident creditor of a foreign corporation, in attaching in another state debts due such corporation after the appointment of a receiver, and in refusing to dismiss such attachment suits, is waived by the voluntary interference of such receiver in the attachment suits. *Id.*

4. A court of equity asked to proceed as for a contempt against a creditor who seeks to reach by attachment or garnishment debts due to an insolvent debtor by persons residing out of the state may inquire which of the parties has a paramount right or statutory equity to those debts. *Id.*

CONTINUANCE.

1. A continuance because of absence of witnesses should be denied when not made in good faith, as shown by the fact that the applicant made efforts to prevent the attendance on behalf of the state of one of the absent witnesses, and used no diligence to procure the testimony of the others. *State v. Beloe* (Iowa) 846

2. Affidavits in opposition to a motion for continuance may be received for purposes other than to contradict statements as to what the testimony of absent witnesses will be. *Id.*

CONTRACTS. See also CORPORATIONS, 7, 8; EVIDENCE, 11; HACKS, 8; MUNICIPAL CORPORATIONS, 10, 11.

1. The construction put upon the contract by the parties may be looked to in determining its legal effect, if the language employed leaves the true meaning in doubt. *Webster v. Clark* (Fla.) 126

2. A corporation and its members in their control over it may constitute a trust or combination to fix the price of merchandise or limit the amount sold, within the meaning of a statute prohibiting such trust or combination and relieving third persons from liability to pay for goods purchased from such combination. *Ford v. Chicago Milk Shippers' Assn.* (Ill.) 298

3. A statute relieving purchasers from a trust or combination to raise the price of food

products, from liability to pay for their purchases, will apply to purchases made after its passage under a continuing contract previously executed, which guarantees payment on the 15th of each month for goods furnished during the prior month. *Ford v. Chicago Milk Shippers' Assn.* (Ill.) 298

4. A statutory right to recover money paid on an unlawful purchase of intoxicating liquors cannot apply to a purchase made in another state where it was valid, although the seller's intent to aid the purchaser to violate the laws of his state would defeat his right to recover for the purchase price, on grounds of public policy. *Wind v. Her* (Iowa) 219

5. A contract by a grandfather to pay a certain sum to his son's wife, living apart from her husband, and a further sum to his grandson on his coming of age, if she will allow him to take the boy into his family until he is of age, and educate him, giving her the privilege of visiting the child and having him at her home whenever convenient,—is not against public policy as an attempt to shift the burden of parental obligation by mere sale of the child. *Enders v. Enders* (Pa.) 56

NOTES AND BRIEFS.

See also MUNICIPAL CORPORATIONS.

Validity of contract for transfer of parental responsibility or authority:—parent cannot relieve himself of his obligations; exceptions; right to revoke; contract not enforced; children restored; right under statute; rights of third person; estoppel of parent; child's welfare will be regarded; effect of child's choice; child may enforce contract; agreement as to residence of child. 56

Monopoly in contract for removal of garbage. 540

Conclusiveness of writings. 822

Rescission of, in equity. 835

CONVICTS. See CRIMINAL LAW, 5-7.
NOTES AND BRIEFS.

CORPORATIONS. See also ACTION OR SUIT, 2; CONFLICT OF LAWS, 4, 6, 7; CONSPIRACY; CONTRACTS, 2; COSTS AND FEES, 2; CRIMINAL LAW, 2; INSURANCE, 1, 8; RECEIVERS; SPECIFIC PERFORMANCE; STATUTES, 6; TAXES, 2; TRADENAME, 1.

1. A corporation is not responsible for unauthorized and unlawful acts of its officers, though done *colore officii*. *Central R. Co. v. Brewer* (Md.) 63

Preferred stock.

2. The holder of preferred stock, even if it was issued in compromise of a debt of the corporation to him, is a stockholder, and not a creditor, under a statute giving the holders of such stock all the privileges of other members of the corporation, including the right to vote upon the stock. *Field v. Lamson & G. Mfg. Co.* (Mass.) 186

3. A guaranty by a corporation of dividends upon preferred stock, in accordance with a statute permitting a guaranty of such dividends payable cumulatively out of net profits, does not make the dividend payable at all events, 37 L. R. A.

but only devotes the profits to the payment of dividends upon such stock in preference to common stock. *Id.*

4. The declaration of a dividend out of net profits contrary to the judgment of the directors is not required by a guaranty by the corporation of dividends upon preferred stock in accordance with a statute simply permitting a guaranty of such dividends payable cumulatively out of net profits. *Id.*

5. The right to dividends on preferred stock, which are payable out of net profits, cannot be enforced in an action at law, even if there are net profits out of which they might be paid, if no dividend has been declared. *Id.*

6. A court of equity cannot compel the declaration of a dividend on preferred stock out of net profits from which the directors have a right to make the dividend payable cumulatively, where for half the time for which the dividends are claimed there were no net profits, and the condition of the corporation is such that the court cannot say that the payment of dividends might not injure the concern, or that the withholding of them might not be judicious. *Id.*

Restrictions on transfer of stock.

7. An agreement between a subscriber and a corporation, to the effect that the board of directors shall appraise the value of his shares and have the option to take them at that value in case of any transfer thereof, is not against public policy. *New England Trust Co. v. Abbott* (Mass.) 271

8. Even if a by-law of a corporation giving the board of directors the option to take the shares of any stockholder who desires to sell them at a value appraised by themselves may be invalid, the subscriber is bound by his agreement which adopts the by-law. *Id.*

9. An offer of stock for appraisal is not necessary to permit the exercise of an option of the corporation to take the stock under an agreement making it the duty of an executor or other transferee to offer the shares for appraisal to be taken at the election of the corporation. *Id.*

Forfeiture of stock.

See also FORFEITURE.

10. A positive statutory provision that a corporation may not only forfeit stock for nonpayment of calls, but collect all calls made prior to the forfeiture, will control any principle adopted as a mere equitable rule. *Mandel v. Swan Land & O. Co.* (Ill.) 813

11. The general rule in the United States is that, while a corporation having the right under the statute creating it to declare a forfeiture of shares for nonpayment of calls may exercise an option to forfeit the stock or sue for the amount of the calls, it cannot forfeit the stock and afterwards sue at law for such amount. *Id.*

12. A right of recovery by a foreign corporation, of calls made upon stock which has been forfeited for nonpayment of such calls, being in conflict with the current of legislation in this country cannot depend on a by-law merely, but must exist in the Act under which the company is incorporated. *Id.*

18. A statute authorizing recovery after forfeiture of corporate stock, of all calls owing upon it at the time of forfeiture, does not authorize recovery of interest and expenses thereafter accruing. *Id.*

Stockholders' liability.

14. A corporation whose articles of association provide that the holders of shares for the time being, whatever the number issued or subscribed for, shall form the company, may make calls upon its stock, although the entire amount of stock has not been subscribed for or the shares allotted. *Id.*

15. The liability of stockholders for failure to publish an annual notice of the corporate debts is in the nature of a penalty as a punishment for their default. *Globe Pub. Co. v. State Bank* (Neb.) 854

16. A creditor's cause of action against a stockholder does not accrue until judgment against the corporation and the exhausting of the remedy by execution, under the Nebraska constitution providing for liability of the stockholder in certain cases, for corporate debts which have been first ascertained and after the corporate property has been exhausted. *Id.*

Dissolution.

17. After the dissolution of a corporation the power to proceed judicially against it is wholly devested except as specially authorized by statute. *Combes v. Milwaukee & M. R. Co.* (Wis.) 869

18. A corporation organized by purchasers of a railroad on foreclosure, which is afterwards devested of all its property and its franchise for the operation of the railroad by the subsequent foreclosure of prior liens thereon created by the original owner, does not thereafter continue to exist so that it can be sued after a new corporation under legislative authority has acquired the property under the latter foreclosure and operated the road for many years. *Id.*

19. The fact that suit by the attorney general to annul the existence of a corporation as an illegal combination to keep down the price of a commodity was instituted upon petition of another association which was formed to enhance such prices cannot affect the decision of the case. *People v. Milk Exchange* (N. Y.) 487

20. A combination between a corporation and its members to control the price of food products may be made illegal by subsequent legislation. *Ford v. Chicago Milk Shippers' Assn.* (Ill.) 298

Insolvency.

21. The mere insolvency of a corporation known to a creditor will not prevent him from obtaining a valid lien by attachment of its property. *Balkin v. Merchants' Exch. Bank* (Wis.) 857

Foreign corporations.

See also CREDITORS' BILL; GARNISHMENT; INSURANCE.

22. The taking of a single mortgage by a foreign corporation for past-due indebtedness

for goods sold at its domicile is not doing business in the state within the meaning of restrictions on business of foreign corporations. *Florsheim Bros. Dry-Goods Co. v. Lester* (Ark.) 505

23. Partnership associations organized under Pa. Act June 2, 1874, which have the powers in substance of corporations, are regarded in New Jersey, when doing business there, as corporations subject to corporation taxes. *State, Tidewater Pipe Co. v. State Bd. of Assessors* (N. J. Sup.) 684

NOTES AND BRIEFS.

Corporation; as an illegal monopoly. 802, 438

Domicil in other state. 826

Power of agents to indorse negotiable paper. 401

Foreign, doing business. 505

Restrictions by by-laws or articles of association on the right to sell shares of stock:— (I.) by by-law: (a) in general; (b) of national banks; (II.) by articles of association; (III.) exercise of power to approve or disapprove. 271

Preferred, guaranteed, and interest-bearing stock:— (I.) power to issue: (a) in the first instance; (b) given by change of charter or articles; (II.) estoppel to deny validity; (III.) nature of interest created by; (IV.) rights and preferences as to assets; (V.) rights and preferences in dividends: (a) in general; (b) payment out of capital; (c) payment when capital is impaired or debts unpaid; (d) guaranteed dividends; (e) preference over common stock; (f) accumulations and arrears; (VI.) remedy to obtain or protect dividends; (VII.) guaranty of dividends by outside party; (VIII.) interest-bearing stock; (IX.) special stock; (X.) reduction of shares; (XI.) miscellaneous matters. 136

Forfeiture of corporate stock: (I.) power to forfeit; (II.) validity of exercise of power: (a) in general; (b) necessity of notice; (c) sufficiency of notice; (III.) redemption or other remedy of stockholder; (IV.) effect of forfeiture on personal liability of stockholder: (a) as to unpaid assessments; (b) as to creditors; (V.) miscellaneous. 805

Statutory liability of stockholders. 855

Dissolution or expiration of. 871

Expiration of franchise of water company. 833

Forfeiture of charter. 438

Preference among creditors by judicial proceedings. 369

Proceedings on indictment against. 231

COSTS AND FEES.

1. Attorneys' fees are taxable as in equitable actions, in a proceeding under Wis. Rev. Stat. § 3129, for the trial of issues on application by a creditor in a partition action, whether the trial is by court or by jury. *Van Oedell v. Champion* (Wis.) 778

2. Minority stockholders may compel the corporation to pay actual and necessary ex-

penses, including reasonable attorneys' fees, of a successful suit by them to recover corporate property which had been wrongfully conveyed by the corporate officers according to the wishes of the majority stockholders. *Grant v. Lookout Mountain Co.* (Tenn.) 98

NOTES AND BRIEFS.

Compelling labor in payment of, see CRIMINAL LAW.

Costs; allowance of attorneys' fees out of fund. 98

COTENANTS. See ACTION OR SUIT, 2.

COUNTIES.

A statute may so far validate void county warrants theretofore issued that the plea of *ultra vires* cannot thereafter be interposed as a defense thereto; but the purpose to validate them must be clearly expressed by the legislature, or be deducible from the statute by necessary implication. *Brakine v. Nelson County* (N. D.) 696

COURTS. See also OFFICERS, 3.

1. The "district" within which an accused person must be tried under the constitutional provision for trial by jury "of the county or district" in which the offense was committed is the "vicinity," and is not necessarily confined to the judicial district; and such provision does not prevent trial, on motion of the accused, in an adjacent county which is in another district. *State, Funck, v. McCarty* (Ohio) 584

2. The location of a sidewalk upon a street is, under the Illinois statute, within the discretion of the city authorities, and cannot be interfered with by the courts. *Mt. Carmel v. Shaw* (Ill.) 580

3. A statute providing for commissioners appointed by a court to make a report as to a proposed annexation of municipal corporations, which annexation becomes complete on the approval of the report by the court, is not unconstitutional as vesting a court with powers not judicial so as to defeat the operation of the statute,—at least where the courts and judges make no objection. *State, Richards, v. Cincinnati* (Ohio) 787

4. The provision of Dak. Comp. Laws, § 7812, that a judge "may" call in another judge to try the case when one indicted for felony presents to him an affidavit stating that he cannot have an impartial trial by reason of the bias or prejudice of such judge, makes it the absolute duty of the judge to call in another judge to try the case, and the word "may" is to be construed "must." *State v. Kent* (N. D.) 686

NOTES AND BRIEFS.

Courts; personal liability for excess of jurisdiction. 93

Change of judges. 687

CREDITORS' BILL.

No lien is acquired upon debts due a foreign corporation from residents of a state other than 27 L. R. A.

that in which a creditors' bill is brought against such corporation, where there is no service of process upon it. *Holbrook v. Ford* (Ill.) 824

CRIM. CON. See HUSBAND AND WIFE, 4.

CRIMINAL LAW. See also APPEAL AND ERROR, 2, 8; ASSAULT; DISTRICT AND PROSECUTING ATTORNEYS; INDICTMENT, 1; PARDON.

1. The right to object to the panel of the grand jury because the required number of jurors were not drawn for it is waived by filing a plea of guilty to the indictment. *State v. Belock* (Iowa) 846

2. A judgment by default against a corporation indicted for misdemeanor may be rendered on its failure to appear, by virtue of the common law in Pennsylvania, which has established this practice in civil cases, notwithstanding the lack of any precedents in criminal cases, since personal appearance of the defendant is no more necessary in case of misdemeanor than in a civil action. *Com. v. Lehigh Valley R. Co.* (Pa.) 231

3. The suspension of a sentence already pronounced, until further order of the court, in case defendant pays the costs that day, is beyond the authority of the court,—at least when it is done merely as a matter of leniency to the prisoner. *Re Webb* (Wis.) 856

4. An order committing a defendant to serve out a sentence previously pronounced but suspended, made after the time of imprisonment named in the sentence has expired, is void for want of jurisdiction. *Id.*

5. An escaped convict who under another name is convicted and sentenced to the same penitentiary for another crime may, at the expiration of the latter sentence, be held to serve out the remainder of his first sentence. *Henderson v. James* (Ohio) 290

6. A transfer of a convict from one place of imprisonment to another is not such a judicial act that it cannot be performed by the governor under authority of statute. *Rick v. Chamberlain* (Mich.) 573

7. Constitutional provisions against slavery and involuntary servitude are not violated by an ordinance permitting prisoners committed to a city prison for violation of a by-law or ordinance, in default of payment of a fine, to be employed by the city marshal at labor either on the streets or public works, or in a public or private place, being credited \$1 a day on a judgment for fine for each day's work performed. *Topeka v. Boutwell* (Kan.) 698

NOTES AND BRIEFS.

Criminal law; right to compel prisoners to labor:—(I.) the power generally; (II.) constitutional restrictions; (III.) necessity of express authority; (IV.) exception when labor is a part of the prison discipline; (V.) construction of statutes conferring the power generally; (a) upon what courts conferred; (b) for what crimes imposed; (c) place of performance; (d) the term of duration; (VI.) imposition for non-payment of costs; (VII.) necessity of strict compliance; (VIII.) delegation of the power; (IX.) hiring out convicts; (a) power to hire

out; (b) the contract; (c) hiring by surety; (d) leasing prisons; (e) assignability of contract; (f) custody and management of convicts; (g) termination of contract; (h) recovery of agreed compensation; (i) disposition of proceeds; (X.) effect of delay in execution of sentence; (XI.) discharge because of inability to pay; (XII.) remedy for improper imposition. 593

Suspension of sentence. 356

Term of imprisonment of escaped criminal. 291

CROSS-ERRORS. See APPEAL AND ERROR, 8.

CURTESY.

NOTES AND BRIEFS.

Right of tenant by the curtesy in partnership real estate. 840

CUSTOM.

Usage cannot excuse a failure of the warning of a school-district meeting to specify the business or question to be considered, as required by Vt. R. L. 1880, § 521. *Scott v. Williamstown School Dist. No. 9* (Vt.) 588

DAMAGES. See also MUNICIPAL CORPORATIONS, 16, 17.

1. The measure of damages for the wrongful discharge of a servant is the deficiency, not due to his fault, between the wages earned by him and those which he would have earned under the contract. *McMullan v. Dickinson Co.* (Minn.) 409

2. The amount of damages which a bank is entitled to claim against a depositor because of his failure to promptly notify it of forged checks returned in his vouchers is, in case the forger is arrested and a part of the money recovered, the difference between the amount paid on the checks and the amount so recovered. *First Nat. Bank v. Allen* (Ala.) 426

NOTES AND BRIEFS.

Damages; for obstructing highway; remoteness. 680

DEATH. See JUDGMENT, 8.

DEBTOR AND CREDITOR. See also COMPOSITION WITH CREDITORS, NOTES AND BRIEFS.

A condition in a devise, that the premises shall in no wise ever be subject to any debt, liability, execution, or attachment against the devisee, existing at that time or at any future time, is void. *Van Osdel v. Champion* (Wis.) 773

DEED.

A condition is not created by an habendum clause "to have and to hold . . . as and for a street, to be kept as a public highway," following a granting clause conveying absolutely a portion of a larger tract of land which a city was acquiring in accordance with a resolution directing its acquisition "for public use," where 37 L. R. A.

the entire property was immediately devoted to the uses of a public square, which could not have been done if the strip was devoted to street purposes, and the opening of the street would have been profitless both to the grantor and the public. *Kilpatrick v. Baltimore* (Md.) 643

NOTES AND BRIEFS.

Deed; for special purpose; condition in. 643

DE FACTO. See HABEAS CORPUS, 2.

DEFINITIONS.

1. The word "ascertained" in the Nebraska constitution, making stockholders liable for debts of the corporation which have been ascertained, means judicially ascertained. *Globe Pub. Co. v. State Bank* (Neb.) 854

2. The proximate cause of an injury is that cause which in natural and continuous sequences unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred. *Goodlander Mill Co. v. Standard Oil Co.* (C. C. App. 7th C.) 583

DESCENT AND DISTRIBUTION.

See also CONFLICT OF LAWS, 3; PARTNERSHIP, 3.

1. A wife's distributive share of the personal estate of her husband at his death cannot be defeated by a transfer or change of title as a mere device for that purpose, while he keeps absolute dominion and enjoyment of the property during his own life. *Walker v. Walker* (N. H.) 799

2. A fraud on the wife of the purchaser is not made by taking a deed of their homestead in his name as trustee for his sons by a former wife, where the amount invested therein is but a small part of his estate and a reasonable provision for the sons. *Id.* See also DOWER.

3. A donor *causa mortis* remains seised or possessed of the property until death, within the meaning of a statute giving dower in personal property of which he dies seised. *Hatcher v. Buford* (Ark.) 507

NOTES AND BRIEFS.

Descent and distribution; rights of heirs in partnership real estate. 840

DISTRICT AND PROSECUTING ATTORNEYS.

1. Counsel employed by private persons may be allowed to assist the prosecuting attorney at his request on the trial of an indictment, although the statute prohibits the latter from receiving any fee or reward from individuals. *State v. Kent* (N. D.) 686

2. The fact that an attorney is a nonresident of the state, and not a member of the bar of that state, does not make it improper to permit him to assist a prosecuting attorney at the latter's request. *Id.*

DIVIDENDS. See CORPORATIONS, 2-6, NOTES AND BRIEFS.

DIVORCE. See CLERK; JUDGMENT, 5.

DOMICIL. See **VOTERS AND ELECTORS**, 1.

DONATION. See **TRUSTS**, 2.

DOWER. See also **DESCENT AND DISTRIBUTION**, 2, 3; **PARTNERSHIP**, 3.

1. The law at the time of the husband's death governs the wife's right of dower, as her inchoate right is not a vested one. *Hatcher v. Buford* (Ark.) 507

2. The equitable interest of a purchaser in land which by his direction is conveyed to a third person under an invalid naked trust, which by provision of statute "is deemed a direct conveyance" to himself, is subject to the right of dower. *Stroup v. Stroup* (Ind.) 523
See also **DESCENT AND DISTRIBUTION**.

3. The inchoate right of the wife of a partner in the real estate of her husband only attaches to such of the real estate as remains *in specie*, unconverted, after the partnership is terminated by judgment or agreement, and its affairs completely wound up and ended. *Woodward-Holmes Co. v. Nudd* (Minn.) 840

4. The sale under order of the court, of partnership real estate, in an action to dissolve the partnership and wind up its affairs, is made free from any inchoate interest of the wives of the partners, even if the property sells for more than is necessary to pay the firm debts, or if it was not necessary to sell the whole of the property for that purpose. *Id.*

5. The sale of the real estate of the husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the wife's inchoate right of dower. *Butler v. Fitzgerald* (Neb.) 252

6. Land sold under execution against a husband is "aliened by the husband" within the meaning of Neb. Comp. Stat. 1893, chap. 23, § 7, providing that the widow's dower in such land shall be estimated according to its value when so aliened. *Id.*

7. The estimate of the value of real estate for the purpose of assigning a widow's right of dower therein, under Neb. Comp. Stat. 1893, chap. 23, § 7, providing that the value of land aliened by the husband, and afterwards enhanced in value, shall be estimated according to the value when aliened, is to be made by deducting the value of improvements made after alienation, but otherwise according to the value at the time of assigning the dower, thus giving the widow the benefit of the increase from other causes than improvements made upon the property. *Id.*

NOTES AND BRIEFS.

Dower; right of, in partnership real estate. 840

Fraud on wife's dower right. 507, 523

Effect of judgment and execution against husband. 252

DUE PROCESS. See **CONSTITUTIONAL LAW**, 4-6.

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ELECTRICAL USES AND APPLICATIONS. See also **TRIAL**, 4.

1. The unnecessary conflict of poles and wires of a trolley-railway company with those of a prior existing telephone plant to the damage of the latter makes the railway company liable for the cost of necessary changes made by the telephone company. *Cumberland Teleph. & Telog. Co. v. United Electric R. Co.* (Tenn.) 226

2. A telephone company cannot recover for loss sustained from induction on account of parallel wires of an electric-railway company, where a provision of the statute authorizing the construction of the telephone line prohibits its obstructing the ordinary use of the street. *Id.*

3. The destruction of the use of a telephone plant with a ground circuit, which made no injurious disturbance of natural electric conditions anywhere, caused by conduction resulting from the operation of a single-trolley street car line which charged the earth for half a mile on each side with powerful currents of electricity, makes the street railway company liable for the cost of return wires for the telephone line as a substitute for the ground circuit. *Id.*

4. The lack of guard wires between trolley wires and telephone wires will render a trolley company liable for injury to a person in a street by contact with a broken telephone wire lying across the trolley wire, if the omission of the guard wires was negligent and was also the proximate cause of the injury. *Block v. Milwaukee Street R. Co.* (Wia.) 365

NOTES AND BRIEFS.

Conflicting rights of telephone and street railway. 236

Liability for shock from electric wire. 365

ELECTRIC RAILWAYS. See also **EMINENT DOMAIN**, 4; **INJUNCTION**, 2.

Electric railways over country roads, connecting widely separated cities and towns, cannot be built without consent of the owners of the fee of such roads, notwithstanding consent of the town authorities has been given, under the general Street-Railway Act of Pennsylvania of 1889, authorizing corporations for the construction of street railways "on any street or highway" on which no track is already laid or authorized to be laid, but giving no right of eminent domain, and providing that every railway must have a continuous route forming a complete circuit with its own track. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* (Pa.) 765

EMINENT DOMAIN.

1. An ordinance vesting in a committee the power to condemn property within a square selected as the site for a court-house, if unable to agree with the owners, and a mere delay in acquiring title after request and warning by a land owner and after the city had acquired title to a considerable part of the square, give no claim for damages because of the uncertainty of tenure and injury to business to the

owner of a long lease of property on such square, which is in use for a hotel, since the ordinance is not the beginning of condemnation proceedings. *Shanfelter v. Baltimore* (Md.) 648

2. Damage to an abutting owner by an elevated approach to a bridge across railroad tracks, which leaves a space of about 7½ feet between the structure and the side of the street for access to his premises, is *damnum absque injuria*. *Horne Bldg. & C. Co. v. Roanoke* (Va.) 551

3. Building in a city an approach to a bridge over railroad tracks, leaving access to abutting owners, is not an additional servitude. *Id.*

4. An electric railway imposes an additional servitude on the land over which public roads run outside of municipal boundaries. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* (Pa.) 766

NOTES AND BRIEFS.

Eminent domain; damages to abutting owners by elevated structure in street. 551

EQUITY.

1. There is no adequate remedy at law for a defrauded vendor of goods, who did not learn of the fraud until the purchaser had sold a large part of them to bona fide purchasers, and then had made an assignment for creditors, which will defeat the jurisdiction of equity to aid him to reach the proceeds in the hands of the assignee. *American Sugar Ref. Co. v. Panther* (N. Y.) 757

2. Equity will not decree the rescission of an executed sale of land merely because of a breach of covenant as to title, in the absence of fraud or other ground of equitable jurisdiction except mutual mistake as to the title,—especially where the extent of the failure of title is not shown. *Decker v. Schuies* (Wash.) 835

ESTOPPEL. See also **INSURANCE**, 12, 18.

1. A depositor who fails to notify a bank of forged checks returned in his vouchers is estopped from holding the bank liable for subsequently paying similar forgeries. *First Nat. Bank v. Allen* (Ala.) 426

2. No estoppel against claiming that real estate of an insolvent firm is individual, and not partnership property, will arise by signing a request that the court authorize a sale of the assets at a price offered, which contains a statement that a certain dividend will be thereby obtained, although such statement can only be true in case all the proceeds go to firm creditors, if no creditor is misled or injured by the statement. *National Union Bank v. National Mechanics' Bank* (Vt.) 476

3. A city is estopped from denying its duty as to a dangerous pit where it has passed an ordinance declaring such pits to be a nuisance. *Pekin v. McMahon* (Ill.) 206

4. A city which has for many years recognized and accepted a waterworks system as fully complying with a contract cannot afterwards repudiate such recognition and claim damages for failure to comply with the contract. *National Waterworks Co. v. Kansas City* (C. C. App. 8th C.) 827

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EVIDENCE.

Judicial notice.

1. A court cannot take judicial notice of the contents of a city ordinance. *Shanfelter v. Baltimore* (Md.) 648

2. Judicial knowledge is taken of the fact that leaks occur in gas pipes, requiring immediate repair. *Indianapolis v. Consumers' Gas Trust Co.* (Ind.) 514

3. It is a matter of common knowledge that different species of fish, good and bad, those that take the hook readily and those that do not, inhabit the same waters; that the usual methods of taking fish are by hook and line and by nets and seines, and that the latter method usually results in the rapid and undue depletion of most kinds of valuable food fishes. *State v. Mrosinski* (Minn.) 76

Presumptions; burden of proof.

4. The presumption is that gifts made during the donor's last illness and when all hope of recovery was gone are *causa mortis*. *Hatcher v. Buford* (Ark.) 507

5. The carrier has the burden of proving freedom from negligence, on proof of injury to a passenger in a public carriage, resulting from the running and kicking of the horses, which the driver could not control. *Budd v. United Carriage Co.* (Or.) 279

6. Presumption of negligence arising out of the doctrine of *res ipsa loquitur* applies to the falling of cross-ties from a railroad car injuring a person walking over a footpath running beside the roadbed, but upon the right of way. *Houser v. Cumberland & P. R. Co.* (Md.) 154

Secondary.

7. Secondary evidence of the books and papers of a corporation is inadmissible in its behalf, where the originals are under its control. *Mandel v. Swan Land & C. Co.* (Ill.) 818

8. Entries of mailing letters and notices of calls upon corporate stock are mere memoranda to which the person making them may refer to refresh his recollection, and not a record which can be proved only by the originals or by certified copies. *Id.*

9. The complaint, answer, and decree in a suit by the People to wind up an insolvent bank, are admissible in evidence against the plaintiff in an attachment against such bank, to show that its property has been placed beyond the reach of attachment. *Crane v. Pacific Bank* (Cal.) 562

10. Written instructions to an accomplice from the instigator of the crime, as to the explanation he should give, which were written down by the accomplice, may be put in evidence under the latter's oath that they were written by direction of the accused and as he gave them. *State v. Kent* (N. D.) 686

Parol, as to writings.

11. An agreement by one employing another to procure a loan, to give notes and mortgage "in your usual form," does not make a provision of the latter's customary form for payment in gold a part of the contract, so as to exclude evidence that the employer had previously on like application procured loans upon notes and mortgages without such pro-

vision, as the expression as to form does not bind him to make payment upon unusual terms and conditions printed in such forms. *Peabody v. Dewey* (Ill.) 323

Opinions.

12. The opinion of a physician that a wound on the interior of the womb of a woman could not have been self-inflicted is admissible as expert testimony. *State v. Lee* (Conn.) 493

13. A physician may testify that the condition of an injured person could have been produced by contact with a heavily charged electric wire. *Block v. Milwaukee Street R. Co.* (Wis.) 365

14. A doctor's opinion of the reasonable probability of the ultimate recovery of a person from injuries is not inadmissible. *Id.*

15. Proof of papers, entries, and records of a private corporation in its possession, cannot be made by the opinion or conclusion of a witness as to what is shown. *Mandel v. Swan Land & C. Co.* (Ill.) 318

Miscellaneous.

16. The depositor may be required to separate the true from the false signatures upon the witness stand, in an action by him against the bank for the amount of forged checks charged against him; and his inability to do so is a circumstance for the jury in weighing the evidence. *First Nat. Bank v. Allen* (Ala.) 426

17. A Bohemian accomplice may be allowed to translate to the jury instructions written by him in the Bohemian dialect as they were given him by the accused, where he testifies to his ability to make the translation correctly. *State v. Kent* (N. D.) 686

18. A physician's testimony of a patient's statements, made for the purpose of receiving advice and treatment, is not inadmissible as hearsay. *Block v. Milwaukee Street R. Co.* (Wis.) 365

19. The testimony of a witness that he received an electric shock at the same time that an injury was received by another person may be competent as bearing on the question whether such injury was caused by an electric shock. *Id.*

20. Evidence to corroborate an accomplice under Dak. Comp. Laws, § 7312, must tend to connect the accused with the commission of the crime, and not merely show the commission of the crime or guilt of the accomplice. *State v. Kent* (N. D.) 686

NOTES AND BRIEFS.

Evidence; presumption of negligence from accident. 154

Presumption as to law of other jurisdiction. 793

Burden of proof as to negligence of passenger carrier. 287

To explain contract. 320

Of conspiracy. 683

EXECUTION. See also CONSTITUTIONAL LAW, 4; DOWER, 5, 6; JUDICIAL SALE; LEVY AND SEIZURE, 2.

Execution cannot be ordered to issue against 27 L. R. A.

a city, in an action for damages. *Pekin v. McMahon* (Ill.) 303

NOTES AND BRIEFS.

See also LEVY AND SEIZURE.

Execution; against members of limited partnership. 573

EXECUTORS AND ADMINISTRATORS. See JUDGMENT, 1, 2.

NOTES AND BRIEFS.

Foreign judgments against. 101

Rights of, as to partnership real estate. 340

EXEMPTION. See HOMESTEAD; LEVY AND SEIZURE, 1, NOTES AND BRIEFS.

EXPERTS. See EVIDENCE, 12-14; WITNESSES, 1, NOTES AND BRIEFS.

FALSE IMPRISONMENT. See also CARRIERS, 2.

A person acting upon appearances in making a criminal charge is justified if the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was innocent. *Central R. Co. v. Brewer* (Md.) 63

FERRY. See also PROXIMATE CAUSE, 1.

The owner of a ferry-boat should provide a bar to the driveway strong enough to withstand the crowding of a horse when frightened by the usual whistle of a vessel in the locality. *Sturgis v. Kounts* (Pa.) 390

FINE. See APPEAL AND ERROR, 13.

FIRE. See BAILMENT, 3; CONSTITUTIONAL LAW, 7.

FIREMEN. See NEGLIGENCE, 3.

FISHERIES. See CONSTITUTIONAL LAW, 16; EVIDENCE, 3.

NOTES AND BRIEFS.

Fisheries; state regulation of. 76

FOOD. See CONTRACTS, 3; CORPORATIONS, 20.

FORFEITURE. See also CORPORATIONS, NOTES AND BRIEFS, for forfeiture of shares of corporate stock.

See also TIMBER.

A declaration of forfeiture of shares in an unincorporated joint stock company or partnership is absolutely void, where the articles of association provide for publication of notice in newspapers of Philadelphia and Detroit thirty days before declaring a forfeiture, and such notice has been published in Philadelphia, but not in Detroit. *Morris v. Metallic Land Co.* (Pa.) 303

FORGERY. See also **BANKS**, 3-7; **DAMAGES**, 2; **SET-OFF AND COUNTERCLAIM**.

Forgery may be committed by changing the second initial of a name which is composed of two initials and a surname. *State v. Higgins* (Minn.) 74

FRAUD. See also **DESCENT AND DISTRIBUTION**, 1, 2; **EQUITY**, 1; **PLEADING**, 2.

1. Claims for the purchase price of goods sold to bona fide purchasers by an insolvent who had procured them under fraudulent representations of solvency can be recovered, in lieu of the goods themselves, from his voluntary assignee for creditors by the defrauded vendor on his timely election to rescind the original sale for fraud. *American Sugar Ref. Co. v. Fancher* (N. Y.) 757

2. A wife is within the class of "creditors and others," in a statute against fraudulent conveyances, in respect to her distributive share in her husband's property at his death. *Walker v. Walker* (N. H.) 799

NOTES AND BRIEFS.

Fraud; remedy of defrauded vendor. 757

FREEHOLDERS. See **BOARDS**, 2.

GARBAGE. See **CONSTITUTIONAL LAW**, 11, 12.

NOTES AND BRIEFS.

Garbage; monopoly in contract for removal of. 540

GARNISHMENT. See also **CONTEMPT**, 4.

1. A debt may be garnished at any place where suit thereon may be brought by the creditor, if the laws of the place authorize it. *Wyeth Hardware & Mfg. Co. v. Lang* (Mo.) 651

2. Service by publication only upon a non-resident may be sufficient to sustain garnishment of his debtor, although the indebtedness is by its terms payable at the residence of the non-resident. *Id.*

3. A foreign corporation having its principal office and place of business and various lines of railroad in another state, although it operates a road extending into the state where garnishment proceedings are attempted, is not subject to garnishment there under a statute providing that no person shall be summoned as trustee unless he resides in the state. *Craig v. Gunn* (Vt.) 511

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Garnishment; of foreign corporation. 511
Of nonresident. 651

GAS. See **EVIDENCE**, 2; **HIGHWAYS**, 2-4.

GIFT. See also **DESCENT AND DISTRIBUTION**, 3; **EVIDENCE**, 4; **TRUSTS**, 2.

1. A complete gift *inter vivos* of stocks to the donor's sons is not made by taking the shares in their names and leaving them with a third person subject to the donor's control. *Walker v. Walker* (N. H.) 799

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2. Bank stock given a few nights before the donor's death from consumption and while on his deathbed is a gift *causa mortis*. *Hatcher v. Buford* (Ark.) 507

3. A gift of notes by the payee to his sister, the mother of the maker, made as an indirect way of giving the maker of the notes an interest in a mercantile business for which the notes were given, at a time when the donor was able to be at the store, although nearing death from consumption, should be regarded as a gift *inter vivos*, and not *causa mortis*. *Id.*

NOTES AND BRIEFS.

Gift; donation from trust funds. 654
Causa mortis. 507

GOVERNOR. See **CRIMINAL LAW**, 6; **PARDON**.

GRAND JURY. See also **CRIMINAL LAW**, 1; **HABEAS CORPUS**.

An indictment is not void because presented by a jury of five persons in a county where the statute requires seven,—especially where all concur, and under the statute five of the seven could present a valid indictment, and failure to make timely objection will waive the irregularity. *State v. Beloit* (Iowa) 848

NOTES AND BRIEFS.

Number of grand jurors necessary or proper to act:—general rule; power of legislature to change number required at common law; rule in various states. 848

Organization of grand jury:—(I.) pleading and practice generally: (a) mode; (b) party; (c) time; (II.) writ; summons; officer: (a) precept; venire; (b) form; (c) seal; (d) officer; (e) oath; (f) summons, service, return; (g) name; (h) time; (III.) excusing and completing panel: (a) discharging and excusing from panel; (b) power to complete panel; (c) class; (IV.) drawing: (a) irregularities; (b) certificate; (c) manner: (1) mode; (2) machinery; (d) notice; (e) number; (f) name; (g) officers; (h) oath to officer; (i) officer's presence; (j) fraud; (k) power to draw; (V.) time and term: (a) adjournment; (b) first day, first week, first term; (c) legal term; (d) time limited; (e) prior to term; (f) time designated; (VI.) reconvening; (VII.) court; (VIII.) special term; (IX.) special grand jury; (X.) oath: (a) affirmation; (b) form; (c) objection that grand jury was not sworn; (d) time and person administering; (e) "then and there." 776

GUARANTEED STOCK. See **CORPORATIONS**, 3, 4, **NOTES AND BRIEFS**.

HABEAS CORPUS. See also **APPEAL AND ERROR**, 4, 5.

1. An objection to indictments, that they were found by a grand jury impaneled for a term prior to that at which they were found, cannot be made the basis of a habeas corpus proceeding for the release of the persons so indicted. *State, Dunn, v. Noyes* (Wis.) 776

2. The legality of a *de facto* grand jury cannot be inquired into upon habeas corpus proceedings for discharge from commitments based upon indictments found by such body,

under the rule that the acts of persons acting as *de facto* officers cannot be questioned collaterally. *State, Dunn, v. Noyes* (Wis.) 776

HABITUAL DRUNKARD. See PUBLIC MONEY.

HACKS. See also EVIDENCE, 5.

1. A passenger is not guilty of contributory negligence in jumping from a public carriage while the team is running and kicking, if persons of ordinary prudence would take that course. *Budd v. United Carriage Co.* (Or.) 279

2. General directions of a passenger in a public carriage, to drive down a certain street, does not relieve the driver from responsibility in driving over an unsafe place on such route, as the driver is expected to know whether the road is suitable and reasonably safe. *Id.*

3. An ordinance requiring hackmen to keep outside a railroad depot while trains are there, and leave a clear passageway at the entrance, cannot be limited in operation by a prior contract by which the railroad company has, "so far as it is lawful," granted to a hackman the exclusive right to enter the depot and trains for soliciting passengers. *Lindsey v. Anniston* (Ala.) 486

HEALTH. See BUILDINGS; CONSTITUTIONAL LAW, 7.

HIGHWAYS. See also CONSTITUTIONAL LAW, 18; COURTS, 2; DEED; ELECTRIC USES AND APPLIANCES, 2; ELECTRIC RAILWAYS; EMINENT DOMAIN, 2, 4; INJUNCTION, 6; MUNICIPAL CORPORATIONS, 7; PROXIMATE CAUSE, 2; PUBLIC IMPROVEMENTS; STREET RAILWAYS, 4.

1. Shade trees in the public streets of a city in Illinois are the property of the municipality, and it has complete control over them. *Mt. Carmel v. Shaw* (Ill.) 580

2. An ordinance prohibiting streets to be cut without consent of the aldermen and common council is inoperative as to a gas company which, by acceptance of a prior ordinance, has acquired the right to take up and repair its pipes in the streets from time to time as necessary. *Indianapolis v. Consumers' Gas Trust Co.* (Ind.) 514

3. A reservation in an ordinance authorizing a gas company to lay pipes in streets, of the right to bind the company by future ordinances,—such as one to prohibit the streets to be cut without the consent of aldermen and common council,—is not made by a clause declaring the duty of the city attorney to compel compliance with existing and future ordinances. *Id.*

4. The fact that a pavement was laid on a street after the acceptance by a gas company of an ordinance authorizing it to lay pipes in the street, and to take them up and repair them from time to time, does not restrict its rights. *Id.*

5. A man of full age playing with a dog on a sidewalk, and not going anywhere, is not so using the walk as to entitle him to recover
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for injuries caused by defects therein. *Jackson v. Greenville* (Miss.) 537

6. The mere imposition of a public duty to keep highways in repair, upon a municipal corporation, does not create a private right of action for injuries sustained by an individual. *Roberts v. Detroit* (Mich.) 573

7. Recovery for the loss of services of a wife and expenses incurred by her personal injury on a defective sidewalk cannot be had against the city, under 8 How. (Mich.) Stat. §§ 1446-1446A, which authorizes a recovery only by a person "sustaining bodily injury," or the owner of a "horse, . . . or vehicle, or other property" injured by defective highways or sidewalks. *Id.*

8. A city may do anything with its streets not incompatible with the end for which streets are established, under the powers given by the Illinois general incorporation Act to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve its streets and sidewalks, and vacate the same. *Mt. Carmel v. Shaw* (Ill.) 580

9. Under the power given by the Illinois statutes to a city to vacate streets, it may vacate a strip upon each side of the street so as to narrow it, where the purpose of narrowing is not for the benefit of private owners, but because it is deemed that so great a width of street is not required for public use and convenience. *Id.*

10. An ordinance vacating a strip upon each side of a street for the purpose of narrowing it is not invalidated by a provision that such strip is donated and given to the abutting lot owners, where the strip was laid out upon the original plat of the city by dedication from the land owners, as upon the vacation of such strip the title of the abutting owners to such strips becomes absolute by operation of law, and such provision is mere surplusage. *Id.*

11. A street line fixed by a valid ordinance vacating a strip along both sides of the street as originally laid out applies to and is coincident with the outside line of such street as mentioned in a subsequent ordinance providing for and locating a sidewalk with reference to such line. *Id.*

12. A city council in Illinois has authority to order a sidewalk 6 feet wide to be built along the line of a street 95 feet wide, adjoining the lots of abutting owners. *Id.*

NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Highways; right of gas company to take up and repair pipes. 515

Obstruction of, as nuisance; damages for. 680

Defect in, causing injury to person playing thereon. 527

Liability of a municipality for permitting animals in. 723

HOMESTEAD.

A homestead is not exempt from a note given in renewal of notes outstanding when

the homestead was acquired, the parties to the notes being the same. *Robinson v. Leach* (Vt.) 303

NOTES AND BRIEFS.

Homestead; exemption of. 304

HOSPITAL. See CHARITIES, 3.

HUSBAND AND WIFE. See also CONFLICT OF LAWS, 2, 3; DESOENT AND DISTRIBUTION, 1; FRAUD, 3; HIGHWAYS, 7.

1. A wife in giving an order to a domestic employed by her husband, to climb a ladder to a loft for pigeons, is, when considered as the implied agent of her husband, not liable for an injury resulting to the servant from the falling of the ladder because it was not of the right length. *Steinhauser v. Spraul* (Mo.) 441

2. A provision of an antenuptial contract that, as regards the worldly success and substance of the parties, the bride agrees to receive the groom to live at her house, does not make the contract applicable to the future acquisitions of the parties,—especially those after emigrating from their then residence and making their permanent domicile in a foreign country. *Long v. Hess* (Ill.) 791

3. A wife may maintain an action for damages sustained from desertion by her husband, against any person or persons who have brought about such abandonment. *Hodgkinson v. Hodgkinson* (Neb.) 120

4. A married woman cannot maintain an action simply in the nature of crim. con. against another woman. *Kroessin v. Keller* (Minn.) 685

NOTES AND BRIEFS.

Husband and wife; fraud on prospective wife in respect to property. 799

Action for alienating husband's affections. 685

Action by wife for enticing away husband. 120

IMPROVEMENTS. See DOWER, 7.

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 13, NOTES AND BRIEFS.

INDIANS. See CONSTITUTIONAL LAW, 17; INTOXICATING LIQUORS, 1.

INDICTMENT. See also GRAND JURY; HABEAS CORPUS.

1. A statute authorizing the instigator of a murder committed by another to be charged in an indictment as principal by making an averment that he himself did the act is not unconstitutional,—especially where the constitution does not expressly provide that the accused shall be informed of the nature and cause of the accusation. *State v. Kent* (N. D.) 636

2. An indictment charging a libel on two or more persons, although not associated together in business, which is contained in a 27 L. R. A.

single writing and published by a single act, is not bad on the ground that it charges more than one offense. *State v. Hoskins* (Minn.) 413

NOTES AND BRIEFS.

See also GRAND JURY.

Indictment; duplicity of. 413

INFANTS. See CONFLICT OF LAWS, 8; CONTRACTS, 5; INTOXICATING LIQUORS, 2; NEGLIGENCE, 4-7; PARENT AND CHILD, NOTES AND BRIEFS.

INITIALS. See NAME.

INJUNCTION.

1. An injunction will not be granted against the manufacture of cannon in a navy yard of the United States for use on war vessels, on the ground of infringement of a patent, even if the United States is not made a party to the action. *Dashiell v. Grosvenor* (C. C. App. 4th C.) 67

2. An injunction against the construction of an electric railway over public country roads can be had by the owner of the fee until his damages are paid or secured to his satisfaction. *Pennsylvania R. Co. v. Montgomery County, Pass. R. Co.* (Pa.) 768

3. The courts may enjoin collection of municipal taxes on property which an unconstitutional statute has attempted to annex to a city. *Denver v. Coulahan* (Colo.) 751

4. A citizen, taxpayer, and property owner in a city, may invoke equity jurisdiction to restrain the execution of an illegal contract for public works involving an expenditure of public money. *Frame v. Felix* (Pa.) 803

5. A court of equity has no jurisdiction to interfere by injunction with the action of municipal authorities within their well-recognized powers, or in the exercise of a discretionary power, unless the power or discretion is manifestly being abused to the oppression of the citizen. *Mt. Carmel v. Shaw* (Ill.) 580

6. Municipal authorities will not be enjoined from cutting down shade trees 2 feet in thickness standing within the line of a sidewalk ordered to be constructed, where they would constitute permanent obstructions if left standing. *Id.*

INSOLVENCY. See also ATTACHMENT; COMPOSITION WITH CREDITORS, NOTES AND BRIEFS; RECEIVERS, 2.

A creditor of an insolvent estate, holding collateral security for his claim, must credit its value upon his demand before he can share in the distribution of the estate, whether the collateral has been turned into money or not. *National Union Bank v. National Mechanical Bank* (Md.) 476

INSTRUCTIONS. See APPEAL AND ERROR, 13; TRIAL, 7, 8.

INSURANCE. See also CARRIERS, 4; LEVY AND SEIZURE, 1.

1. The office of the insurer is the place of

contract, where it, in response to the request of a broker not its agent, mails a policy, blank application, and premium note to the property owner in another state, for him to fill the blanks and return the application and note for the approval of the insurer. *Seamans v. Knapp S. & Co. Company* (Wis.) 863

2. A broker is not the agent of the insurer in procuring insurance where, having no authority from or blanks of the insurer, he requests it to write a certain policy, which it does, and for his services allows him a commission on the cash premium received. *Id.*

3. A valid contract of insurance may be made in one state upon property located in another, although the insurer is not entitled to do business in the state where the property is located. *Id.*

4. A contract made by mail for the insurance of property within the state by a foreign company which is prohibited from transacting insurance business within the state, directly or indirectly, will not sustain an action by a receiver of the company against the policy holder to recover an assessment. *Ross v. Kimberly & C. Co.* (Wis.) 556

5. A mortgage clause declaring that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, or by any change in title or possession without the mortgagee's notice, makes a new contract between the insurer and mortgagee which is unaffected by the false statements of the mortgagor as to his title or ownership of the property of which the mortgagee is ignorant, whereby the insurance never became valid as to the mortgagor. *Syndicate Ins. Co. v. Bohn* (C. C. App. 8th C.) 614

6. A provision on a slip of paper pasted on the face of an insurance policy and having no connection with the warranties expressed therein that a watchman shall be employed by the insured to be constantly on the premises while the mill is not in operation does not release the company from liability for a loss which is not due to a failure to keep the watchman. *Hart v. Niagara F. Ins. Co.* (Wash.) 86

7. A person was attended by a physician within the meaning of the question in an application for life insurance, if he went to the office of the physician, telling him he had coughed and spit blood, submitted to a physical examination, obtained a prescription, and paid a fee therefor, and afterwards consulted the physician again and paid a fee. *White v. Providence Sav. L. Assur. Soc.* (Mass.) 898

8. Technical warranties as well as representations made in an application for insurance, although referred to in the policy as part of the contract, are included in the provision of Mass. Stat. 1887, chap. 214, § 21, that misrepresentations in the negotiation of a contract shall not be deemed material unless made with actual intent to deceive, or unless the matter misrepresented increases the risk. *Id.*

9. A pistol-shot wound causing tetanus, with great bodily pain and delirium or fever, may be found to be the proximate cause of death, where a person insured against accidents, excluding suicide, sane or insane, and intentional

injuries, cuts his throat in a period of delirium or state of frenzy which is uncontrollable. *Travelers' Ins. Co. v. Melick* (C. C. App. 8th C.) 629

10. Sole owners of the capital stock of a corporation have not the sole and unconditional ownership of the corporate property within the meaning of an insurance policy which is void unless they have such ownership. *Syndicate Ins. Co. v. Bohn* (C. C. App. 8th C.) 614

11. Neither inquiry nor statement before the issue of policies is necessary to the validity of a provision making sole and unconditional ownership essential. *Id.*

12. One who makes sworn proofs of loss stating that he owned the property in fee simple cannot claim that the insurer is estopped from denying it by continuing to act for a short time on the assumption that the oath was true, after hearing a rumor to the contrary. *Id.*

13. An insurance company is estopped to deny that one sent out by it to solicit business for it is not its agent, although the policy provides that no person, "unless authorized in writing," shall be deemed its agent. *Hart v. Niagara F. Ins. Co.* (Wash.) 86

14. The time of death by accident, and not the time when the cause of action accrues on a policy of life insurance, is the time from which is to be computed the period of "one year from the date of the happening of the alleged injury" within which suit must be brought by the terms of the policy, although the right of action on the policy did not accrue until the expiration of ninety days after proof of the injury. *McFarland v. Railway Officials & E. Acci. Assn.* (Wyo.) 48

15. A provision that proof of loss must be made within a specified time is not dispensed with as to a mortgagee by a clause to the effect that no act or neglect of the mortgagor shall defeat the insurance as to the mortgagee's interest. *Southern Home Bldg. & L. Assn. v. Home Ins. Co.* (Ga.) 844

16. Statements made as to the cause of death in proofs of loss are not conclusive, although they have the probative force of solemn admissions under oath against interest. *Travelers' Ins. Co. v. Melick* (C. C. App. 8th C.) 629

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See also LEVY AND SEIZURE.

Insurance; by foreign corporation, place of. 863

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Stipulated limitation of time for action. 49

Effect of condition in policy. 86

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Effect of warranties. 898

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Proximate cause of death. 639

INTERPRETER. See EVIDENCE, 17.

INTOXICATING LIQUORS. See also COMMERCE, 3, 4; CONSTITUTIONAL LAW, 17; CONTRACTS, 4.

1. The sale or giving of liquors to an Indian of full blood, whether he has adopted the habits of civilization and separated from tribal relations, or not, is prohibited by Cal. Pen. Code, § 897, prohibiting the sale or furnishing of such liquors "to any Indian." *People v. Bray* (Cal.) 158

2. Selling intoxicating liquors to a minor who says that he is buying it as agent for two sick teachers not named, at a college where there are more than two teachers, is a violation of a statute against selling to minors. *State v. Neelly* (Ark.) 508

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INVOLUNTARY SERVITUDE. See CRIMINAL LAW, 7.

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JUDGES. See COURTS, 4, NOTES AND BRIEFS.

JUDGMENT. See also ACTION OR SUIT, 1; COMMON LAW, 2; CRIMINAL LAW, 2; PLEADING, 8.

1. A judgment against an administrator in one state has no binding force or effect against another administrator of the same estate in another state. *Braithwaite v. Harvey* (Mont.) 101

2. An administrator will not become bound by the judgment by assisting in the defense of a suit against another administrator of the same estate in another state. *Id.*

3. A decision against a city by a court of competent jurisdiction, as to the validity of consent to the use of streets by a street-railway company in the exercise of its franchises, is a bar to proceedings against the company by quo warranto in the name of the attorney general, based on a denial of the right upheld in the former action. *Detroit v. Ellis* (Mich.) 211

4. Full faith and credit are given to a decree or judgment affecting lands, rendered in a personal action in another state, if the courts of the situs of the land accord to the decision a force merely personal upon the parties and enforceable by the process of the courts of the state in which it was rendered. *Bullock v. Bullock* (N. J. Err. & App.) 218

5. An order in a divorce suit, for the execution of a mortgage upon lands in another state to secure the payment of alimony, will not constitute the basis of a suit in equity in the state where the lands lie to enforce the giving of the mortgage. *Id.*

6. Courts of the situs of land cannot be compelled to issue their decrees to enforce the process of courts of another state, or the performance of acts required by the decree of such
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courts ancillary to the relief thereby granted, affecting such lands. *Id.*

7. A judgment duly rendered by the police court of a city cannot be held void because of a defense of which the prisoner did not avail himself. *Topeka v. Boutwell* (Kan.) 598

8. A decree based on a summons against a dead man who is named as the owner of property, the sale of which is sought for an assessment for an improvement, is of no validity whatever, no matter how the summons was posted or published, although such notice in case of unknown owners might be sufficient. *Greenstreet v. Thornton* (Ark.) 785

9. Jurisdiction can be collaterally attacked in an action for wrongful acts in executing a judgment. *Thompson v. Jackson* (Iowa) 92

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Of another state or country rendered against an executor or administrator:—(I.) general rule; (II.) in proceedings commenced in decedent's lifetime; (III.) reasons for the rule; (IV.) the effect of the United States Constitution and Act of Congress; (V.) how affected by state statute; (VI.) as evidence of indebtedness; (VII.) exceptions to the general rule; (VIII.) English decisions. 101
Collateral attack on. 785

JUDICIAL SALE. See also DOWER, 5-7; LEVY AND SEIZURE, 2.

The rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance thereof has the effect simply of a quitclaim deed from the execution debtor. *Bulter v. Fitzgerald* (Neb.) 252

JURISDICTION. See APPEAL AND ERROR, 1; COURTS, 1; CRIMINAL LAW, 4; JUDGMENT, 9; JUSTICE OF THE PEACE; OFFICERS, 8.

JURY. See GRAND JURY, NOTES AND BRIEFS; TRIAL, 1.

JUSTICE OF THE PEACE. See also OFFICERS, 8; TRIAL, 1.

Jurisdiction of a justice of the peace in Iowa over a nonresident is not obtained without any service in the township where the suit was brought. *Thompson v. Jackson* (Iowa) 92

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KEELEY CURE. See PUBLIC MONEY.

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LANDLORD AND TENANT. See EMINENT DOMAIN, 1; NUISANCES, 2.

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LEGALIZATION. See COUNTIES.

LEGISLATURE.

NOTES AND BRIEFS.

Power as to municipalities, see MUNICIPAL CORPORATIONS.

LEVY AND SEIZURE. See also EXECUTION.

1. The exemption of certain property from execution attaches to the proceeds of insurance thereon, which the owner intends to invest in similar exempt property. *Puget Sound Dressed Beef & P. Co. v. Jeffs* (Wash.) 808

2. An execution creditor who consents to the postponement of the sale from time to time, for the mere purpose of giving the debtor an opportunity to negotiate with his creditors, so as to secure from them some compromise or other advantage, loses his priority of lien as against a junior execution coming into the hands of the sheriff during the pendency of such postponement, although his motive is that of kindness or leniency to the debtor, with no actual intention to hinder or defraud creditors, and the postponements do not in fact hinder, delay, or defraud other creditors. *Sweetser v. Matson* (Ill.) 874

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Levy; loss of priority of execution by consent of creditor to delay or postponement of sale:—execution cannot be used as a cover; leaving property in debtor's hands; delaying sale; temporary postponement; indefinite postponement; contract to suspend; property which requires delay; land; effect as to debtors; effect on alias execution. 874

Exemption of proceeds of insurance on exempt property. 808

LIBEL. See APPEAL AND ERROR, 18; INDICTMENT, 2.

LICENSE. See COMMERCE, 1.

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License; local license tax on vessels licensed by the United States. 414

LIENS. See ATTORNEYS; CREDITORS' BILL.

LIMITATION OF ACTIONS. See also CONSTITUTIONAL LAW, 2.

1. A statement in a letter, that "whatever is due is ready whenever I can safely pay you or" a third person named, is not a sufficient new promise to take the claim out of the statute of limitations. *Braithwaite v. Harvey* (Mont.) 101

2. A payment on a mortgage, made by heirs of a deceased mortgagor to protect their title 37 L. R. A.

to part of the mortgaged premises descended to them, will not arrest the running of the statute as against the lien of the mortgage on another part of the mortgaged premises conveyed by the mortgagor for full value in his lifetime to a third person who is under no obligation to pay any portion of the mortgage debt. *Murdock v. Waterman* (N. Y.) 418

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Limitation of actions; effect of payment by other party to arrest statute. 418

LOSS. See BAILMENT, 2.

MALICE. See BOYCOTT; TORTS.

MALICIOUS PROSECUTION.

The mayor of a city is not liable for malicious prosecution in attempting to enforce an unconstitutional ordinance which has not yet been judicially declared invalid, although opinion as to its validity is divided, if he acts in good faith, in the discharge of his duty as he understands it, and in the absence of any malice, oppression, or wanton disregard of the rights of the person prosecuted. *Guild v. Goodwin* (Tenn.) 600

NOTES AND BRIEFS.

Malicious prosecution; cause of action for. 63

MANDAMUS.

1. Mandamus is the proper remedy to compel payment of a decree against a city. *Battimore v. Keeley Institute* (Md.) 646

2. The duty of the secretary of state to countersign and affix the great seal of the state to commissions, official acts, and other instruments issued or done by the governor, under a statute saying "he shall affix" the seal in such cases, is merely ministerial, and may be compelled by mandamus. *State, Miller, v. Barber* (Wyo.) 45

3. The right of an officer to a commission which has been issued to him by the governor cannot be considered on an application for mandamus to compel the secretary of state to perform his ministerial duty to affix the great seal to such commission, notwithstanding the general rule that a clear legal right to the writ must be shown. *Id.*

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Mandamus; to secretary of state. 45

MARK. See WILL, NOTES AND BRIEFS.

MARSHAL. See ASSAULT.

MASTER AND SERVANT. See also ACTION OR SUIT, 1; BOYCOTT; CHARITIES, 2, 8; CORPORATIONS, 1; DAMAGES, 1.

1. The liability of a master to a servant wrongfully discharged is not an absolute liability for wages for constructive services during the balance of the term, but a contingent liability of indemnity for loss of wages. *McMullan v. Dickinson Co.* (Minn.) 409

2. Ordinary care is all that is required of the master in furnishing a ladder of the proper length for use by domestics several times a year in reaching a pigeon loft. *Steinhauer v. Spraul* (Mo.) 441

3. A riveter and carpenters under the same superintendent engaged in shipbuilding are fellow servants, so as to preclude recovery by the riveter for injuries caused by negligence of the carpenters in constructing a scaffold on which he works. *Beeley v. P. W. Wheeler & Co.* (Mich.) 266

4. The duty of a master to provide a safe place for workmen does not make a ship-builder liable for negligence of carpenters in preparing a scaffold for other workmen engaged in constructing a ship. *Id.*

5. A domestic, knowing the length of a ladder which she had used previously to reach a pigeon loft, assumes the risk of using it for that purpose when it is too long. *Steinhauer v. Spraul* (Mo.) 441

Liability of master to third persons.

6. Willful and unauthorized acts by an agent of a corporation will render the employer liable, when performed while he is engaged in the discharge of duties within the general scope of his agency. *Pittsburgh, C. O. & St. L. R. Co. v. Sullivan* (Ind.) 840

7. The question is in most cases one of fact, whether or not the act of a servant for which it is sought to hold the master responsible was done in the execution of the master's business, within the scope of the servant's employment. *Ritchie v. Waller* (Conn.) 161

8. If a servant's deviation from the strict course of his employment or duty is slight and not unusual the court may determine as matter of law that he is still executing the master's business; and if the deviation is very marked and unusual, it may likewise determine that he is not executing the master's business, within the rule that the master is liable for his negligence. *Id.*

9. That a servant sent by the master, with the latter's team and wagon, to a certain place to procure a load, deviates from the most direct course home for the purpose of seeing about the repair of his own shoes, is not of itself sufficient to show that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team. *Id.*

10. The scope of employment of a servant leading a colt from a water tub to its stall does not extend to an invitation to ride, given by him to a boy who is injured in attempting to accept it. *Bowler v. O'Connell* (Mass.) 178

11. A railroad company is not liable for an injury to a child riding on a hand car contrary to the rules and not in accordance with any custom acquiesced in by the officers of the company. *Houston, C. A. & N. R. Co. v. Bolling* (Ark.) 190

12. The engineer and fireman in charge of a railroad locomotive are acting within the scope of their employment in blowing the whistle wantonly and maliciously to frighten a horse which a person is driving near the track, so as to render the company liable for injuries to the

driver. *Texas & P. R. Co. v. Scoville* (C. C. App. 5th C.) 179

13. Persons having a franchise to lay water-pipes in streets cannot relieve themselves from responsibility for negligence in failing to cover the pipes properly, by letting the work to independent contractors and requiring the latter by express stipulation to perform the duty. *Colgrove v. Smith* (Cal.) 590

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Master and servant; when relation exists. 296

Right to discharge servant arbitrarily. 416

Remedy of discharged servant. 409

Liability for negligence of surgeon attending servant. 840

Liability for unsafe scaffold. 266

Master's civil responsibility for the wrongful or negligent act of his servant or agent towards one who has no claim upon the master by reason of a contract, incipient or perfected:— (I.) liability for acts expressly directed to be done; (II.) grounds of liability in case the servant is not obeying orders; (III.) the servant must have been acting in the capacity for which he was employed; (IV.) master liable for acts within scope of servant's employment; (a) liability the general rule; (b) liability for negligent acts; (c) liability for fraudulent and tortious acts; (d) limitation of scope of employment; (e) disobedience of orders; (f) performance of unlawful acts; (g) acts of master of vessel; (h) willful and malicious acts; (V.) when the result of abuse of authority will be serious or the temptation to abuse is strong; (VI.) neglect or disobedience of statutory requirements; (VII.) question for jury; (VIII.) contribution to injury. 161

Liability for negligence of independent contractor. 591

MAXIMS.

1. Accessorium non ducit, sequitur principale. *Nashville Trust Co. v. Smythe* (Tenn.) 668

2. Damnum absque injuria. *Graham v. St. Charles Street R. Co.* (La.) 416; *Lindsey v. Anniston* (Ala.) 436; *Home Bldg. & C. Co. v. Roanoke* (Va.) 551; *Shanfelter v. Baltimore* (Md.) 648; *Health Department v. Trinity Church* (N. Y.) 710

3. Expressio unius est exclusio alterius. *Hart v. Niagara F. Ins. Co.* (Wash.) 86; *Re Contested Election of School Directors* (Pa.) 234

4. He who sticks in the letter sticks in the bark. *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* (Tenn.) 236

5. Id certum est quod certum reddi potest. *Culbertson v. Nelson* (Iowa) 222

6. Mobilia inhærent ossibus domini. *Holbrook v. Ford* (Ill.) 824

7. Mobilia non habent situm. *Wyeth Hardware & Mfg. Co. v. Lang* (Mo.) 651

8. Mobilia sequuntur personam. *Holbrook v. Ford* (Ill.) 824

9. Nemo in lædit qui jure suo utitur. *Graham v. St. Charles Street R. Co.* (La.) 416

10. Nemo debet bis vexari eadem causa. *State v. Lee* (Conn.) 498

11. Respondent superior. *Steinhaus v. Sprau* (Mo.) 441
 12. Sic utere tuo ut alienum non lēdas. *Pekin v. McMahon* (Ill.) 206; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* (Tenn.) 286

MAYOR. See MALICIOUS PROSECUTION.

MILK. See CONSPIRACY; STOCK AND PRODUCE EXCHANGE.

MONOPOLY. See CONSTITUTIONAL LAW, 11, 12.

NOTES AND BRIEFS.

Monopoly; in contract for removal of garbage. 540

MORTGAGE. See also BANKS, 8; INSURANCE, 5, 15; LIMITATION OF ACTIONS, 2; TAXES, 1.

1. The grantee of land "subject to incumbrances" is not bound to pay a mortgage thereon which did not constitute a part of the consideration of his purchase, and which was not made in good faith for a real indebtedness. *Robinson Bank v. Miller* (Ill.) 449

2. The whole or any part of the mortgage or vendor's lien which secures negotiable notes may be assigned to secure any part of the notes which may be assigned, whether they be the first or last maturing, or the intermediate notes of the series. *Nashville Trust Co. v. Smythe* (Tenn.) 663

3. Assignees of several notes secured by mortgage or vendor's lien share pro rata, if there is nothing in the contract of assignment or in the contention of the parties to vary the rule. *Id.*

4. An agreement for preference in the security given to an assignee of a part of a series of negotiable notes secured by mortgage or vendor's lien is valid as against subsequent assignees of other notes in the series. *Id.*

5. Bona fide holders of promissory notes secured by mortgage or vendor's lien may hold the security as well as the notes, unaffected by equities between prior holders and the mortgagor. *Id.*

Of chattels.

6. The interest of a vendee of goods by conditional sale will pass under a mortgage of all his stock, so that the mortgagee may maintain replevin for them against an insolvency receiver claiming them for the benefit of all creditors. *Chafey v. Mathews* (Mich.) 558

7. The security of a mortgage is not affected by statements made in good faith by the mortgagee to creditors of the mortgagor, that the latter is doing a good business and will be able to meet his obligations, although the statements prove to be untrue. *Id.*

8. Affidavits for renewal of a perpetual mortgage need not state the amount of matured indebtedness if the obligations, matured and unmatured, exceed the amount of the mortgage. *Id.*

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Mortgages; priority of notes secured by. 664
 On chattels; failure to renew, effect of. 558

MUNICIPAL CORPORATIONS. See also BOARDS, 8; CONSTITUTIONAL LAW, 11-18; COUNTIES; COURTS, 8; ESTOPPEL, 8, 4; EXECUTION; HACKS, 8; HIGHWAYS, 6, 7; INJUNCTION, 8-6; MANDAMUS, 1.

1. Non-contiguous land separated from a municipality by intervening territory cannot be added by the legislature to a specially chartered town or city. *Denver v. Coulehan* (Colo.) 751

2. A statute authorizing the annexation of another municipal corporation to a city without consent of its constituted authorities or of its inhabitants is not unconstitutional, although the taxable property therein will become subject to previously incurred indebtedness of the city. *State, Richards, v. Cincinnati* (Ohio) 737

3. The aggregate vote cast in favor of annexation, where it is sought to annex more than one municipality at the same time to a city of the first grade, is sufficient under Ohio Act April 18, 1893; and it is not necessary to the annexation of any municipality that the majority of the votes cast by its electors should be in favor of it. *Id.*

4. The mere lack of the mayor's signature to an ordinance is not fatal, where it is expressly provided that if he neglects or refuses to sign or return it with objections it shall become a law without his signature. *Saleno v. Neosho* (Mo.) 769

5. Approval of an ordinance by the acting president of the board of aldermen in the absence of the mayor is sufficient, where the statute provides that in the absence of the mayor he shall perform the duties, with all the rights, power, and jurisdiction of the mayor. *Id.*

6. The city council of the city of Topeka has the power by ordinance to require the keepers of boarding houses, restaurants, and hotels to furnish the street commissioner the names of persons liable to poll tax boarding or lodging in their houses, and to impose a fine for refusal to do so. *Topeka v. Boutwell* (Kan.) 593

7. Giving an officer power to grant permission to beat a drum in a street when in his judgment it will not violate the purpose of an ordinance prohibiting such acts does not make the ordinance void. *Re Flaherty* (Cal.) 529

Municipal contracts.

8. The validity of a contract with a city in no way depends upon the execution of duplicate copies as required by a provision that, in every case of contract entered into, duplicate copies shall be executed, one of which shall be filed and not taken from the office except for the purpose of evidence. *Saleno v. Neosho* (Mo.) 769

9. A provision that all contracts for public improvements or buildings shall be let to the lowest responsible bidder does not prevent a city from constructing such works under the direction of its own engineers and officers. *Horne Bldg. & C. Co. v. Roanoke* (Va.) 551

10. A city cannot evade a requirement that contracts must be let to the lowest responsible bidder by acting indirectly through the agency of the water board, which is only a department of the city government. *Frame v. Felix* (Pa.) 80

11. Proposals for bids for public work cannot fix the price to be paid for labor, where the statute requires all contracts for public work to be let to the lowest responsible bidder. *Id.*

Indebtedness.

12. A contract by a city to pay a fixed price annually for a supply of water for a term of twenty years does not constitute a debt for the aggregate amount which may ultimately become payable, within the meaning of a constitutional provision restricting the amount of city indebtedness. *Saleno v. Neesho* (Mo.) 769

Purchase of waterworks.

13. A provision in a statute authorizing a waterworks franchise, that "at the expiration of the twenty years if the grant be not renewed the city shall purchase" is not an incidental, directory, or subordinate provision, but mandatory, vital, and controlling. *National Waterworks Co. v. Kansas City* (C. C. App. 8th C.) 897

14. The title and right of possession to a waterworks plant does not pass absolutely to a city on the expiration of the franchise, without payment or tender of payment therefor, under a statutory provision that the city shall purchase if the grant be not renewed. *Id.*

15. The disability of a city under its charter and Acts of the legislature to take the title to waterworks cannot be set up by the waterworks company, if it has paid for the property, to defeat a purchase by the city under a statutory provision that the city shall purchase if the grant be not renewed when the franchise expires. *Id.*

16. "The fair and equitable value" which by statute and ordinance a city is to pay for waterworks on the expiration of a franchise is not the amount on which the income or earnings would pay interest; neither is it merely the original cost of construction or the cost of reproduction, but it includes, in addition to the cost of reproduction, the additional value created by the fact of connection with buildings and of the actual operation of the plant and actual earnings. *Id.*

17. The value of connections with buildings, which is to be added to the cost of reproduction in determining the present value of a system of waterworks, which a city must pay therefor, is not merely the cost of making such connections, since they are not compulsory, but depend upon the will of property owners and are secured only by effort and inducements. *Id.*

Liabilities.

18. A municipal corporation owning vacant lots is chargeable with the same duties and obligations which devolve upon individuals in respect to their condition. *Bekin v. McMahon* (Ill.) 206

19. The express grant of power in the charters of certain cities to prevent cattle from running at large cannot be taken as an intention

by the legislature to prohibit the exercise of such power by other cities. *Cochrane v. Frostburg* (Md.) 728

20. Ordinances to prevent stock from running at large in a city are within the grant of power to pass ordinances not contrary to law, which may be deemed beneficial, and to remove nuisances and obstructions upon streets, lanes, and alleys. *Id.*

21. A city may be liable for injuries to a person on a street by a cow running at large, which it could have prevented by ordinary care and diligence, where it has permitted the running at large of such cattle without any attempt to stop it, while it has become a common nuisance and source of danger. *Id.*

22. A city is not liable for injuries committed by a cow running at large without any fault of the owner. *Id.*

NOTES AND BRIEFS.

Municipal corporations; power of legislature as to annexation. 752

Power of legislature to annex territory to municipalities;—power as against municipality; power as against the inhabitants of the town; as against owner of annexed territory; power of court to control legislature; rights of land owner; taking property without compensation or due process of law; annexation by special law; interference with election districts; other constitutional requirements; held valid on facts; limitation on legislative power; making special taxing district. 787

Exercise of police power by. 436

Requisites of contract by. 769

Statutes legalizing invalid municipal contracts;—general rules; bonds; general power to validate; validating elections; authorizing bonds for past debt; form of statute; constitutional provisions; the Illinois doctrine; subscriptions to internal improvements; contract to pay bounties; land grants; other contracts; excessive indebtedness; construction of statutes. 696

Rights of bidders for contracts of. 807

Monopoly in contract for removal of garbage. 540

Acquisition of waterworks on expiration of franchise. 833

Liability for permitting animals in streets. 728

NAME. See also FORGERY; TRADENAME.

1. The rule that the middle name or initial is not a material part of a person's name does not apply when his first name is not given, but only its initial. *State v. Higgins* (Minn.) 74

2. The second initial, "F." is a material part of the name "M. F. Higgins." *Id.*

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Name of person summoned as grand juror. 780, 783

Middle initial as part of. 74

NEGLIGENCE. See also EVIDENCE, 5, 6; HACKS, 1; PROXIMATE CAUSE; TRIAL, 8-6.

1. Crude petroleum is not so dangerous that

a shipper is bound to so protect and guard it that harm therefrom shall come to no one, but his duty is performed by providing a suitable vehicle able to encounter the usual risks of transportation. *Goodlander Mill Co. v. Stand and Oil Co.* (C. C. App. 7th C.) 588

2. Active vigilance is not required to see that a mere licensee on one's premises is not injured. *Walsh v. Fitchburg R. Co.* (N. Y.) 724

3. The owner of a building is not liable to members of a fire department for failure to guard an elevator well, or for so packing merchandise as to conduct them to such well when entering under a license conferred by law to extinguish a fire. *Beahler v. Daniels* (R. I.) 513

4. A turntable on railroad lands, properly made and used, is not, even as to children of tender years, such a dangerous and enticing machine that the railroad company will be liable for injury to a child playing with it merely because it is in an unfenced lot near footpaths which the public are permitted to use. *Walsh v. Fitchburg R. Co.* (N. Y.) 724

5. Unguarded premises supplied with dangerous attractions are regarded as holding out implied invitation to children, which makes the owners responsible for injuries to them. *Pekin v. McMahon* (Ill.) 206

6. A pond or pit in a populous city, in which the water is from 5 to 14 feet deep, with logs and timber floating therein on which children are in the habit of playing, near a driveway across vacant lots but partially enclosed from the streets on the sides thereof, renders the city which owns them liable for the drowning of a child playing there, if the premises are found by the jury sufficiently attractive to entice children into danger and to suggest the probability of such an accident. *Id.*

7. A child of eight years of age is bound to use such care as children of his age, capacity, and intelligence are capable of exercising. *Id.*

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See also MASTER AND SERVANT.

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NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

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NONRESIDENTS. See GARNISHMENT, 2.

NOTICE. See also BANKS, 5.

Notice of a partnership interest in land is not created by knowledge of the fact that the holder of the legal title is a member of a firm which is using the property for partnership purposes. *Robinson Bank v. Miller* (Ill.) 449

NUISANCES. See also ESTOPPEL, 8.

1. Notice of damages caused by a nuisance, and a request to remove it, must precede an action against a party who did not originally
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create it. *Philadelphia & R. R. Co. v. Smith* (C. C. App. 3d C.) 181

2. Repairing and preserving a railroad embankment does not make a lessee of the road liable for continuing it as a nuisance, in the absence of any notice or request from the person injured. *Id.*

3. The doctrine of contributory negligence does not apply to prevent a person's recovering for injury caused by a nuisance, because he has sustained other and additional damages of the same character through separate acts or omissions of his own. *Id.*

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OBSCENE PUBLICATIONS.

A purpose to exhibit, loan, and circulate an obscene picture, is not shown by proving the mere sitting for a negative of it. *People v. Ketchum* (Mich.) 448

OFFICERS. See also CRIMINAL LAW, 6; MALICIOUS PROSECUTION; MANDAMUS, 2, 3.

1. Disqualification of freeholders elected to prepare a city charter, based on their lack of five years' residence in the city, does not prevent them from being *de facto* officers. *People, Hoffman, v. Hecht* (Cal.) 203

2. A constable is not liable for executing a justice's judgment merely because it was in excess of jurisdiction, if the justice was not liable. *Thompson v. Jackson* (Iowa) 92

3. A justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing he had jurisdiction. *Id.*

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ORIGINAL PACKAGE. See COMMERCE, 3, 4.

PARDON.

The constitutional power of the governor to grant a pardon or commutation of sentence is not infringed by a statute providing a board of

pardons to investigate the facts on petition for a pardon, and to report the results of their investigation, with such recommendations as to them shall seem expedient, where such recommendations have no binding force upon the governor. *Rich v. Chamberlain* (Mich.) 573

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PARENT AND CHILD. See CONSTITUTION, 5.

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Parent and child; contract to transfer parental responsibility or authority. 56

PARLIAMENTARY LAW. See BOARDS, 2; MUNICIPAL CORPORATIONS, 4, 5; SCHOOLS, 1.

PARTIES. See ACTION OR SUIT, 3.

PARTNERSHIP. See also CONSTITUTIONAL LAW, 4; CORPORATIONS, 23; DOWER, 3, 4; ESTOPPEL, 2; FORFEITURE; NOTICE; REAL PROPERTY.

1. A person cannot be held liable as a partner merely because he was held out as such, in respect to a creditor who did not know of the holding out or act on the supposition that he was a partner in giving credit to the firm. *Webster v. Clark* (Fla.) 126

2. A partnership with community of interest in the capital stock and in the profits is created by a written instrument purporting to lease a billiard and bar-room with all furniture therein excepting bar fixtures, billiard tables, and their equipment, "which are to be paid for and owned equally," in consideration of a monthly payment to the owner of the building, with one half of the net profits of the business after the other party has received an equal monthly sum "as compensation for his service, and for the use of money advanced" by him to pay for the articles jointly owned, and to carry on the business. *Id.*

3. Partnership capital invested in land for the benefit of the company will be treated as personality, and not subject to dower or inheritance, until it has performed all its functions to the partnership and thereby ceased to be partnership capital. *Woodward-Holmes Co. v. Nudd* (Minn.) 840

4. The purchase by each of two persons of an undivided interest in real property used for mill purposes, and their subsequent formation of a partnership to operate the mill with a third person who individually buys the other undivided interest in the real property, does not make the real estate partnership property, where no partnership funds were paid for the purchase money, and the repairs subsequently made were paid for by their individual contribution in equal shares. *Robinson Bank v. Miller* (Ill.) 449

5. Entering in the partnership books and treating *inter se* as partnership property real estate devised and deeded to the partners individually, standing on the public records in

their individual names, and not representing partnership funds, will not make it partnership property as against individual creditors, unless the entries were sufficient to satisfy the statute of frauds, and the individual creditors were charged with notice, by the use made of the property or otherwise, that it had been made partnership property. *National Union Bank v. National Mechanics Bank* (Vt.) 476

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The position of tenants in dower and by the curtesy, and of the heirs and personal representatives of a deceased partner, in partnership real estate:— (I.) the widow's right to dower: (a) general doctrine; (b) must yield to partnership claims, liens, and accounts; (c) when dower attaches; (d) in lands purchased for the purpose of resale; (e) effect of an agreement converting real estate into personality; (f) right to dower in improvements; (g) when widow entitled to an equivalent; (h) widow's right to retain possession; (i) how affected by husband's private debts; (j) homestead rights; (k) right of widow to join in deed, action, or suit affecting such estate; (II.) the rights of the heirs: (a) the legal estate passes to the heirs of deceased partner; (b) nature of the title vested in the heirs; (c) the heirs bound to convey the legal title; (d) when a necessary party to suit relating to such lands; (e) when heirs not entitled; (f) as between the surviving partner and the heirs; (g) power of the heirs as against the surviving partner; (h) as between the heir and personal representatives of such deceased partner; (i) powers vested in executors and administrators of a deceased partner; (j) ultimate position of the heirs; (III.) English decisions: (a) relating to dower; (b) position of the heir. 840

When real estate will be considered partnership property:— (I.) general doctrine; (II.) the question of intention: (a) in general; (b) Pennsylvania doctrine; (III.) in whom the legal title vests: (a) the common-law doctrine; (b) Pennsylvania doctrine; (c) how vested at law; (IV.) immaterial to whom legal title is conveyed; (V.) parol evidence: (a) when held admissible; (b) when not admissible; (VI.) implied and resulting trusts: (a) when created in partnership lands; (b) when no such trust created; (VII.) equitable conversion; (VIII.) out and out conversion; (IX.) reconversion; (X.) statute of frauds: (a) in general; (b) within the statute; (c) not within the statute; (XI.) form of conveyance; (XII.) when not considered personality; (XIII.) the question of notice; (XIV.) when partnership formed for the purchase and sale of real estate; (XV.) real estate acquired in payment of debts; (XVI.) real estate held under lease: (a) in general; (b) the question of renewal; (XVII.) the effect of improvements; (XVIII.) lands owned by partner prior to partnership; (XIX.) position of incoming partner; (XX.) facts and circumstances held sufficient to constitute real estate partnership property; (XXI.) facts and circumstances held not sufficient to create a partnership in real estate; (XXII.) Louisiana doctrine. 449

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TER AND SERVANT, NOTES AND BRIEFS.**PICTURE.** See OBSCENE PUBLICATIONS.**PLEADING.** See also APPEAL AND ER-
ROR, 9-11.

1. A bill in equity charging actual fraud as the ground of relief will not justify a decree on another ground, if the fraud is not proved. *Dashiell v. Grosvenor* (C. C. App. 4th C.) 67

2. A charge of fraud and collusion by attaching creditors of a corporation, made by plaintiff in a judgment creditors' action against the corporation and other creditors, having been abandoned by him, a third class of creditors who are among the defendants, and who have not attempted to form any issue with their codefendants, cannot litigate that question. *Ballin v. Merchants' Exch. Bank* (Wis.) 357

3. A judgment against an administrator in one state need not be pleaded in a suit on the same account against another administrator in another state, in order to show that the demand sued on had been given credit for the amount realized under the foreign judgment. *Brathwaite v. Harvey* (Mont.) 101

4. An allegation of unavoidable accident, or of default or neglect of duty by an officer is necessary under Vt. R. L. 1880, § 978, to avoid a plea of the statute of limitations by reason of the failure of a prior writ, whether that is regarded as an abatement or otherwise. *Scott v. Williamstown School Dist. No. 9* (Vt.) 588

5. Mere reference to ordinances by numbers and dates is not sufficient to comply with the established rules of pleading. *Shanfelter v. Baltimore* (Md.) 648

PLEDGE. See BILLS AND NOTES, 5; IN-
SOLVENCY.**PLUMBERS.** See CONSTITUTIONAL LAW, 14, 15.**POLICE.** See ASSAULT.**POLL TAX.** See MUNICIPAL CORPORA-
TIONS, 6.**PONDS.** See NEGLIGENCE, 5, 6.**POOR.** See CHARITIES, 1.
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TIONS, NOTES AND BRIEFS.**PRINCIPAL AND SURETY.**

It is no defense to a surety on an appeal bond, that the obligee has refused on demand to resort to security which he holds and which is amply sufficient to pay the claim, there being no proof of prejudice to the surety by the refusal. *Bingham v. Mears* (N. D.) 257

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Principal and surety; right of surety to have collateral security first applied. 257

PROMISSORY NOTES. See BILLS AND
NOTES, NOTES AND BRIEFS.**PROXIMATE CAUSE.** See also DEFINI-
TIONS, 2; INSURANCE, 9; TRIAL, 2, 3.

1. The proximate cause of the drowning of a horse which breaks a defective guard rail on a ferry-boat when frightened by the whistle of a tug-boat is a defect in the rail, and not the whistle. *Sturgis v. Kountz* (Pa.) 390

2. The obstruction of a highway by an excursion train on a side track is not the proximate cause of injury to travelers on the highway from insulting and terrifying misconduct of the passengers on such train, or of another injury received in jumping from their buggy in fear of being turned over when passing over a rough road in the dark, which was made necessary by the delay. *Shields v. Louisville & N. R. Co.* (Ky.) 680

3. Negligence in omitting to have a proper valve in the outlet of a tank car is not the proximate cause which will render the shipper liable for the destruction of a mill a few feet from the railroad track at the point of destination, which results from the act of the consignee's agents in opening the outlet of the tank, upon which they were unable to prevent the oil from flowing down into the furnace room of the mill and catching fire. *Goodlander Mill Co. v. Standard Oil Co.* (C. C. App. 7th C.) 533

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Proximate cause; of injury. 390

PUBLIC CARRIAGE. See HACKS, 2.**PUBLIC IMPROVEMENTS.** See also
JUDGMENT, 8.

1. The assessment on abutting owners of the whole or part of the cost of grading, paving, or otherwise improving public streets, on the basis of supposed benefits to their property, is not according to the law of the land, and is unconstitutional unless directly authorized by the constitution. *Mauldin v. Greenville* (S. C.) 284

2. Charging upon abutting owners the cost of improving sidewalks and sewers in front of their property, having been recognized as valid prior to the adoption of a state constitution, must be regarded as embraced in the law of the land to which the constitution refers. *Id.*

3. Lots and lands fronting on the opposite side of a street widened by adding a strip on one side only may be regarded as abutting on the improvement for the purpose of assessment, although the street intervenes between them and the strip appropriated. *Cincinnati v. Batsche* (Ohio) 586

4. Lots abutting on other parts of a street cannot be assessed for frontage tax to pay for an improvement of only a portion of the street, under Ohio Rev. Stat. § 2264, which requires an assessment by foot front to be "of the property bounding and abutting upon the improvement." *Id.*

NOTES AND BRIEFS.

Public improvements; validity of assessments for. 285

Liability to repay money received on invalid sale. 121

PUBLIC LANDS.

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Statutes legalizing invalid grants. 696

PUBLIC MONEY. See also BONDS; INFUNCTION, 4.

A statute authorizing any habitual drunkard to be sent for treatment and cure to an institution within the state maintained for such persons, at the expense of the county or city of his residence, if neither he nor his petitioning kin is financially able to incur the expense, does not make an unconstitutional use of money raised by taxation. *Baltimore v. Keeley Institute* (Md.) 646

NOTES AND BRIEFS.

Public money; use of, for what allowed. 72, 646

QUO WARRANTO. See JUDGMENT, 8.

NOTES AND BRIEFS.

Quo warranto; nature of. 211

RAILROADS. See also CONSTITUTIONAL LAW, 8, 9; MASTER AND SERVANT, 11, 12; NEGLIGENCE, 4; NUISANCES, 2.

1. The stock-gaps required by the Alabama statute where a railroad company runs through the premises of an individual are not designed to be closed; and there can be no negligence charged because of leaving them open. *Birmingham Mineral R. Co. v. Parsons* (Ala.) 263

2. The mere fact that water on land overflowed in an extraordinary flood was somewhat deeper, remained longer, and flowed with stronger current than it would have done except for a railroad embankment, does not show any injury by reason of the embankment, where the crops must have been covered with water long before any water was diverted thereto by the embankment. *Kansas City, M. & B. R. Co. v. Smith* (Miss.) 762

3. The right to erect great railroad embankments may be necessarily implied in the duty to provide suitable and safe roadways, so that when done with due regard to the rights of

owners of adjacent and proximate lands any necessary and consequent injury to such lands must be borne by the owners. *Id.*

NOTES AND BRIEFS.

Railroads; statutes legalizing invalid subscriptions to. 696

Liability for embankment. 762

Statutory duty as to cattle-guards. 263

RATIFICATION. See CARRIERS, 3.

REAL PROPERTY. See also DEED.

A bona fide purchaser of land from one who holds the record title, without notice that it is partnership property, obtains a good title. *Robinson Bank v. Miller* (Ill.) 449

RECEIVERS. See also CONTEMPT, 1-3.

1. A receiver of a corporation may be appointed on the application of minority stockholders pending the investigation of charges of outrageous fraud on the part of the majority stockholders and managers, in a suit for an injunction against the negotiation or enforcement of fraudulent obligations created by them, and for other relief, although that does not extend to the winding up of the corporation. *State, Independent Dist. Teleg. Co. v. Silver Bow County Second Judicial Dist. Ct.* (Mont.) 393

2. The rule that a foreign receiver will not be allowed to maintain an action against the assets of an insolvent debtor as against a resident creditor does not apply to a receiver appointed by the courts of the state and under its laws, in a suit instituted by a nonresident creditor. *Holbrook v. Ford* (Ill.) 824

3. A receiver of the property of a foreign corporation takes no title to debts due it from debtors in another State, although in the ordinary course of business of the corporation the debts would have been payable in the state of his appointment, as the locus of the debt follows the domicile of the owner, and the domicile of a corporation is in the State of its creation. *Id.*

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Receiver; of foreign corporation, rights of. 826

Appointment on behalf of minority stockholders. 394

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RECORDS. See CLERK.

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Records; right to inspect public records:—(I.) abstracters; (II.) suits; (III.) record making or copying; (IV.) account books of public officers: (a) in general; (b) toll books; (c) as to boundaries and titles; (V.) as to title to office; (VI.) liquor records; (VII.) patent records. 82

REPLEVIN. See MORTGAGE, 6.

RESUME.

For resumé of contents of book, see 865

SALE. See also **EQUITY**, 1.

1. The reservation of the right to inspect goods does not of itself indicate that title shall not pass until the goods are tested. *Wind v. Her* (Iowa) 219

2. The title does not pass on an option to purchase if satisfactory, until the option is determined; but it is otherwise in case of a purchase with an option to return if not satisfactory. *Id.*

3. A contract by which an article is left with a person for a certain time, for the payment of certain amounts per week, the aggregate of which for the time equals the price of the article, and which provides that the article may be purchased at any time by paying the price, upon which all rents paid shall be credited,—is a sale, and not a lease. *Com. v. Harmel* (Pa.) 888

4. A contract for paving stone according to certain specifications does not imply any warranty. *Talbot Paving Co. v. Gorman* (Mich.) 96

5. Receiving and using goods after opportunity to ascertain whether they conform to the description in the contract, or not, constitutes an acceptance which cuts off all right to recover for defects in them, unless there was a warranty. *Id.*

NOTES AND BRIEFS.

Sale; acceptance of goods. 96

SCAVENGERS. See **CONSTITUTIONAL LAW**, 11, 12.**SCHOOLS.** See also **CUSTOM**.

1. The provision for roll-call and entry of ayes and noes on the vote by members of a board of education to employ a teacher, made by Ohio Rev. Stat. § 8982, is mandatory; and a unanimous vote without such roll-call and entry upon the record does not make a valid election. *New Concord School Dist. Bd. of Edu. v. Best* (Ohio) 77

2. The person who is the prudential committee of a school district, empowered to hire and remove teachers, has no right himself to act as teacher. *Scott v. Williamstown School Dist. No. 9* (Vt.) 588

3. A school district is liable to pay for services of a teacher who, though duly licensed to teach, had no valid contract, where he taught without objection and properly kept and returned the school register, by reason of which the district drew public money according to the attendance at his school. *Id.*

NOTES AND BRIEFS.

Schools; employing self as teacher. 588

SEAL.**NOTES AND BRIEFS.**

On writ of venire for grand jury. 779

SECRETARY OF STATE. See **MAN-DAMUS**, 2, 8.

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SET-OFF AND COUNTERCLAIM.

If upon discovering the forgery of checks the bank, without knowing that it has previously paid similar checks, makes good the amount to the depositor, who has failed to notify the bank of previous forgeries, it may use the amount so paid as a counterclaim when sued for the amounts represented by the prior forgeries. *First Nat. Bank v. Allen* (Ala.) 426

SHIPPING. See **COMMERCE**, 1.**NOTES AND BRIEFS.**

Shipping; local license tax on vessels licensed by the United States. 414

SIGNATURE. See **WILLS**, **NOTES AND BRIEFS**.**SLAVERY.** See **CRIMINAL LAW**, 7**SPECIAL STOCK.** See **CORPORATIONS**, **NOTES AND BRIEFS**.**SPECIFIC PERFORMANCE.**

Specific performance of an agreement to permit a corporation to take the stock of a deceased subscriber at the value appraised by the directors, if they so elect, will not be denied on the ground that the corporation has a remedy at law,—especially where its shares are all subject to its option to purchase, and are not bought and sold in the market like most stocks, and it might be difficult to lay down a clear rule of damages. *New England Trust Co. v. Abbott* (Mass.) 271

SPENDTHRIFT. See **DEBTOR AND CREDITOR**.**STATUTES.** See also **CONTRACTS**, 3.

1. A statute attempting to annex noncontiguous territory to a city is not germane to the subject of amendment to the charter or its provisions expressed in the title as "An Act to Revise and Amend the Charter." *Denver v. Coulahan* (Colo.) 751

2. The title "An Act to Provide for the Treatment and Cure of Habitual Drunkards" does not describe more than one subject, or vary from the body of the act, which mentions treatment only, and not cure. *Baltimore v. Keeley Institute* (Md.) 646

3. The word "may" should be construed "must," in a statute providing that a judge on affidavit of his bias or prejudice "may" call in another judge. *State v. Kent* (N. D.) 686

4. An unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others, to conform it to the requirements of the constitution. *State, Richards, v. Cincinnati* (Ohio) 737

5. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of the statute. *Globe Pub. Co. v. State Bank* (Neb.) 864

6. The statutory liability of stockholders for debts of the corporation in case of failure to publish an annual notice of its existing debts, being penal, and not contractual, a suit to enforce it falls by repeal of the statute before judgment. *Id.*

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Statutes; when mandatory. 79

STAY. See APPEAL AND ERROR, 4

STOCK AND PRODUCE EXCHANGE. See also CONSPIRACY.

An incorporated milk exchange is not engaged in buying and selling milk, where it merely looks up a dealer in each case to purchase the milk directly from the producer, at a price fixed by the exchange. *People v. Milk Exchanges* (N. Y.) 487

STOCK-GAPS. See RAILROADS, 1.

STOCKHOLDERS. See CORPORATIONS, NOTES AND BRIEFS.

STREET RAILROADS. See also BOARDS, 1; CARRIERS, 2, 3; ELECTRICAL USES AND APPLIANCES; ELECTRIC RAILWAYS; JUDGMENT, 3.

1. A street-railway company has no right to build any part of its line until it has the right to complete it, where it has no power of eminent domain. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* (Pa.) 766

2. An actual corporate existence clothed with a legal right to build a railroad, being a fundamental condition of permission to occupy a highway for that purpose, permission nominally granted to a company not yet legally in existence cannot become effective on its incorporation,—at least as against a company previously chartered, which with reasonable promptness obtains a later grant of permission to use the same road. *Homestead Street R. Co. v. Pittsburgh & H. Electric Street R. Co.* (Pa.) 883

3. Not more than one street-railway franchise upon the same highway can be given under a statute authorizing the incorporation of street-railway companies only for the construction and operation of a street railway on a street or highway "upon which no track is laid, or authorized to be laid or to be extended under any existing charter." *Id.*

4. The ordinary use of streets which a telephone company is forbidden to obstruct by a proviso in the statute giving permission to use the streets includes the use of the streets by an electric street-car line. *Cumberland Teleph. & Tel. Co. v. United Electric R. Co.* (Tenn.) 236

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Street railways; right to build in highway. 883

Right to construct on country roads. 766

SUPERVISORS. See BOARDS, 1.
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TAXES. See also BONDS; INJUNCTION, 3; PUBLIC MONEY.

1. A real-estate mortgage owned and controlled by a nonresident of the state is no subject to taxation as "property in the state." *Holland v. Silver Bow County* (Mont.) 797

2. A tax on a foreign pipe-line company imposed by way of license, which consists of a percentage of the gross amount of its receipts from transportation of oil within the state, which is taken to be such proportion of its gross receipts for transportation as the length of the line in the state bears to the whole line,—is not an unconstitutional burden on interstate commerce. *State, Tidewater Pipe Co. v. State Bd. of Assessors* (N. J. Sup.) 684

3. In the absence of an express statutory mandate, a city of the metropolitan class cannot be compelled, either at law or in equity, to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment levied against such real estate by said city, and for which special assessment said real estate was not liable. The rule *caveat emptor* applies with full force to such a purchaser. *Pennock v. Douglas County* (Neb.) 121

NOTES AND BRIEFS.

Taxes; for what purposes may be levied. 73

On mortgages of nonresident. 797

Liability to refund money on invalid sale. 121

TELEGRAPHS. See also COMMERCE, 5.

1. A statutory prohibition of discrimination by telegraph companies merely declares a principle of the common law. *Western U. Tele. Co. v. Call Pub. Co.* (Neb.) 622

2. A substantial difference in conditions affecting the difficulty or expense of performing the service justifies a difference in rates charged by a telegraph company. *Id.*

3. Dissimilar conditions of telegraph service justifying different rates exist in reference to duplicate copies of the same news report furnished at the same time to two newspapers of the same city, where one is an evening paper and requires the report about 8 P. M., so that it must come during the day and take preference over commercial business, while the other is a morning paper which does not need the report until evening, and to which it could be sent at any time in the day during lulls in other business. *Id.*

NOTES AND BRIEFS.

Telegraphs; discrimination in rates. 622

TELEPHONES. See ELECTRICAL USES AND APPLIANCES, 1-3; STREET RAILWAYS, 4.

TENEMENT HOUSE. See BUILDINGS; CONSTITUTIONAL LAW, 7.

TIMBER.

Failure to cut and remove timber within a reasonable time, under an absolute grant thereof which specified no time for the removal, does not forfeit the title of the grantee in favor of a subsequent purchaser of the land whose conveyance recites the prior sale of the timber. *Magnetic Ore Co. v. Marbury Lumber Co. (Ala.)* 484

TOLLS.**NOTES AND BRIEFS.**

Inspection of public toll books. 83

TORTS. See also **BOYCOTT.**

An intentional causing of loss by one man to another without justifiable cause, and with malicious purpose to inflict it, is of itself an actionable wrong. *Graham v. St. Charles Street R. Co. (La.)* 416

TOWBOATS. See **COMMERCE**, 1.**TOWNS.** See **BOARDS**, 1.**TRADENAME.**

1. The right of a person to use his own name in business notwithstanding the prior use of the name by others in a similar business does not extend to a corporation of which he is a promoter and member. *Chas. S. Higgins Co. v. Higgins Soap Co. (N. Y.)* 42

2. The use of the name "Higgins Soap Co." to some extent as that of the "Chas. S. Higgins Co." which is engaged in manufacturing various kinds of soap called by the general name of "Higgins Soap," will prevent the right of a company subsequently incorporated in another state under that name to use it in a rival business in the same city. *Id.*

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Tradename; conflicting rights in. 43

TREES. See **HIGHWAYS**, 1; **INJUNCTION**, 6.**TRESPASS.** See **ACTION OR SUIT**, 3; **ANIMALS**, 2.**TRIAL.** See also **APPEAL AND ERROR**, 13; **DISTRICT AND PROSECUTING ATTORNEYS.**

1. The right to a jury trial on appeal from a justice of the peace or a police justice, with an absolutely free and untrammelled right to such appeal, satisfies a constitutional provision that "a man hath a right to a speedy trial by an impartial jury" in a criminal case, at least when the accused has the right to elect whether he will be tried in the first instance before the justice or in the higher court. *Brown v. Epps (Va.)* 676

2. The cause of death is a question for the jury where one witness testifies that it was a cutting, another that it was tetanus, and the third that it was both. *Travelers' Ins. Co. v. Melick (C. C. App. 8th C.)* 629

3. Whether the negligent failure of a trolley-railway company to place guard wires between the trolley wires and the wires of a telephone company was or was not the proximate cause of a shock to a traveler, from contact with a broken telephone wire which had fallen across the trolley wire,—is a question for the jury. *Block v. Milwaukee Street R. Co. (Wis.)* 365

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4. Negligence in omitting to place guard wires between trolley wires and telephone wires is a question for the jury. *Id.*

5. Whether a passenger in jumping from a public carriage when directed to do so by the driver, while the horses were running and kicking, was guilty of contributory negligence or not, is a question of fact for the jury. *Budd v. United Carriage Co. (Or.)* 279

6. The attractiveness of dangerous premises for children, which will render the owner liable for accidents to them, is a question for the jury. *Pekin v. McMahon (Ill.)* 206

7. Pertinent questions of fact stated in writing and handed to the court at the close of the testimony must be submitted to the jury, although the attention of the other counsel was not called to them until after his opening argument. *Topeka v. Boutwell (Kan.)* 593

8. An instruction that there must be a "reasonable probability" of the permanency of a personal injury, to justify a recovery therefor, with a refusal to instruct that there must be a "reasonable certainty" thereof, is erroneous. *Block v. Milwaukee Street R. Co. (Wis.)* 365

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Trial; permitting nonresident attorney to aid state's attorney. 688

TRUSTS. See also **CONTRACTS**, 2; **CORPORATIONS**, 19, 20; **DESCENT AND DISTRIBUTION**, 2; **DOWER**, 2.

1. A conveyance in trust made to another, subject to the life use of the purchaser of premises and his right to direct a sale of the property for his own benefit at any time, creates only a naked or nominal title in the trustee, which is invalid under Ind. Rev. Stat. 1894, § 3408. *Stroup v. Stroup (Ind.)* 523

2. A donation from trust funds to aid in building a hotel when this is necessary to secure its location near real property belonging to the trust estate, the value of which will be largely enhanced thereby, is not beyond the power of trustees under a will which creates a trust to continue until the death of all of certain annuitants and of testator's children and of his grandchildren living at his death, after which the estate is to be divided among his descendants then living, and which provides, after paying certain annuities, for a division of three fourths of the net income between testator's children, and for a reserve fund to be made of the remaining one fourth as security against losses by shrinkage; where the trustees can pay the subscription from the reserve fund without disabling the performance of other provisions with respect to that fund, and the will expressly empowers them to invest and reinvest this fund, as well as to do all that the testator could lawfully do, if living, with respect to a part of the real estate and the management thereof and the investing and reinvesting of the proceeds thereof. *Drake v. Crane (Mo.)* 653

NOTES AND BRIEFS.

Trusts; donation from trust funds. 654

In *institum*, doctrine of. 758

Merely naked or nominal. 638

TURNTABLE. See NEGLIGENCE, 4.**UNITED STATES.** See INJUNCTION, 1.**USAGE.** See CUSTOM.**USURY.**

1. One of three joint makers of a note for the purchase price of real estate is not limited in setting up the defense of usury to the portion corresponding with his interest in the land; and the fact that he has purchased the interests of his comakers is immaterial. *People's Bank v. Jackson* (S. O.) 569

2. A statute limiting the rate of interest upon any contract "for hiring, lending, or use of money or other commodity," applies to a promissory note for the purchase price of real estate. *Id.*

3. The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price, without violating the usury law, although the per cent agreed upon is greater than the lawful rate of interest. *First Nat. Bank v. Munn* (Tenn.) 565

NOTES AND BRIEFS.

Usury; in deferred payments of purchase money;—making interest a part of the purchase price; cash and credit prices; agreement as to interest made after original contract completed; other contracts. 565

VALIDATION. See COUNTIES.**VENDOR AND PURCHASER.** See also EQUIT, 2; MORTGAGE, 1-5.

The assignment of notes secured by vendor's lien is governed by the same rule as the assignment of notes secured by mortgage. *Nashville Trust Co. v. Smythe* (Tenn.) 663

VENUE. See ACTION OR SUIT, 4, NOTES AND BRIEFS.**VOTERS AND ELECTIONS.** See also MUNICIPAL CORPORATIONS, 3.

1. A voter need not have any particular spot which he calls "home," provided he makes his home, in the sense of having no other home, anywhere or in however many places, for the required times, within the limits of the state and the voting district. *Langhammer v. Munter* (Md.) 880

2. A voter cannot paste a slip, ticket, or sticker procured from outside parties over the printed matter as well as the blank spaces in the right hand column of an official ballot, where the only prescribed mode of voting for persons who were not already named thereon is by inserting their names in blank spaces prepared therefor in such column. *Re Consolidated Election of School Directors* (Pa.) 234

NOTES AND BRIEFS.

Voters and elections; effect of statute as to marking ballots. 234

Domicil of voter. 880

WAGES. See MASTER AND SERVANT, 1.**WARRANTS.** See COUNTIES.

97 L. R. A.

WARRANTY. See SALE, 4.**WATERS.** See also BUILDINGS; CONSTITUTIONAL LAW, 7; ESTOPPEL, 4; MUNICIPAL CORPORATIONS, 12-17.

1. Flood waters of a large stream which in time of ordinary floods include within their course farms innumerable, and railroads, villages, towns, and cities, cannot be regarded as within the strict rules of law on the subject of obstructing streams. *Kansas City, M. & B. R. Co. v. Smith* (Miss.) 762
See also RAILROADS, 2, 3.

2. Water brought in large quantities to a brewery for the purpose of cooling beer and cleaning utensils cannot be discharged upon the surface of the ground in such manner as to injure neighboring proprietors. *Baltimore Breweries Co. v. Ranstead* (Md.) 294

NOTES AND BRIEFS.

Waters; disposal of waters brought in unnatural quantities upon property. 294

WILLS. See also CONFLICT OF LAWS, 3; DEBTOR AND CREDITOR.

The signature of a witness who does not make any mark on the instrument, or touch the pen which makes the signature, although written for him at his request and in his presence, cannot be sufficient as that of a subscribing witness to a will of real property. *Bush v. McFarland* (Tenn.) 662

NOTES AND BRIEFS.

Signature by mark. 662
Condition to protect against creditors of donee. 774

WITNESSES.

1. Compensation for expert testimony on behalf of the state in a criminal case includes only the usual witness fees, unless further provision is made by statute. *Klinn v. Prairie County* (Ark.) 669

2. An accomplice may be asked on cross-examination in a murder case if he expects to be hung. *State v. Kent* (N. D.) 686

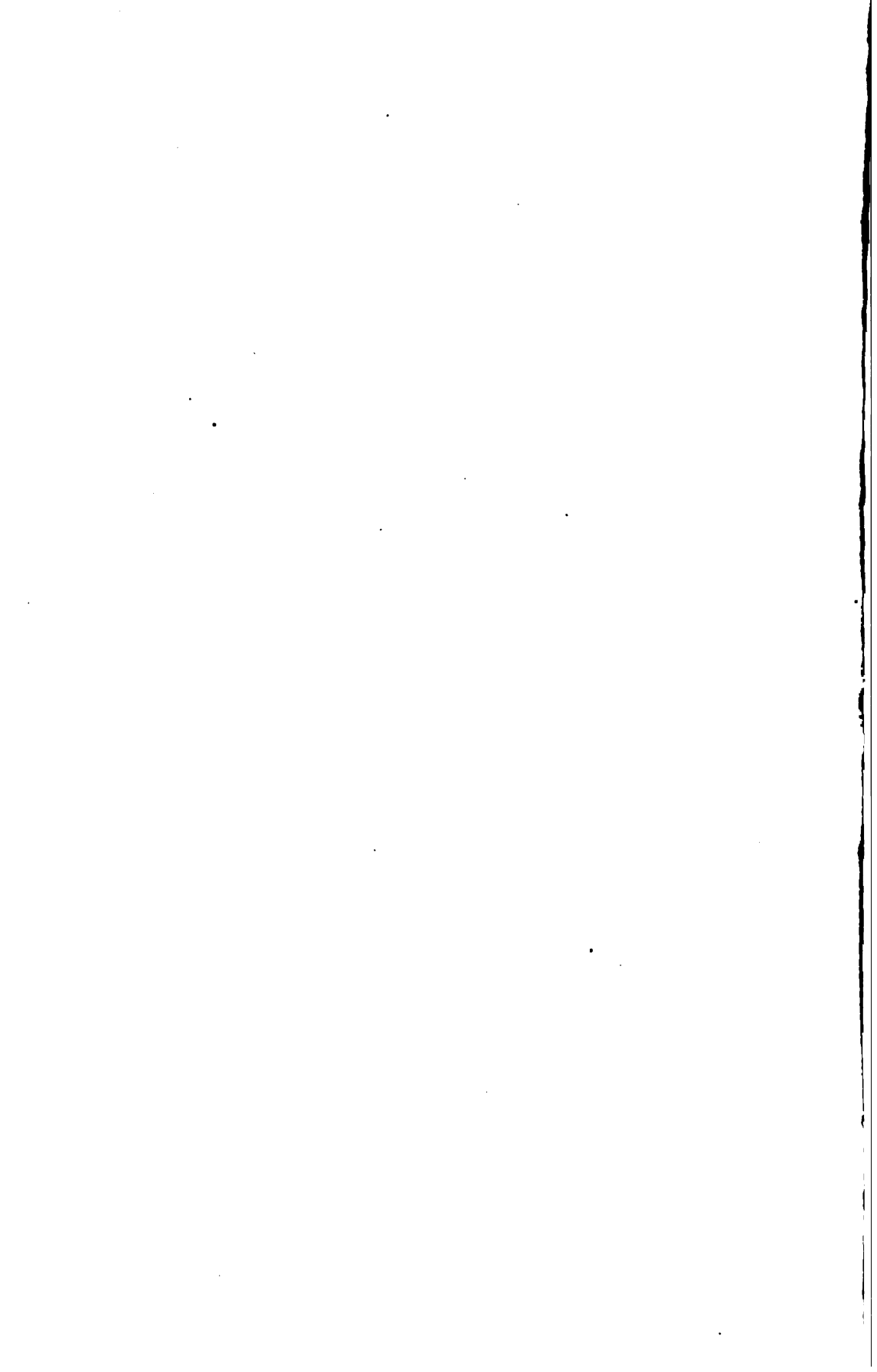
3. To affect the credibility of an accomplice it may be shown that no proceedings have been instituted against him, although some time has elapsed since the crime. *Id.*

NOTES AND BRIEFS.

Witnesses; compensation of expert witnesses;—(I.) as to matters of fact; (II.) as to requiring examination or preparation; (III.) cases denying the right to additional compensation; (IV.) cases affirming the right to additional compensation; (V.) reasons given for the different rulings; (VI.) statutory provisions; (VII.) by whom paid; (VIII.) the English rule: (a) in common-law courts; (b) in courts of chancery; (c) the modern rule. 669

WRIT AND PROCESS. See GARNISHMENT, 2.**NOTES AND BRIEFS.**

Writ; for summoning grand jury, see GRAND JURY.



L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
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L. R. A. CASES AS AUTHORITIES.

CASES IN 27 L. R. A.

27 L. R. A. 33, HANOVER NAT. BANK v. BLAKE, 142 N. Y. 404, 59 N. Y. S. R. 794, 40 Am. St. Rep. 607, 37 N. E. 519.

Effect of secret preference in relation to composition agreement.

Cited in *Re Chaplin*, 115 Fed. 166, holding amount of fraudulent preference in compositions, if paid, recoverable by trustee in bankruptcy; *Continental Nat. Bank v. McGeoch*, 92 Wis. 308, 66 N. W. 606, holding composition agreement not invalidated by payment of attorney's fees incurred in suits up to time of agreement.

Distinguished in *Powers Dry-Goods Co. v. Harlin*, 68 Minn. 200, 64 Am. St. Rep. 460, 71 N. W. 16, holding payment of notes given in composition not enforceable against sureties, because of secret agreement of holder for additional payment; *Glens Falls Nat. Bank v. Van Nostrand*, 41 Misc. 528, 85 N. Y. Supp. 50, holding guaranty by third person of note as secret preference to secure signature of creditor to composition agreement, void as against public policy.

27 L. R. A. 42, CHAS. S. HIGGINS CO. v. HIGGINS SOAP CO. 144 N. Y. 462, 63 N. Y. S. R. 724, 43 Am. St. Rep. 769, 39 N. E. 490.

Unauthorized use or infringement of trade-names and labels.

Cited in *De Long v. De Long Hook & Eye Co.* 89 Hun, 404, 35 N. Y. Supp. 509, restraining use of name "De Long Hook & Eye Co." in imitation of trademark "The De Long Hook and Eye," although name of an incorporator was De Long; *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun, 69, 36 N. Y. Supp. 384, restraining use of name "The Tuerk Water Meter Company" in imitation of name "The Tuerk Water Motor Company;" *Church v. Kresner*, 26 App. Div. 351, 49 N. Y. Supp. 742, restraining use of trade-name "Cameron" by person not of that name, although original user was also not of that name; *Dr. David Kennedy Corp. v. Kennedy*, 36 App. Div. 604, 55 N. Y. Supp. 917, restraining person selling right to use his own name as trade-name, from receiving mail directed to him at address of purchasing corporation; *Cutter v. Gudebrod Bros. Co.* 44 App. Div. 610, 61 N. Y. Supp. 225, Modifying 36 App. Div. 373, 55 N. Y. Supp. 298, holding that purchaser of assets of corporation using name of individual cannot be restrained from using corporation name thereafter; *Society of the War 1812 v. Society of the War 1812*, 46 App. Div. 572, 62 N. Y. Supp. 355, restraining use of corporate name "The Society of the War of 1812," as part of corporate name of subsequently organized corporation; *Ft. Stanwix Canning*

Co. v. William McKinley Canning Co. 49 App. Div. 574, 63 N. Y. Supp. 704, holding words on labels "Our Flag" and "Pride of the Home" infringement on "F. S. Flag" and "Pride of Rome;" *Re Adams*, 24 Misc. 295, 53 N. Y. Supp. 666, upholding right of plaintiff to restrain sale of his own name as trademark, by assignee; *Schmid v. De Grauw*, 27 Misc. 695, 59 N. Y. Supp. 569, restraining use of name "De Grauw, Aymar, & Co." against prior right to use, although partners were named De Grauw and Aymar; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.* 28 Misc. 48, 58 N. Y. Supp. 979, holding use of name "Camm-Roy Watch Case Co." restrainable by prior corporation named "Roy Watch Case Co.;" *Arnheim v. Arnheim*, 28 Misc. 399, 59 N. Y. Supp. 948, restraining use of name "Arnheim the Tailor" by person of name of Arnehim; *Crawford v. Laus*, 29 Misc. 249, 60 N. Y. Supp. 387, holding words "The Little Antique Shop" infringement on words "The Little Shop;" *Falk v. American West Indies Trading Co.* 71 App. Div. 322, 75 N. Y. Supp. 964, Affirming 36 Misc. 378, 73 N. Y. Supp. 547, holding words "El Falco" infringement on words "El Falcon," not justified because director of infringing corporation was named Gregorio Lopez of Falco; *Rubel v. Allegretti Chocolate Cream Co.* 76 Ill. App. 590, restraining use of firm name of "Algretti & Co." as infringement of trade-name of "Algretti," used in connection with sale of chocolate creams; *Grand Lodge, A. O. U. W. v. Graham*, 96 Iowa, 607, 31 L. R. A. 138, 65 N. W. 837, restraining use of name "Grand Lodge of the Ancient Order of United Workmen of Iowa" by seceding body, although alone incorporated; *Red Polled Cattle Club v. Red Polled Cattle Club*, 108 Iowa, 111, 78 N. W. 803, enjoining use by one corporation of name of another incorporated in different state; *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 113 Mich. 136, 38 L. R. A. 661, 71 N. W. 470, refusing injunction against use of name "Improved Order Knights of Pythias" by withdrawing members of Knights of Pythias; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 120 Mich. 164, 44 L. R. A. 844, footnote p. 841, 78 N. W. 1072, denying right to use one's own name so as to deceive public as to business rightfully engaged in by another; *Lafean v. Weeks*, 177 Pa. 431, 34 L. R. A. 174, 35 Atl. 693, holding use of initials "W. H. W." as infringement on trademark "P. C. W." improperly enjoined; *American Clay Mfg. Co. v. American Clay Mfg. Co.* 198 Pa. 194, 47 Atl. 936, enjoining use by foreign corporation of name of older domestic corporation; *Armington v. Palmer*, 21 R. I. 113, 43 L. R. A. 99, footnote p. 95, 79 Am. St. Rep. 786, 42 Atl. 308, sustaining private suit in equity to prevent wrongful assumption by corporation of name belonging to plaintiff; *Robinson v. Storm*, 103 Tenn. 48, 52 S. W. 880, restraining unauthorized use of trade-name "Storm's Liver Regulator;" *Clark Thread Co. v. Armitage*, 67 Fed. 902, restraining use of small label in all respects like plaintiff's, except that letters "O. N. T." were replaced by letters "N-E-W;" *Godillot v. American Grocery Co.* 71 Fed. 875, restraining use of letters "A. S." the trademark of another, where combined in monogram, infringers using letters in similar monogram; *Lever Bros. Limited Boston Works v. Smith*, 112 Fed. 999, upholding right of defendant to use name "Welcome A. Smith" on soap labels, although soap on market known as "Welcome" soap; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 89, footnote p. 81, 51 C. C. A. 262, 113 Fed. 302, enjoining use of corporate name "Peck Bros. Co." as infringement upon name "The Peck Bros. & Co.;" *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 367, holding name "The Bissell Chilled Plow Works" infringed by name "The T. M. Bissell Plow Co.;" Com-

pany;" Wyckoff v. Howe Scale Co. 58 C. C. A. 514, 122 Fed. 352, enjoining use of word "Remington" in name of corporation manufacturing typewriters, but refusing to enjoin use of "Rem-Sho" for name of typewriter, as infringement on original name "Remington typewriter;" Pettes v. American Watchman's Clock Co. 89 App. Div. 347, 85 N. Y. Supp. 900, enjoining use by corporation of copartnership name of another company; American Novelty & Mfg. Co. v. Manufacturing Electrical Novelty Co. 36 Misc. 455, 73 N. Y. Supp. 755, enjoining, on motion of American novelty and manufacturing company, use of name "Manufacturing Electrical Novelty Company," adopted by another company for purpose of deception; Van Houten v. Hooton Cocoa & Chocolate Co. 130 Fed. 603, enjoining sale of cocoa under name of "Hooton's" by new company, where well-known brand known as "Van Houton's Cocoa" was on the market.

Cited in footnotes to Nolan Bros. Shoe Co. v. Nolan, 53 L. R. A. 384, which sustains right of one using family name as trade-name to prevent deceptive use of name by other member of same family; International Committee, Y. W. C. A. v. Young Women's Christian Assn. 56 L. R. A. 888, which sustains right of local Y. W. C. A. to enjoin deceptive use of similar name by organization subsequently incorporated; Bagby & R. Co. v. Rivers, 40 L. R. A. 632, which denies assignability of continuing partner's right to use retiring partner's name; Slater v. Slater, 61 L. R. A. 796, Affirming 78 App. Div. 454, 80 N. Y. Supp. 363, which holds firm name an asset of partnership which executor of deceased partner has right to have sold.

Examination of corporation officer before trial.

Cited in Rosenbaum v. Rice, 36 Misc. 413, 73 N. Y. Supp. 714, upholding right of examination before trial of president and director of corporation at suit of minority stockholder on allegations on information and belief.

27 L. R. A. 45, *STATE ex rel. MILLER v. BARBER*, 4 Wyo. 409, 34 Pac. 1028.

Jurisdiction of courts of last resort as to mandamus.

Cited in note (58 L. R. A. 867) on original jurisdiction of courts of last resort in mandamus case.

27 L. R. A. 48, *McFARLAND v. RAILWAY OFFICIALS & E. ACCI. ASSO.*
5 Wyo. 126, 63 Am. St. Rep. 29, 38 Pac. 347.

Limitation of time to sue on insurance policy.

Cited in Egan v. Oakland Ins. Co. 29 Or. 410, 54 Am. St. Rep. 798, 42 Pac. 990, and Rottier v. German Ins. Co. 84 Minn. 118, 86 N. W. 888, holding that limitation of time for suit begins to run from date of fire, although loss not payable until sixty days after proof thereof.

Cited in note (47 L. R. A. 705) as to when stipulation limiting time for suit on insurance policy begins to run.

27 L. R. A. 56, *ENDERS v. ENDERS*, 164 Pa. 266, 44 Am. St. Rep. 598, 30 Atl. 129.

Agreements concerning custody and support of children.

Cited in Anderson v. Young, 54 S. C. 394, 44 L. R. A. 279, footnote p. 277, 32 S. E. 448, sustaining court's power to uphold, in interest of child, custody held under void agreement with parent.

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Cited in footnotes to *Fletcher v. Hickman*, 55 L. R. A. 896, which holds father bound by agreement intrusting custody of infant child to another; *Van Epps v. Redfield*, 34 L. R. A. 360, which sustains agreement by father of bastard to convey property to mother for release from liability as to maintenance of child.

27 L. R. A. 63, *CENTRAL R. CO. v. BREWER*, 78 Md. 394, 28 Atl. 615.

Liability of principal for torts of agent.

Cited in *Barabasz v. Kabat*, 86 Md. 36, 37 Atl. 720, holding pastor not liable for act of his door keeper in causing arrest of woman attempting to enter church without ticket; *Baltimore & Y. Turnp. Road v. Green*, 86 Md. 167, 37 Atl. 642, holding turnpike company not liable for arrest and prosecution of person by gate keeper for nonpayment of toll; *Grand Fountain U. O. of T. R. v. Murray*, 88 Md. 426, 41 Atl. 896, holding supreme lodge of benefit society not liable for unauthorized order of office directing subordinate lodge to expel member; *Carter v. Worcester County*, 94 Md. 625, 51 Atl. 830, holding county commissioners not liable for unauthorized act of road supervisor in causing arrest of person for refusal to work on roads; *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 148, 40 L. R. A. 474, footnote p. 473, 45 S. W. 57, denying carrier's liability for arrest of street-car passenger by policeman called by conductor, who was only authorized to put delinquent passengers off car.

Cited in footnotes to *Eichengreen v. Louisville & N. R. Co.* 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; *Palmer v. Maine C. R. Co.* 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is own, no justification for procuring his arrest; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465, which holds carrier liable for illegal arrest of passenger without warrant, caused by conductor; *Brunswick & W. R. Co. v. Ponder*, 60 L. R. A. 714, which denies carrier's liability for failure to prevent illegal arrest by officers, or for stopping train to permit removal; *Markley v. Snow*, 64 L. R. A. 685, which denies liability of employer for act of employee in causing arrest, long after commission of crime, of one suspected of having set fire to building of employer.

Reasonable cause for arrest.

Cited in *Edger v. Burke*, 96 Md. 724, 54 Atl. 986, holding officer justified in arresting, without warrant, one accused of rape on description of woman believed to be truthful.

27 L. R. A. 67, *DASHIELL v. GROSVENOR*, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334.

Affirmed in 162 U. S. 425, 40 L. ed. 1025, 16 Sup. Ct. Rep. 805.

Government use of machinery infringing patents.

Cited in *International Postal Supply Co. v. Bruce*, 114 Fed. 515, dismissing bill to enjoin postmaster from leasing infringing canceling machine.

27 L. R. A. 72, *BALTIMORE & E. S. R. CO. v. SPRING*, 80 Md. 510, 31 Atl. 208.

Unauthorized bond issues.

Cited in footnote to *Wilkes County v. Call*, 44 L. R. A. 252, which holds void, county bonds issued under authority of unconstitutional statute.

Public purposes authorizing taxation or appropriations.

Cited in footnotes to *Bush v. Orange County*, 45 L. R. A. 566, which holds void. statute authorizing counties to raise by taxation, money to pay drafted men or their heirs; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes, toll bridge owned by private corporation; *Allen v. State Auditors*, 47 L. R. A. 117, which denies right to appropriate public money to pay pardoned convict for alleged wrongful imprisonment; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation.

27 L. R. A. 74, *STATE v. HIGGINS*, 60 Minn. 1, 51 Am. St. Rep. 490, 61 N. W. 816.

Middle initials as material part of name.

Cited in *Houghton v. Tibbets*, 126 Cal. 59, 58 Pac. 318, holding record of service upon "W. F. Curtis," where defendant's name was William T. Curtis, not to justify judgment by default.

Cited in footnote to *Beattie v. National Bank*, 43 L. R. A. 654, which holds middle initial letter not part of Christian name.

27 L. R. A. 76, *STATE v. MROZINSKI*, 59 Minn. 465, 61 N. W. 560.

Police power.

Cited in *State v. Sherod*, 80 Minn. 450, 50 L. R. A. 663, 81 Am. St. Rep. 268, 83 N. W. 417, upholding act requiring baking powder manufacturers to affix labels on product, containing names of ingredients.

— As to game and fish.

Cited in *State ex rel. Keith v. Chapel*, 63 Minn. 536, 65 N. W. 940, upholding act prohibiting possession of illegally captured game or fish; *State v. Theriault*, 70 Vt. 624, 43 L. R. A. 293, 67 Am. St. Rep. 695, 41 Atl. 1030, upholding act for protection of fish in ponds or streams stocked by fish and game commissioners.

Cited in footnotes to *Peters v. State*, 33 L. R. A. 114, which holds valid, as to private lake, act regulating mode of taking fish; *State v. Snowman*, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunting; *Smith v. State*, 51 L. R. A. 404, which sustains statute prohibiting possession of quail during close season.

Cited in note (39 L. R. A. 586) on governmental control over right of fishery.

27 L. R. A. 77, *BOARD OF EDUCATION v. BEST*, 52 Ohio St. 138, 39 N. E. 694.

Employment of teacher.

Cited in *Pierce v. Board of Education*, 1 Ohio N. P. 290, holding appointment of teacher without public roll call of members of board of education illegal.

27 L. R. A. 82, *Re CASWELL*, 18 R. I. 835, 49 Am. St. Rep. 814, 29 Atl. 259.

Right to inspect public records.

Cited in *Stuart v. Press Pub. Co.* 83 App. Div. 478, 82 N. Y. Supp. 401, hold-

ing that at common law, pleadings and papers in action were not open to public inspection.

Cited in footnote to Tryon v. Pingree, 37 L. R. A. 222, which denies mayor's right to aid private individual in obtaining examination of city officer's books for private purposes.

Distinguished in Sloan Filter Co. v. El Paso Reduction Co. 117 Fed. 507, upholding right of users of patented article claimed to infringe patent, to inspect record of action between other parties.

27 L. R. A. 86, HART v. NIAGARA F. INS. CO. 9 Wash. 620, 38 Pac. 213.

Acts of agent binding on principal.

Cited in Hall v. Union Cent. L. Ins. Co. 23 Wash. 613, 51 L. R. A. 291, 83 Am. St. Rep. 844, 63 Pac. 505, holding that principal cannot escape responsibility for acts of person held out to public as agent, under secret agreement that he be agent of another; Coles v. Jefferson Ins. Co. 41 W. Va. 267, 23 S. E. 732, holding insurance company bound by mistake of agent acting within scope of apparent authority; Nixon v. Travellers' Ins. Co. 25 Wash. 260, 65 Pac. 195 (concurring opinion), holding that innocent parties, acting on advice of insurance agents, should not suffer therefor; German Ins. Co. v. Shader (Neb.) 60 L. R. A. 920, 93 N. W. 972, holding company bound by act of agent receiving premium after loss, with knowledge of facts.

Construction of insurance policies.

Cited in Cole v. Union Cent. L. Ins. Co. 22 Wash. 31, 47 L. R. A. 205, 60 Pac. 68, holding insured not bound by unknown condition in policy never delivered to him.

Cited in footnote to McGannon v. Michigan Millers' Mut. F. Ins. Co. 54 L. R. A. 739, which holds policy not avoided by temporary absence of competent watchman from mill.

Instructions as to preponderance of evidence.

Cited in Carstens v. Charles, 26 Wash. 694, 67 Pac. 404, holding use of words "fair preponderance" in instruction in civil action, as to necessary preponderance of evidence, not reversible error.

27 L. R. A. 92, THOMPSON v. JACKSON, 93 Iowa, 376, 61 N. W. 1004.

Collateral attack on judgments.

Cited in note (39 L. R. A. 459) on decision against constitutional right, as nullity subject to collateral attack.

Residence of parties as affecting jurisdiction.

Cited in Little v. Devendorf, 109 Iowa, 49, 79 N. W. 476, holding residence of parties, in absence of record of same, presumed to have been such as to confer jurisdiction of subject-matter on justice of peace.

Individual liability for erroneous judicial and executive acts.

Cited in Robertson v. Parker, 99 Wis. 658, 67 Am. St. Rep. 889, 75 N. W. 423, holding wilful assumption of criminal jurisdiction by municipal court judge, knowing he had none, actionable; Calhoun v. Little, 106 Ga. 340, 43 L. R. A. 632, footnote p. 630, 71 Am. St. Rep. 254, 32 S. E. 86, denying personal liability of inferior judicial officer for unofficial sentence imposed under illegal

ordinance which judge held valid; *Wright v. Jones*, 14 Tex. Civ. App. 430, 33 S. W. 249, holding members of county commissioners court not individually liable by reason of judicial act done through misconstruction of law.

Cited in footnotes to *Guild v. Goodwin*, 27 L. R. A. 660, which holds mayor not liable for malicious prosecution in attempting to enforce void ordinance; *Scott v. Fishplate*, 30 L. R. A. 696, which denies liability of mayor to civil action for imprisonment for contempt; *Coleman v. Roberts*, 36 L. R. A. 84, which holds failure to enter sentence of imprisonment for contempt does not render justice liable on bond for imprisonment; *Glazer v. Hubbard*, 39 L. R. A. 210, which holds police judge guilty of false imprisonment in committing person without other warrant than telegram from chief of police for his arrest; *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president for procuring arrest for violating void ordinance; *Webb v. Fisher*, 60 L. R. A. 791, which holds judge not subject to private action for corruptly entering decree disbaring attorney.

Liability of officers executing process of court.

Cited in *Heath v. Halfhill*, 106 Iowa, 133, 76 N. W. 522, holding constable not liable for levy under execution regular on its face, on judgment void for want of jurisdiction of defendant.

Cited in footnote to *Kelley v. Schuyler*, 44 L. R. A. 435, which holds officer a trespasser in breaking and entering dwelling house to serve replevin writ.

27 L. R. A. 96, *TALBOT PAVING CO. v. GORMAN*, 103 Mich. 403, 61 N. W. 655.

Acceptance by vendee of goods not conforming to contract.

Cited in *Williams v. Robb*, 104 Mich. 247, 62 N. W. 352, holding vendee of potatoes estopped by acceptance, after opportunity for inspection, from claiming damages for defects; *W. K. Henderson Lumber Co. v. Stilwell & Co.* 130 Mich. 127, 89 N. W. 718, holding vendee, inspecting and keeping goods knowing they did not comply with contract, not entitled, in action for purchase price, to recoup damages for loss of profits.

Cited in footnote to *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which requires buyer to pay for fruit received under contract, knowing full amount cannot be delivered.

Distinguished in *Gorman v. Kennedy*, 126 Mich. 184, 85 N. W. 458, upholding right of vendee to deduct from contract price expense of making stone conform to specifications under verbal warranty.

27 L. R. A. 98, *GRANT v. LOOKOUT MOUNTAIN CO.* 93 Tenn. 691, 28 S. W. 90.

Lien for attorney's fees.

Cited in *Bristol-Goodson Electric Light & P. Co. v. Bristol Gas, Electric Light & P. Co.* 99 Tenn. 389, 42 S. W. 19, upholding right of attorneys to reasonable compensation from fund obtained by general creditors bill, for benefit of creditors.

Cited in footnote to *Loofbourow v. Hicks*, 55 L. R. A. 874, which holds lien for attorneys' fees allowed by judgment of foreclosure enforceable against land bid in by mortgagee or assignee.

Distinguished in *Alexander v. Atlanta & W. P. R. Co.* 113 Ga. 205, 54 L. R. A. 312, footnote p. 305, 38 S. E. 772, denying right of minority stockholders to attorneys' fees in successful suit to enjoin corporation from doing *ultra vires* acts, where no property recovered.

27 L. R. A. 101, *BRAITHWAITE v. HARVEY*, 14 Mont. 208, 43 Am. St. Rep. 625, 36 Pac. 38.

Judgments of foreign state against executor or administrator.

Cited in *Jefferson v. Beall*, 117 Ala. 440, 67 Am. St. Rep. 177, 23 So. 44, holding judgment rendered in foreign state against executor of estate void; *Johnston v. McKinnon*, 129 Ala. 225, 29 So. 696, holding foreign judgment against administrator no ground of action in intestate's state; *Price v. Ward*, 25 Nev. 213, 46 L. R. A. 463, 58 Pac. 849, holding administrator without power to redeem intestate's land in another state from mortgage, by setting off waste committed by mortgagee, after intestate's death; *Burton v. Williams*, 63 Neb. 435, 88 N. W. 765, holding action not maintainable on foreign judgment against administrator.

Cited in footnote to *Smith v. Smith*, 43 L. R. A. 403, which holds judgment by court of state of decedent's domicile, making family allowance to widow, not binding on lands in other state.

Statute of limitations.

Cited in *Slaughter's Succession*, 108 La. 494, 58 L. R. A. 409, footnote p. 408, 32 So. 379, holding bar of limitation not removed by expression of ability to pay debt, followed by part payment.

27 L. R. A. 120, *HODGKINSON v. HODGKINSON*, 43 Neb. 269, 47 Am. St. Rep. 759, 61 N. W. 577.

Actions by married women for tort.

Cited in *Case v. Case*, 45 Neb. 497, 63 N. W. 867, holding alienation of husband's affections, resulting from accusing wife of adultery, proper element of damages in action by wife for slander; *Wolf v. Frank*, 92 Md. 143, 52 L. R. A. 105, footnote p. 102, 48 Atl. 132, sustaining wife's right of action for alienating husband's affections; *Love v. Love*, 98 Mo. App. 569, 73 S. W. 255, upholding right of action by wife against husband's parents for causing husband to abandon her.

Cited in footnotes to *Kroessin v. Keller*, 27 L. R. A. 685, which denies married woman's right to maintain crim.'con. against other woman; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Brown v. Brown*, 38 L. R. A. 242, which sustains right of action in own name by abandoned wife against person causing abandonment; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections, unaccompanied by adultery; *Dietzman v. Mullin*, 50 L. R. A. 808, and *Betser v. Betser*, 52 L. R. A. 630, which sustain wife's right of action for alienating husband's affections.

27 L. R. A. 121, *PENNOCK v. DOUGLAS COUNTY*, 39 Neb. 293, 42 Am. St. Rep. 579, 58 N. W. 117.

Rule of caveat emptor as applied to tax sale.

Followed in *McCague v. Omaha*, 58 Neb. 39, 78 N. W. 463, and *Merrill v. Omaha*, 39 Neb. 305, 58 N. W. 121, holding money paid by purchaser at illegal tax sale of land not recoverable.

Cited in *Martin v. Kearney County*, 62 Neb. 541, 87 N. W. 351, holding that cities of second class cannot be required to refund money to purchaser at sale of real estate for illegal municipal taxes; *Norris v. Burt County*, 56 Neb. 296,

76 N. W. 551, and *Adams v. Osgood*, 42 Neb. 460, 60 N. W. 869, holding, in absence of statute, rule of *caveat emptor* applies to purchaser at tax sale.

27 L. R. A. 126, *WEBSTER v. CLARK*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 So. 601.

Partnerships and partnership liabilities.

Cited in *Marx v. Culpepper*, 40 Fla. 324, 24 So. 59, holding persons holding themselves out as partners may be jointly liable for partnership debt, although no partnership in fact exists; *Rider v. Hammell*, 63 Kan. 736, 66 Pac. 1026, holding question whether agreement created partnership as between the parties, one of law; *Sheldon v. Bigelow*, 118 Iowa, 590, 92 N. W. 701, holding person holding himself out to public as partner not liable as partner to one acting without knowledge of such fact.

Cited in footnotes to *Shrum v. Simpson*, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds; *Carter v. McClure*, 36 L. R. A. 282, which holds partnership created by subscription to stock of co-operative store, with provision for distribution of profits; *Brandon v. Connor*, 63 L. R. A. 260, which holds partnership as to third persons constituted by agreement by contractor for grading railroad, to give half of net profits to one furnishing mules and harness.

Construction of contracts.

Cited in *New York L. Ins. Co. v. Smith*, 139 Ala. 309, 35 So. 1004, holding that position taken by insurer in written notice to insured may be looked to in construing ambiguous clause in contract.

27 L. R. A. 131, *PHILADELPHIA & R. R. CO. v. SMITH*, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

Notice to original wrongdoer.

Cited in *Lion v. Baltimore City Pass. R. Co.* 90 Md. 275, 47 L. R. A. 130, footnote p. 127, 44 Atl. 1045, holding notice to original wrongdoer unnecessary to create liability for injury to subsequent owner of property.

Liability for continuing nuisance created by third persons.

Cited in footnote to *Rockport v. Rockport Granite Co.* 51 L. R. A. 779, which holds landowner liable for permitting guy rope to derrick to remain stretched across highway.

Liability for damming back water of stream.

Cited in note (59 L. R. A. 859, 860, 904) on liability for damming back water of stream.

27 L. R. A. 136, *FIELD v. LAMSON & G. Mfg. CO.* 162 Mass. 388, 38 N. E. 1126. **Preferred, guaranteed, and interest-bearing stock.**

Cited in *Daley v. People's Bldg. Loan & Sav. Asso.* 172 Mass. 535, 52 N. E. 1090, holding covenant of building and loan association to pay certificate holder par value of shares at certain date not absolute; *Savannah Real Estate, Loan & Bldg. Co. v. Silverberg*, 108 Ga. 289, 33 S. E. 908, holding certificate stating holder to be entitled to one share of preferred building and loan association stock, mere evidence of indebtedness; *Mercantile Trust Co. v. Baltimore & O. R.*

Co. 82 Fed. 370, holding city holding railroad corporation stock, interest and dividends being payable from "profits," not a creditor of such corporation.

Cited in footnotes to Hamlin v. Toledo, St. L. & K. C. R. Co. 36 L. R. A. 826, which holds holders of nonvoting preferred stock not entitled to any capital until all creditors provided for; Sumrall v. Columbia Finance & Trust Co. 44 L. R. A. 659, which holds void, issuance of preferred stock by loan association; Heller v. National Marine Bank, 45 L. R. A. 438, as to extent of lien of preferred stock.

27 L. R. A. 154, HOWSER v. CUMBERLAND & P. R. CO. 80 Md. 146, 45 Am. St. Rep. 332, 30 Atl. 906.

Presumption of negligence from happening of event.

Cited in Western U. Teleg. Co. v. State, 82 Md. 311, 31 L. R. A. 576, 51 Am. St. Rep. 464, 33 Atl. 763, holding killing of boy by broken electric wire, one end having fallen from pole to street, prima facie evidence of negligence; Benedick v. Potts, 88 Md. 57, 41 L. R. A. 480, 40 Atl. 1067, holding defendant not liable for injury to plaintiff, falling in unexplained manner from car on switch-back railway; Winkelmann & B. Drug Co. v. Colladay, 88 Md. 91, 40 Atl. 1078, affirming judgment for plaintiff hurt by falling of dumb waiter, caused by breaking of rope for unexplained reason; Hearn v. Quillen, 94 Md. 45, 50 Atl. 402, holding falling of roof on building in course of construction, prima facie evidence of negligence; Judson v. Giant Powder Co. 107 Cal. 557, 29 L. R. A. 724, 48 Am. St. Rep. 156, 40 Pac. 1020, holding that presumption of negligence arises from fact of explosion of nitro glycerine factory; Cleveland, C. C. & St. L. R. Co. v. Berry, 152 Ind. 619, 46 L. R. A. 57, 53 N. E. 415, holding fact that plaintiff was struck by iron pin thrown from passing train not sufficient evidence of negligence; Graham v. Badger, 164 Mass. 47, 41 N. E. 61, applying doctrine of *res ipsa loquitur* to breaking of derrick rope at place where it had been spliced; McCray v. Galveston, H. & S. A. R. Co. 89 Tex. 171, 34 S. W. 95, holding killing of brakeman by falling of steel rail from car in front of one on which he was sitting, sufficient evidence of negligence to go to jury; Snyder v. Wheeling Electrical Co. 43 W. Va. 669, 39 L. R. A. 502, 64 Am. St. Rep. 922, 28 S. E. 733, holding falling into streets of wire charged with deadly current of electricity, prima facie evidence of negligence; Vorbrich v. Geuder & P. Mfg. Co. 96 Wis. 281, 71 N. W. 434, raising, but not deciding, question whether negligence is to be presumed from starting of machine in unknown manner; Pederson v. John D. Sprecklers & Bros. Co. 81 Fed. 208, holding that no presumption of negligence arises as to owners of tug towing schooner, by breaking of schooner breast chock through which tow line was passed; The Joseph B. Thomas, 46 L. R. A. 67, 30 C. C. A. 337, 56 U. S. App. 619, 86 Fed. 663, Affirming 81 Fed. 587, holding fact that water keg was left where it might easily roll into hold of vessel sufficient evidence of negligence; Womble v. Merchants Grocery Co. 135 N. C. 484, 47 S. E. 493, holding falling of elevator without apparent cause, evidence of negligence as to its construction; Gulf, C. & S. F. R. Co. v. Hayden, 29 Tex. Civ. App. 283, 68 S. W. 530, holding evidence that starting of machinery causing injury could only have been due to defects therein, sufficient proof of negligence.

Cited in footnotes to Shafer v. Lacock, 29 L. R. A. 254, which holds negligence presumed from burning of house through fire set from sparks of fire-pot placed on roof by workmen; Wolf v. Downey, 51 L. R. A. 242, which denies liability

of contractor for either carpenter or mason work, for injury from fall of brick from unknown cause.

Burden of proof as to negligence.

Cited in footnote to *Gulf, C. & S. F. R. Co. v. Shieder*, 28 L. R. A. 538, which holds burden of proving contributory negligence on defendant.

27 L. R. A. 158, *PEOPLE v. BRAY*, 105 Cal. 344, 38 Pac. 731.

Sale of liquor to Indians.

Cited in *State v. Wise*, 70 Minn. 101, 72 N. W. 843, upholding act forbidding sale of liquor to Indians, whether citizens or not.

27 L. R. A. 161, *RITCHIE v. WALLER*, 63 Conn. 155, 38 Am. St. Rep. 361, 28 Atl. 29.

Liability of master for torts of servant or agent.

Cited in *Fiske v. Enders*, 73 Conn. 340, 47 Atl. 681, holding master not liable for negligence of servant driving horses for his own pleasure, without authority; *Postal Teleg. Cable Co. v. Brantley*, 107 Ala. 688, 18 So. 321, holding telegraph company liable for wrongful cutting of trees by servant, within scope of authority, but in disobedience of orders; *Carl Corper Brewing & Malting Co. v. Huggins*, 96 Ill. App. 148, holding evidence that servant, taking day off, had purchased revenue stamps at request of and for master not sufficient to establish master's liability for servant's negligence in driving home; *Baltimore Consol. R. Co. v. Pierce*, 89 Md. 503, 45 L. R. A. 530, footnote p. 527, 43 Atl. 940, holding master not relieved because injury by servant is wilful and malicious; *McCarthy v. Timmins*, 178 Mass. 381, 86 Am. St. Rep. 490, 59 N. E. 1038, holding master not liable for negligence of driver of public carriage, while going out of his way to visit saloon; *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 156, 84 Am. St. Rep. 620, 28 So. 823, holding master not liable for injury to stranger, due to practical joke by servants, although they employ his machinery therefor; *Murray v. Lehigh Valley R. Co.* 66 Conn. 525, 32 L. R. A. 542, 34 Atl. 506 (dissenting opinion), majority holding carrier liable to passenger for negligence of servants of another company over whose line its cars are running, subject to signals of latter company; *Loomis v. Hollister*, 75 Conn. 724, 55 Atl. 561, holding question whether master liable for negligence of servant in leaving horses unhitched while he went to postoffice for his paper, properly submitted to jury.

Cited in footnotes to *Southern Bell Teleph. & Teleg. Co. v. Francis*, 31 L. R. A. 193, which holds employer not liable in trespass for employee's unnecessary cutting of trees on sidewalk while removing telephone wires; *Brown v. Jarvis Engineering Co.* 32 L. R. A. 605, which denies liability for negligence of employee causing injury to third person, assisting him at foreman's directions; *Pierce v. North Carolina R. Co.* 44 L. R. A. 316, which holds company liable for brakeman knocking or frightening boy from tender of engine; *Galveston, H. & S. A. R. Co. v. Zantzinger*, 44 L. R. A. 553, which sustains right to recover from company for engineer's throwing steam and water on trespasser negligently on footboard between engine and flat car; *Nelson Business College Co. v. Lloyd*, 46 L. R. A. 314, which holds employer liable for servant's wilful or malicious acts in course of employment; *Galveston, H. & S. A. R. Co. v. Zantzinger*, 47 L. R. A. 282, which sustains liability for engineer's ejection of trespasser from footboard.

of engine; *Dorsey v. Kansas City, P. & G. R. Co.* 52 L. R. A. 92, which holds carrier liable for death of trespasser falling under wheels in escaping from rocks thrown by brakeman; *Enright v. Pittsburgh Junction R. Co.* 53 L. R. A. 330, which denies right to eject or frighten ten-year-old boy from rapidly moving train; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Paulton v. Keith*, 54 L. R. A. 670, which denies theater owner's liability for manager obstructing service of process on actor; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales; *Alsever v. Minneapolis & St. L. R. Co.* 56 L. R. A. 748, which sustains liability for injuries by engineer operating blow-off cock to frighten children; *Palmisano v. New Orleans City R. Co.* 58 L. R. A. 405, which denies master's liability for injury to boy running blindly against moving car after release by employee who had caught and lectured him; *Southern R. Co. v. James*, 63 L. R. A. 257, which holds master liable for injury by night watchman shooting trespasser while running away after being arrested by him.

Cited in notes (28 L. R. A. 437) on liability of agent or servant to third persons for own negligence or nonfeasance; (29 L. R. A. 94) on liability of bailee for wrongful appropriation by his servant of thing bailed.

Defendant's right to plead to amended complaint.

Cited in *La Barre v. Waterbury*, 69 Conn. 557, 37 Atl. 1068, holding judgment not erroneously rendered against defendant not pleading to amended complaint after notice.

27 L. R. A. 173, *BOWLER v. O'CONNELL*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498.

Liability of master for independent torts of servant.

Cited in *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, holding master not liable for injury to infant invited by driver of cart to ride with him for pleasure; *Brown v. Jarvis Engineering Co.* 166 Mass. 77, 32 L. R. A. 606, 55 Am. St. Rep. 382, 43 N. E. 1118, holding master not liable to servants at work on building, injured while assisting in unloading rolls of paper under order of foremen; *Gray v. Boston & M. R. Co.* 168 Mass. 25, 46 N. E. 397, holding carrier liable to passenger entering station, injured by act of servant in ejecting drunken man; *Gibson v. International Trust Co.* 177 Mass. 103, 52 L. R. A. 929, 58 N. E. 278, holding master not liable for injury to passenger in elevator through negligence of janitor riding as passenger; *Perlstein v. American Exp. Co.* 177 Mass. 532, 52 L. R. A. 960, 59 N. E. 194, holding evidence to show that driver had no authority from master to go on street where collision occurred competent; *Brown v. Boston Ice Co.* 178 Mass. 110, 86 Am. St. Rep. 469, 59 N. E. 644, holding master not liable for act of servant in striking boy with ax handle for breaking employer's ax; *McCarthy v. Timmins*, 178 Mass. 381, 86 Am. St. Rep. 490, 59 N. E. 1038, holding master not liable for negligence of driver while out of his way visiting saloon; *Davies v. Eastern S. B. Co.* 94 Me. 385, 53 L. R. A. 241, 47 Atl. 896, holding carrier by water not liable for non-delivery of telegram received by captain for passenger; *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 156, 84 Am. St. Rep. 620, 28 So. 823, holding master not

liable for result of practical joke by servants using his machinery therefor; *Rowell v. Boston & M. R. Co.* 68 N. H. 359, 44 Atl. 488, holding master's liability question for jury where evidence showed that freight train conductor ejected person from car, using more force than necessary.

Cited in note (27 L. R. A. 164) on master's civil responsibility for wrongful or negligent act of his servant towards one who has no claim on master by reason of contract, incipient or perfected.

27 L. R. A. 179, *TEXAS & P. R. CO. v. SCOVILLE*, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730.

Liability of master for independent tort of servant.

Cited in *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 156, 84 Am. St. Rep. 620, 28 So. 823, denying liability of master for injury due to practical joke by servant using master's machinery.

Cited in footnotes to *Nelson Business College Co. v. Lloyd*, 46 L. R. A. 314, which holds employer liable for servant's wilful or malicious acts in course of employment; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Alsever v. Minneapolis & St. L. R. Co.* 56 L. R. A. 748, which sustains liability for injuries by engineer operating blow-off cock to frighten children; *Euting v. Chicago & N. W. R. Co.* 60 L. R. A. 158, which holds company liable for engineer's running engine for own amusement over torpedoes on track near bystanders.

Cited in note (27 L. R. A. 164) on master's civil responsibility for wrongful or negligent act of his servant towards one who has no claim on master by reason of contract, incipient or perfected.

— Wrongful frightening of horses.

Cited in footnote to *McCann v. Consolidated Traction Co.* 38 L. R. A. 236, which holds running tank car on street railway track, with black coats waving from it, frightening horse, negligence.

27 L. R. A. 190, *HOUSTON, C. A. & N. R. CO. v. BOLLING*, 59 Ark. 395, 43 Am. St. Rep. 38, 27 S. W. 492.

Liability of master for independent torts of servant.

Cited in *Willis v. Atlantic & D. R. Co.* 120 N. C. 513, 26 S. E. 784, holding evidence of rules of railroad as to employees permitting strangers to ride on hand cars improperly excluded; *Randall v. Chicago & G. T. R. Co.* 113 Mich. 121, 38 L. R. A. 669, 71 N. W. 450, holding brakeman without implied authority to eject trespasser from freight train; *Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 7, 90 N. W. 346, holding carrier liable for injury to person received without authority by conductor as passenger on construction train.

Cited in footnote to *Pittsburgh, C. C. & St. L. R. Co. v. Redding*, 34 L. R. A. 767, which holds wanton negligence of duty not shown by failure to stop freight train on sharp grade to remove boy catching on.

Cited in note (27 L. R. A. 166) on master's civil responsibility for wrongful or negligent act of his servant towards one who has no claim on master by reason of contract, incipient or perfected.

27 L. R. A. 203, *PEOPLE ex rel. HOFFMAN v. HECHT*, 105 Cal. 621, 45 Am. St. Rep. 96, 38 Pac. 941.

Validity of majority action.

Cited in *People v. Simmons*, 119 Cal. 3, 50 Pac. 844, holding validity of indictment not affected by disqualification or absence of grand juror.

Eligibility to hold public office.

Distinguished in *Ward v. Crowell*, 142 Cal. 590, 76 Pac. 491, holding election of county surveyor not invalidated by reason of disqualification as to license which was removed before term of office began.

27 L. R. A. 206, *PEKIN v. McMAHON*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484.

Injury to children through maintenance of dangerous premises.

Cited in *Jensen v. Wethersell*, 79 Ill. App. 35, sustaining declaration charging defendant with liability for injuring child by maintenance of dangerous premises as common playground for children; *Cowley v. Chicago & A. R. Co.* 87 Ill. App. 127, holding railroad company not required to guard tracks against possible trespass by fifteen-months-old child; *American Advertising & Bill Posting Co. v. Flannigan*, 100 Ill. App. 453, denying liability of lessee for injury to nine-year-old boy burned by falling on hot embers in unguarded premises; *Norman v. Bartholomew*, 104 Ill. App. 673, denying liability for injury to eight-year-old boy, invited on defendant's premises by his mother; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 421, 57 L. R. A. 566, 90 N. W. 95, holding railroad company liable for injury to child seven years old, inflicted by turntable maintained in unfenced lot; *Ryan v. Towar*, 128 Mich. 84, 55 L. R. A. 318, 92 Am. St. Rep. 481, 87 N. W. 644 (dissenting opinion), majority denying liability of landowner for injury to child by unused water wheel; *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 388, holding that child under three years of age cannot be either trespasser, visitor, or licensee; *Com. Electric Co. v. Melville*, 110 Ill. App. 249, holding request to instruct that child of seven years may be guilty of contributory negligence rightly refused when properly covered by another instruction; *True & T. Co. v. Woda*, 201 Ill. 319, 66 N. E. 369, holding one piling lumber in street in such way as to attract children liable for killing of child upon whom it fell.

Cited in footnotes to *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds, unprotected from visits of trespassing children; *Kramer v. Southern R. Co.* 52 L. R. A. 359, which denies railroad company's liability for death of child by fall of pile of cross-ties in unused portion of street; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of unclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground; *Rachmel v. Clark*, 62 L. R. A. 959, which holds manufacturer storing stone slabs on sidewalk in front of building liable for injuries to person lawfully using sidewalk.

Distinguished in *O'Leary v. Brooks Elevator Co.* 7 N. D. 562, 41 L. R. A. 680, 75

N. W. 919, denying liability for injury to child while removing cane, at direction of another, from under shaft; *Putney v. Keith*, 98 Ill. App. 291, denying liability of housekeeper for placing on kitchen floor, vessel of hot water, into which child of two years fell and was scalded to death; *Union Stock Yard & Transit Co. v. Butler*, 92 Ill. App. 170, holding railroad company not liable for injury to four-year-old child invited on premises by trespassing older brother; *Northwestern Elev. R. Co. v. O'Malley*, 107 Ill. App. 605, holding company not liable for injury to eight-year-old boy picking up chips under elevated railroad structure in process of construction.

— **Drowning.**

Cited in *Stendal v. Boyd*, 73 Minn. 57, 42 L. R. A. 289, footnote p. 288, 72 Am. St. Rep. 597, 75 N. W. 735, holding that attractiveness of pond on premises does not render owner liable for failure to fence them; *Cooper v. Overton*, 102 Tenn. 220, 45 L. R. A. 595, footnote p. 591, 73 Am. St. Rep. 864, 52 S. W. 183, denying owner's liability for drowning of trespassing child in pond formed in unfenced city lot by city damming surface water; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 64, 38 L. R. A. 575, footnote p. 573, 66 Am. St. Rep. 856, 41 S. W. 62, denying railroad company's liability for drowning of child, while playing, in excavation near path to station platform; *Price v. Atchison Water Co.* 58 Kan. 556, 62 Am. St. Rep. 625, 50 Pac. 450, holding water company liable for drowning of eleven-year-old boy in reservoir; *Le Grand v. Wilkes-Barre & W. Valley Traction Co.* 10 Pa. Super. Ct. 16 (dissenting opinion), majority denying liability of proprietor for drowning of boy in pond located on picnic ground.

Cited in footnotes to *Moran v. Pullman Palace Car Co.* 33 L. R. A. 755, which denies liability of owner for drowning of boy in pond on vacant land near highway; *Omaha v. Bowman*, 40 L. R. A. 531, which denies city's liability for drowning of child on private premises, in pond caused by city's obstruction of water; *Savannah, F. & W. R. Co. v. Beavers*, 54 L. R. A. 314, which denies duty of one making excavation on own land to guard trespassing children from injury; *Rome v. Cheney*, 55 L. R. A. 221, which denies city's liability for drowning of child in necessary sewer, 4 feet wide and 2 feet deep.

Distinguished in *Peters v. Bowman*, 115 Cal. 355, 56 Am. St. Rep. 106, 47 Pac. 113, denying liability of lot owner for drowning of child in pond while trespassing on premises.

Disapproved in *Arnold v. St. Louis*, 152 Mo. 183, 48 L. R. A. 294, footnote p. 291, 75 Am. St. Rep. 447, 53 S. W. 900, denying liability of city or private owner for drowning of children while skating on pond without invitation.

When question of trespass for jury.

Cited in *Siddall v. Jansen*, 168 Ill. 48, 39 L. R. A. 114, 48 N. E. 191, holding it question for jury whether child five years old, playing near elevator in store, was trespasser.

Degree of care required of children.

Cited in *Glickson v. Shannon*, 88 Ill. App. 244, holding error, instruction against recovery if boy of twelve, run over by wagon, could, by exercise of ordinary care, have avoided accident; *Chicago City R. Co. v. Tuohy*, 95 Ill. App. 319, raising, but not deciding, question whether child nearly six years old can be guilty of contributory negligence; *Heimann v. Kinnare*, 190 Ill. 164, 52 L. R. A. 655, footnote p. 652, 83 Am. St. Rep. 123, 60 N. E. 215, Reversing 73 Ill.

App. 188, holding thirteen-year-old boy negligent *per se* in jumping over strip of water onto rotten ice on pond and sliding to point where water over his head; Quincy Gas & Electric Co. v. Bauman, 104 Ill. App. 609, upholding instruction that eleven-year-old child need only use care exercised by children of same age and intelligence under like circumstances; Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 599, 68 Am. St. Rep. 252, 52 N. E. 220 (dissenting opinion), majority holding seven-year-old child, sleeping upon railroad track, guilty of contributory negligence.

Contributory negligence of parent.

Cited in Lewin v. Lehigh Valley R. Co. 52 App. Div. 77, 65 N. Y. Supp. 49, upholding recovery by father for death of child killed at railway crossing, partly through father's negligence; O'Shea v. Lehigh Valley R. Co. 79 App. Div. 258, 79 N. Y. Supp. 890, denying right of father, guilty of contributory negligence, to recover for death of eight-year-old son; Bias v. Chesapeake & O. R. Co. 46 W. Va. 362, 33 S. E. 240 (dissenting opinion, by Brannon, J.), who holds that contributory negligence of parent should bar his recovery for death of child.

Liability of municipal corporation for negligence.

Cited in Chicago v. Hannon, 94 Ill. App. 147, denying liability of city for injury occurring on private way to dumping ground, used by city teamsters; Omaha v. Richards, 49 Neb. 249, 68 N. W. 528, holding city liable for death of boy drowned in pond by falling from section of sidewalk used as raft, where pond was formed through negligence of city.

Issue of erroneous execution.

Cited in Canton v. Dewey, 71 Ill. App. 348, refusing to deprive plaintiff of benefit of judgment because of award of execution against city; School Directors of Dist. No. 2 v. Orr, 88 Ill. App. 651, holding judgment not reversible because of erroneous award of execution.

Facts reviewable on appeal.

Cited in Siddall v. Jansen, 168 Ill. 46, 39 L. R. A. 114, 48 N. E. 191, holding that appellate court may review facts on appeal from ruling on request to instruct jury to find for defendant.

27 L. R. A. 211, DETROIT v. ELLIS, 103 Mich. 612, 61 N. W. 886.

Res judicata.

Cited in Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 395, 46 L. ed. 610, 22 Sup. Ct. Rep. 410, holding city barred by former action from denying validity of ordinance extending franchises of railroad company.

27 L. R. A. 213, BULLOCK v. BULLOCK, 52 N. J. Eq. 561, 46 Am. St. Rep. 528, 30 Atl. 676.

Judgments of foreign courts.

Cited in Wilmer v. Lewis, 24 Pa. Co. Ct. 616, holding transfer of judgment from one state to another upon exemplified record unauthorized.

— Decrees for divorce or alimony.

Cited in Bullock v. Bullock, 57 N. J. L. 509, 31 Atl. 1024, holding action at law maintainable upon decree for alimony made in another state; Lynde v. Lynde, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555, holding no Federal question

presented by judgment of state court refusing to give effect to decree of sister state, as to payment of alimony in future; *Bennett v. Bennett*, 63 N. J. Eq. 308, 49 Atl. 501, refusing specific performance of foreign decree of divorce as to alimony on ground that adequate remedy at law existed.

Cited in footnotes to *Felt v. Felt*, 47 L. R. A. 546, which holds divorce on substituted service in other state where complainant domiciled entitled to recognition by interstate comity; *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony, though subject to alteration, final for enforcement in other state.

Cited in note (59 L. R. A. 179) on conflict of laws on subject of divorce.

Void agreements as to alimony.

Distinguished in *Lynde v. Lynde*, 64 N. J. Eq. 750, 58 L. R. A. 476, 97 Am. St. Rep. 692, 52 Atl. 694, holding agreement of wife securing divorce from husband, to give her attorney a share of alimony recovered, void.

27 L. R. A. 219, *WIND v. ILER*, 93 Iowa, 316, 61 N. W. 1001.

Passing of title on sale of personal property.

Cited in *Sachs v. Garner*, 111 Iowa, 425, 82 N. W. 1007, holding sale of liquor by verbal order to agent, subject to approval of foreign vendor, takes place in vendor's state upon acceptance of order.

Cited in footnote to *H. M. Tyler Lumber Co. v. Charlton*, 55 L. R. A. 301, which holds that title does not pass by acceptance of offer to sell lumber piled at mill, to be inspected by common employee.

Cited in note (61 L. R. A. 420, 431, 433) on conflict of laws as to sale of intoxicating liquors.

Distinguished in *Brown v. Wieland*, 116 Iowa, 714, 61 L. R. A. 423, 89 N. W. 17, holding it an Ohio sale, where liquor was delivered there upon specified payment to bank holding bill of lading sent in shipper's name.

What constitutes original package.

Cited in *McGregor v. Cone*, 104 Iowa, 474, 39 L. R. A. 487, 65 Am. St. Rep. 522, 73 N. W. 1041, holding pine box containing smaller packages of cigarettes for shipment to be original package.

Cited in note (60 L. R. A. 664) on corporate taxation and the commerce clause as to original packages.

27 L. R. A. 222, *CULBERTSON v. NELSON*, 93 Iowa, 187, 57 Am. St. Rep. 266, 61 N. W. 854.

Effect of stipulations and alterations as to payment of notes.

Cited in *Sawyer v. Campbell*, 107 Iowa, 402, 78 N. W. 56, holding sureties not released by alteration of note, by which payee agrees to extend time of payment upon written request of makers.

— On negotiability.

Followed on similar state of facts arising out of same transaction in *Sharp v. Nelson*, 93 Iowa, 469, 61 N. W. 946.

Cited in *Tolman v. Janson*, 106 Iowa, 457, 76 N. W. 732, holding negotiability of notes not affected by void provision authorizing attorney to appear at any time and take judgment thereon; *Nicely v. Commercial Bank of Union City*,

15 Ind. App. 566, 57 Am. St. Rep. 245, 44 N. E. 572, and *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 35, 47 N. E. 476, holding negotiability of promissory note destroyed by stipulation for exchange.

Cited in footnote to *Clark v. Skeen*, 49 L. R. A. 190, which holds negotiability not destroyed by stipulation for payment of certain amount with current exchange.

Disapproved in effect in *Haslack v. Wolf*, 66 Neb. 601, 60 L. R. A. 435, footnote p. 434, 92 N. W. 374, which holds negotiability not destroyed by agreement to pay certain amount "with exchange."

27 L. R. A. 228, *WILLOCK v. PENNSYLVANIA R. CO.* 166 Pa. 184, 45 Am. St. Rep. 674, 30 Atl. 948.

Limitation of carrier's liability.

Cited in *Ruppel v. Allegheny Valley R. Co.* 167 Pa. 180, 36 W. N. C. 210, 46 Am. St. Rep. 666, 31 Atl. 478, holding stipulation of bill of lading requiring determination of amount of loss through carrier's negligence, as to place and time of shipment, invalid; *Hughes v. Pennsylvania R. Co.* 202 Pa. 226, 63 L. R. A. 515, 97 Am. St. Rep. 713, 51 Atl. 990, holding stipulation limiting carrier's liability for negligence, good in New York where made, not enforceable in Pennsylvania where negligence occurs; *Davenport v. Pennsylvania R. Co.* 10 Pa. Super. Ct. 51, upholding right of carrier to limit liability for transporting perishable fruit to negligence of carrier's servants; *Roos v. Philadelphia, W. & B. R. Co.* 199 Pa. 382, 49 Atl. 344, Affirming 13 Pa. Super. Ct. 569, Which Affirmed 21 Pa. Co. Ct. 183, 7 Pa. Dist. R. 406, upholding right of carrier to deduct from total loss of goods, amount of insurance received by owner; *Cleveland, C. C. & St. L. R. Co. v. Heath*, 22 Ind. App. 54, 53 N. E. 198, holding delay caused by freezing of water pipes not within contract exempting carrier from liability due to "stress of weather."

Cited in note (36 L. R. A. 649) on limitation of common carrier's duty and liability in case of dangerous articles.

Distinguished in *Allam v. Pennsylvania R. Co.* 183 Pa. 177, 39 L. R. A. 536, 41 W. N. C. 209, 38 Atl. 709, Reversing 3 Pa. Super. Ct. 345, upholding contract providing that at certain small stations goods are at "risk" of owner, until loaded in cars, or when unloaded therefrom; *Needy v. Western Maryland R. Co.* 22 Pa. Super. Ct. 494, holding burden upon shipper to show negligence of carrier in caring for hogs lost in shipment at special rate under agreement that shipper care for the hogs while in transit.

27 L. R. A. 231, *COM. v. LEHIGH VALLEY R. CO.* 165 Pa. 162, 30 Atl. 836.

Prosecution of corporations.

Cited in *Com. v. Easton*, 8 Northampton Co. Rep. 322, holding that where city fails to appear and answer indictment for neglect of public duty, judgment by default may be entered and sentence pronounced; *United States v. Correspondence Institute of America*, 125 Fed. 95, holding first step in prosecution of corporation to be finding of indictment.

27 L. R. A. 234, *Re CONTESTED ELECTION*, 165 Pa. 233, 30 Atl. 955.

Irregularities in ballots.

Cited in *Re Contested Election*, 173 Pa. 63, 37 W. N. C. 394, 33 Atl. 703,

holding ballot vitiated by writing name of candidate printed on ballot in blank space for names of candidates not on ballot; *Re Contested Election*, 181 Pa. 459, 41 W. N. C. 34, 37 Atl. 523, Reversing 5 Pa. Dist. R. 170, 2 Lack. Legal News, 5, holding perpendicular mark in square on ballot, instead of oblique cross required by statute, illegal; *Re Elizabethville Election*, 2 Dauphin Co. Rep. 383, 17 Pa. Co. Ct. 568, 5 Pa. Dist. R. 229, holding ballots not containing as many blank spaces as there were persons to be voted for, defective; *Re Pike Twp. Contested Election*, 18 Pa. Co. Ct. 280, 5 Pa. Dist. R. 521, holding straight mark in or outside circle or square not sufficient compliance with statutory requirement of oblique cross; *Re Fairchance Contested Election*, 22 Pa. Co. Ct. 455, 8 Pa. Dist. R. 598, holding that markings of ballots must comply strictly with statute; *Re Leh's Contested Election*, 6 Pa. Dist. R. 154, holding that election should be declared invalid for irregular certification to official ballot; *Re Contested Election*, 30 Pittsb. L. J. N. S. 319, holding use of blanket sticker on vacant column for names not printed on ballot illegal; *Lawlor's Contested Election*, 180 Pa. 570, 37 Atl. 92, holding use of pasters attached to official ballot illegal; *Re Upperman*, 33 Pittsb. L. J. N. S. 380, holding ballot containing cross in circle at head of one of party columns and large X across other columns not void.

Cited in footnotes to *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once; *Page v. Kuykendall*, 32 L. R. A. 656, which holds words "long term," after one of two names on ballot in election of school directors, sufficient designation of office; *Fletcher v. Wall*, 40 L. R. A. 617, which holds use of paster ballots unlawful.

Record in certiorari.

Distinguished in *Re Diamond Street*, 196 Pa. 263, 46 Atl. 428, declining to review evidence on the merits on certiorari.

Expressio unius est exclusio alterius.

Cited in *Westfield School District v. Dillman*, 22 Pa. Co. Ct. 569, 5 Lack. Legal News, 288, holding that remedy provided by statute must be pursued, in absence of contract, to collect tuition for nonresident pupils.

27 L. R. A. 236, *CUMBERLAND TELEPH. & TELEG. CO. v. UNITED ELECTRIC R. CO.* 93 Tenn. 492, 29 S. W. 104.

Use of streets for electricity.

Cited in *Snyder v. Ft. Madison Street R. Co.* 105 Iowa, 288, 41 L. R. A. 347, 75 N. W. 179, holding that injunction should be granted to compel removal of electric light pole unnecessarily erected in front of plaintiff's property; *Howe v. West End Street R. Co.* 167 Mass. 51, 44 N. E. 386, denying right of compensation to abutting owner for maintenance of trolley electric railway in public way; *La Crosse City R. Co. v. Higbee*, 107 Wis. 402, 51 L. R. A. 929, 83 N. W. 701, holding additional burden not imposed on fee by maintenance of electric trolley railway.

Cited in note (31 L. R. A. 802) on police regulation of electric companies.

Rights of domestic and foreign corporations.

Cited in *Markwood v. Southern R. Co.* 65 Fed. 822, holding foreign corporation not made corporation of Tennessee by statute, by compliance with which they are "deemed to be such," so as to prevent removal of cause to Federal court;

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Africa v. Knoxville, 70 Fed. 739, holding franchise of railway company, granted by legislature upon consent of municipality, not revocable by municipality after giving its consent.

27 L. R. A. 248, *ANDERSON v. RODGERS*, 53 Kan. 542, 36 Pac. 1067.

Collection and payment of checks.

Cited in *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 143, 44 L. R. A. 507, footnote p. 504, 77 Am. St. Rep. 609, 78 N. W. 980, holding bank not authorized to send check for collection directly to drawee, notwithstanding custom; *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 320, 34 S. W. 458; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 457; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 109, 61 Am. St. Rep. 550, 69 N. W. 765; *Givan v. Bank of Alexandria* (Tenn. Ch. App.) 47 L. R. A. 272, footnote p. 270, 52 S. W. 923,—holding sending check directly to drawee bank for collection, negligence; *Watt v. Gans*, 114 Ala. 272, 62 Am. St. Rep. 99, 21 So. 1011, holding proof of laches on part of creditor in presenting check for payment permissible under plea of payment in action for original debt for which check was given; *O'Leary Bros. v. Abeles*, 68 Ark. 262, 82 Am. St. Rep. 291, 57 S. W. 791, holding delivery of check to bank for collection, forwarding of same to drawee, which marked check paid and surrendered same to drawer, payment as between drawer and drawee; *Bailie v. Augusta Sav. Bank*, 95 Ga. 286, 51 Am. St. Rep. 74, 21 S. E. 717, holding bank receiving check for collection liable for its own or its agent's negligence in collecting same; *Edminsten v. Herpolsheimer* (Neb.) 59 L. R. A. 935, footnote p. 934, 92 N. W. 138, requiring check to be presented not later than day after receipt, to hold drawer.

Cited in footnotes to *Commercial Nat. Bank v. First Nat. Bank*, 32 L. R. A. 712, which upholds stipulation against payment of check if presented through specified agency; *First Nat. Bank v. Citizens' Sav. Bank*, 48 L. R. A. 583, which holds collecting bank impliedly instructed to send certificate of deposit directly to bank making it, which is only bank in place; *Second Nat. Bank v. Merchants' Nat. Bank*, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker, without hearing from similar note previously sent.

Cited in note (53 L. R. A. 432) on effect on drawer's liability of delay in presenting check, where drawee remains solvent.

Distinguished in *Kershaw v. Ladd*, 34 Or. 387, 44 L. R. A. 241, footnote p. 236, 56 Pac. 402, holding custom of banks to send checks directly to drawee bank for collection, reasonable.

27 L. R. A. 252, *BUTLER v. FITZGERALD*, 43 Neb. 192, 47 Am. St. Rep. 741, 61 N. W. 640.

Followed on similar facts in *Breed v. McCoy*, 43 Neb. 208, 61 N. W. 644.

Right of dower or curtesy.

Cited in *David Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 290, 75 N. W. 877, holding release of dower right a good consideration for transfer of absolute title to part of real estate of husband to wife; *Pinkham v. Pinkham*, 55 Neb. 732, 76 N. W. 411, holding widow entitled to dower in land deeded to husband before marriage, to take effect on his death; *Wylie v. Charlton*, 43 Neb. 852, 62 N. W. 220, holding prospective inchoate right of dower sufficient interest to pre-

vent wife from testifying to conversation with deceased person to establish husband's right to land; *Sorensen v. Sorensen*, 56 Neb. 735, 77 N. W. 68, holding right of dower sufficient interest to prevent alleged widow from testifying as to conversation constituting verbal contract of marriage; *Martin v. Abbott*, 1 Herdman (Neb.) 61, 95 N. W. 356, holding dower not extinguished by execution sale of husband's real estate.

Cited in footnote to *Haggerty v. Wagner*, 39 L. R. A. 384, which holds wife's inchoate interest in husband's interest as cotenant of land subject to defeat by partition.

Distinguished in *Turner v. Heinberg*, 30 Ind. App. 618, 65 N. E. 294, denying right of surviving husband to redeem lands of wife, sold during her lifetime at judicial sale.

Application of rule caveat emptor.

Cited in *Motley v. Motley*, 53 Neb. 382, 68 Am. St. Rep. 608, 73 N. W. 738, holding purchaser at administrator's sale disclosing that deceased left a widow charged with notice of her right of dower; *Peterborough Sav. Bank v. Pierce*, 54 Neb. 719, 75 N. W. 20, holding one purchasing land from mortgagee charged with notice of unmatured note which unassigned mortgage secured; *Pinckney v. Pinckney*, 114 Iowa, 443, 87 N. W. 406, holding recording acts not applicable to unrecorded receipt for advancement.

Cited in footnote to *Johnson v. Equitable Securities Co.* 56 L. R. A. 933, which holds bona fide purchaser paying purchase money protected from unknown equities.

27 L. R. A. 257, *BINGHAM v. MEARS*, 4 N. D. 437, 61 N. W. 808.

27 L. R. A. 263, *BIRMINGHAM MINERAL R. CO. v. PARSONS*, 100 Ala. 662, 46 Am. St. Rep. 92, 13 So. 602.

Liabilities imposed on railroads by statute.

Cited in *Louisville & N. R. Co. v. Murphree*, 129 Ala. 434, 29 So. 592, denying right of tenant to maintain action against railroad company for failure to repair cattle guards.

Cited in footnotes to *Chicago, R. I. & P. R. Co. v. Zerneck*, 55 L. R. A. 610, which sustains statute making carrier liable for injury to passengers, not due to their criminal negligence or violation of express rule; *Johnson v. Oregon Short Line R. Co.* 53 L. R. A. 744, which holds railroad company liable for horses killed on unfenced track.

27 L. R. A. 266, *BEESEY v. WHEELER*, 103 Mich. 196, 61 N. W. 658.

Master's duty to furnish safe places and appliances.

Cited in *Anderson v. Michigan C. R. Co.* 107 Mich. 595, 65 N. W. 585, holding railroad company liable for injury to brakeman, due to depression in track; *McDonald v. Michigan C. R. Co.* 108 Mich. 12, 62 N. W. 597, holding railroad company liable for injury to brakeman, due to defect in push bar, discovered by engineer before accident; *Petaja v. Aurora Iron Min. Co.* 106 Mich. 468, 32 L. R. A. 438, 58 Am. St. Rep. 505, 64 N. W. 335, denying liability of master for injury to servant by falling of roof of mine chamber; *Turner v. St. Clair Tunnel Co.* 111 Mich. 582, 36 L. R. A. 137, 66 Am. St. Rep. 397, 70 N. W. 146, holding liability of master

for injury to servant in Canadian portion of tunnel dependent upon law of Canada as to duty to furnish safe place to work; *Thomas v. Ann Arbor R. Co.* 114 Mich. 62, 72 N. W. 40, holding master liable for injury to servant, due to selection of unsuitable guy rope by foreman; *Allen v. Galveston, H. & S. A. R. Co.* 14 Tex. Civ. App. 346, 37 S. W. 171, denying liability of master for injury to servant, due to stepping on loose plank while repairing bridge; *Kerr-Murray Mfg. Co. v. Hess*, 38 C. C. A. 651, 98 Fed. 56, holding master liable for injury due to defective lumber furnished for scaffolding.

Injuries due to negligence of fellow servants.

Cited in *Andre v. Winslow Bros. Elevator Co.* 117 Mich. 563, 76 N. W. 86, denying liability of master for injury to servant while handing tools to foreman at work on elevator shaft; *Frazee v. Stott*, 120 Mich. 628, 79 N. W. 896, denying liability of master for injury to servant, due to misplacing of guide board in mill by another employee; *Lepan v. Hall*, 128 Mich. 526, 87 N. W. 619, denying liability of master for injury to servant, due to negligence of foreman directing work in sawmill; *Callan v. Bull*, 113 Cal. 605, 45 Pac. 1017, denying liability of master furnishing safe materials, for injury due to defectively constructed appliance used in building jetty.

Who are fellow servants.

Cited in *Schroeder v. Flint & P. M. R. Co.* 103 Mich. 216, 29 L. R. A. 323, 50 Am. St. Rep. 354, 61 N. W. 663, holding foreman of gang of men unloading and leveling dirt, fellow servant of members of the gang; *Balhoff v. Michigan C. R. Co.* 106 Mich. 613, 65 N. W. 592, holding brakeman not fellow servant of section men whose duty was to keep tracks safe; *Findlay v. Russel Wheel & Foundry Co.* 108 Mich. 290, 66 N. W. 50, holding foreman of department in car shops, assisting men in placing car on trucks, their fellow servant; *Wellihan v. National Wheel Co.* 128 Mich. 9, 87 N. W. 75, holding foreman starting spoke lathe to see if it worked right, fellow servant of lathe operator; *Mikolojczak v. North American Chemical Co.* 29 Mich. 85, 88 N. W. 75, holding workman assisting in breaking down salt, and department foreman in charge of the work, fellow servants.

Cited in note (50 L. R. A. 437, 439) on what servants are deemed to be in same common employment, apart from statutes, where no questions as to vice principalship arise.

Who are vice principals.

Cited in note (54 L. R. A. 111, 144, 149, 152) on vice principalship as determined with reference to character of act which caused injury.

27 L. R. A. 271, *NEW ENGLAND TRUST CO. v. ABBOTT*, 162 Mass. 148, 38 N. E. 432.

Corporation by-laws.

Cited in *Audette v. L'Union St. Joseph*, 178 Mass. 115, 59 N. E. 668, dismissing action for sick benefits because of failure to procure physician's sworn certificate, as required by by-laws; *Barrett v. King*, 181 Mass. 479, 63 N. E. 934, upholding by-law of corporation permitting directors to purchase stockholder's stock at same price offered by another prospective purchaser; *Bronson Electric Co. v. Rheubottom*, 122 Mich. 611, 81 N. W. 563, upholding validity of lien created by by-law on stock for debts of stockholder; *Blue Mountain Forest Asso. v. Borrowe*, 71 N. H. 74, 51 Atl. 670, holding stockholders bound by by-laws referred

to in certificates of stock and made condition of issuance of same; *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 201, 51 S. W. 24, sustaining action to compel corporation to purchase its own stock, in accordance with provision of by-laws; *Lane v. Albertson*, 78 App. Div. 619, 79 N. Y. Supp. 947, construing clause in articles of joint stock association as not requiring executor to sell stock owned by deceased member of association.

Cited in footnotes to *Ireland v. Globe Mill. & Reduction Co.* 29 L. R. A. 429, which holds invalid, by-law giving corporation first right to purchase stock; *Victor G. Bloede Co. v. Bloede*, 33 L. R. A. 107, which holds unreasonable, by-law restricting transfer of stock without giving option to corporation and stockholders; *Craig v. Hesperia Land & Water Co.* 35 L. R. A. 306, which holds refusal to transfer stock on books not justified by existence of unpaid assessment; *Wells v. Black*, 37 L. R. A. 619, which holds by-law of savings bank declaring waiver of stockholders' liability void; *Ireland v. Globe Mill. & Reduction Co.* 38 L. R. A. 299, which holds contract by proposed stockholder to offer stock to corporation before offering to other purchaser not binding; *Carter v. Producers' Oil Co.* 39 L. R. A. 100, which holds right of member of limited partnership to purchase additional shares limited by rule requiring re-election to membership as to such shares; *Spurgeon v. Santa Ana Valley Irrigation Co.* 39 L. R. A. 701, which holds purchaser at sale of delinquent stock for assessments not affected by by-law restricting transfers.

Cited in notes (47 L. R. A. 261) on effect of transfer of shares of stock on liability for unpaid subscription; (50 L. R. A. 504, 508) on specific performance of contract for sale of stock in corporation; (61 L. R. A. 623, 633) on right of corporation to purchase its own shares of stock.

Public policy as affecting corporations and stockholders.

Cited in *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 605, 35 L. R. A. 316, 56 Am. St. Rep. 119, 47 Pac. 582, upholding agreement between three prospective stockholders to vote stock at a unit for five years.

Distinguished in *Chrisman-Sawyer Bkg. Co. v. Independence Mfg. Co.* 168 Mo. 642, 68 S. W. 1026, holding unpaid stock subscriptions assets of corporation, of which creditor cannot be deprived by act of corporation or stockholder.

Specific performance of contract to transfer stock.

Cited in *Jones v. Brown*, 171 Mass. 324, 50 N. E. 648, holding equity action is proper remedy to compel specific performance of contract to transfer stock.

27 L. R. A. 279, *BUDD v. UNITED CARRIAGE CO.* 25 Or. 314, 35 Pac. 660.

Presumption of negligence from happening of event.

Cited in footnotes to *Shafer v. Lacock*, 29 L. R. A. 254, which holds negligence presumed from burning of house through fire set by sparks from fire-pot placed on roof by workmen; *Whalen v. Consolidated Traction Co.* 41 L. R. A. 836, which authorizes presumption of carrier's negligence, where passenger injured through defect in appliances, or preventable act or omission of servant; *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance.

27 L. R. A. 284, *MAULDIN v. GREENVILLE*, 42 S. C. 293, 46 Am. St. Rep. 723. 20 S. E. 842.

Municipal licenses.

Cited in *Hill v. Abbeville*, 59 S. C. 403, 38 S. E. 11, upholding validity of occupation license ordinance.

Powers of municipality.

Cited in *Crawfordsville v. Braden*, 130 Ind. 159, 30 Am. St. Rep. 214, 28 N. E. 849, upholding power of municipality to furnish electric light to citizens in their private houses; *Stehmeyer v. Charleston*, 53 S. C. 283, 31 S. E. 322, holding city without power to contract for waterworks plant, to be paid for by assessments of lot owners on streets in which pipes are laid.

Municipal assessments.

Cited in footnotes to *Cincinnati v. Batsche*, 27 L. R. A. 536, which holds assessment on foot front plan valid and binding only as to such lots and lands as abut on the improvement; *Reelfoot Lake Levee District v. Dawson*, 34 L. R. A. 725, which holds tax on land alone, in levee district, void.

Cited in notes (28 L. R. A. 498) on charging expense of grading for sidewalk on abutting owner; (58 L. R. A. 355) on who is liable for expense of drainage.

Overruled in *Maudlin v. Greenville*, 53 S. C. 287, 43 L. R. A. 102, footnote p. 101, 69 Am. St. Rep. 855, 31 S. E. 252, denying validity of assessment of abutting owners for sidewalks and drains.

27 L. R. A. 290, *HENDERSON v. JAMES*, 52 Ohio St. 242, 39 N. E. 805.

Nature of habeas corpus proceeding.

Cited in *State ex rel. Roberts v. Superior Court*, 32 Wash. 146, 72 Pac. 1040, holding that appeal from judgment in habeas corpus proceeding must be governed by law relating to civil proceedings.

27 L. R. A. 294, *BALTIMORE BREWERIES CO. v. RANSTEAD*, 78 Md. 501, 28 Atl. 273.

Use of one's own property to injury of another.

Cited in footnotes to *Defiance Water Co. v. Olinger*, 32 L. R. A. 736, which holds proprietor liable for injury to guest of tenant from fall of standpipe; *Skaggs v. Martinsville*, 33 L. R. A. 781, which holds valid, ordinance prohibiting flow of water from well or spring on street; *North Point Consol. Irrigation Co. v. Utah & S. L. Canal Co.* 40 L. R. A. 851, which holds right to irrigate land subject to duty to take care not to injure others with seepage or waste water unfit for irrigation.

27 L. R. A. 296, *EIGHMY v. UNION P. R. CO.* 93 Iowa, 538, 61 N. W. 1056.

Liability of master or charitable hospital for negligence of physicians or servants.

Cited in *York v. Chicago, M. & St. P. R. Co.* 98 Iowa, 553, 67 N. W. 574, denying liability of railroad company to employee for negligence of free physician; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 268, 70 N. W. 630, denying liability of railroad company for malpractice of its physician, selected with due care; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 91, 27 L. R. A. 843, foot-

note p. 840, 50 Am. St. Rep. 313, 40 N. E. 138, holding corporation gratuitously furnishing medical services to employees liable only for care in selecting physician; Powers v. Massachusetts Homeopathic Hospital, 47 C. C. A. 126, 109 Fed. 298, denying liability of charitable hospital to pay patient for negligence of nurse; Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 450, 74 S. W. 456, holding railroad company not liable for malpractice of physician in its relief department, if physicians selected with due care.

Cited in footnotes to Hearn v. Waterbury Hospital, 31 L. R. A. 224, which denies liability of charitable hospital for wrongful neglect of servants; Hannon v. Siegel-Cooper Co. 52 L. R. A. 429, which holds department store estopped to deny responsibility for malpractice of dentist employed therein.

Cited in note (28 L. R. A. 549) on duty of master to furnish medical aid to servant.

27 L. R. A. 298, FORD v. CHICAGO MILK SHIPPERS' ASSO. 155 Ill. 166, 39 N. E. 651.

Legal and illegal combinations and agreements.

Cited in National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 270, holding that illegal combination cannot be operated under cloak of corporation purchasing its assets; State *ex rel.* Durner v. Huegin, 110 Wis. 253, 62 L. R. A. 742, 85 N. W. 1046, holding combination of three publishers of newspapers to compel a fourth to reduce rates of advertising, criminal conspiracy; United States v. Addyston Pipe & Steel Co. 46 L. R. A. 135, 29 C. C. A. 159, 54 U. S. App. 723, 85 Fed. 289, holding combination to restrict competition and control price of iron pipe in certain territory illegal.

Cited in footnotes to People v. Milk Exchange, 27 L. R. A. 437, which holds incorporated milk exchange, constituting combination to fix price of milk, illegal; National Harrow Co. v. Hench, 39 L. R. A. 299, which holds agreement by owner of patent with corporation organized by rival manufacturers, to sell no harrow for less than schedule price, invalid; People *ex rel.* McIlhany v. Chicago Live-Stock Exchange, 39 L. R. A. 373, which holds by-law of live-stock exchange, limiting number of solicitors member can employ, ground for forfeiting franchise; Cummings v. Union Blue Stone Co. 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone, to sell through common agent and maintain agreed prices; Com. v. Grinstead, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; Brown v. Jacobs Pharmacy Co. 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 62 L. R. A. 632, which sustains plan by which manufacturers of proprietary medicines shall sell at fixed prices, with rebate only to concerns which can be relied on to maintain selling price decided upon.

Cited in note (64 L. R. A. 695, 720, 721) on illegal trusts and modern anti-trust laws.

Collateral attack on illegal combination.

Cited in Lafayette Bridge Co. v. Streator, 105 Fed. 731, holding defense that plaintiff is illegal trust not available in action to recover contract price for building bridge.

Constitutionality of anti-trust law.

Cited in *Harding v. American Glucose Co.* 182 Ill. 621, 64 L. R. A. 766, 74 Am. St. Rep. 189, 55 N. E. 577, reaffirming constitutionality of Illinois anti-trust act of 1891; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 260, 66 N. E. 349, holding amendment to Illinois anti-trust act, requiring yearly affidavit of officers of corporation stating whether such corporations are connected in any way with illegal trusts, constitutional.

Impairment of contract.

Cited in *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 616, 47 L. ed. 333, 23 Sup. Ct. Rep. 206, holding contract not impaired by statute imposing condition upon transaction of business by foreign corporation in state where statute enacted before, although taking effect after, contract was made.

27 L. R. A. 303, *ROBINSON v. LEACH*, 67 Vt. 128, 48 Am. St. Rep. 807, 31 Atl. 32.

27 L. R. A. 305, *MORRIS v. METALLINE LAND CO.* 164 Pa. 326, 44 Am. St. Rep. 614, 30 Atl. 240.

Forfeiture of stock.

Followed without discussion in *Morris v. Land Co.* 166 Pa. 352, 31 Atl. 114.

Cited in *Schwab v. Frisco Min. & Mill. Co.* 21 Utah, 266, 60 Pac. 940, holding stock not forfeited by failure to pay assessment levied by *de facto* directors.

Cited in footnote to *Aldine Mfg. Co. v. Phillips*, 42 L. R. A. 531, which denies right to foreclose in equity, corporate lien on stock for stockholder's debt.

Cited in note (47 L. R. A. 263) on effect of transfer of stock on liability for unpaid subscription.

Necessity of notice of call on stock subscription.

Cited in footnote to *Germania Iron Min. Co. v. King*, 36 L. R. A. 51, which holds by-law prescribing notice of call for instalment of stock subscription, condition precedent to call.

Partnership associations.

Cited in footnote to *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded in Massachusetts as partnership instead of corporation.

27 L. R. A. 313, *MANDEL v. SWAN LAND & CATTLE CO.* 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462.

Followed on substantially same facts in *Snydacher v. Swan Land & Cattle Co.* 154 Ill. 221, 40 N. E. 466.

Conflict of laws as to foreign corporations.

Cited in *Nashua Sav. Bank v. Anglo-American Land-Mortg. & Agency Co.* 48 C. C. A. 18, 108 Fed. 767, holding assumpsit proper form of action in United States to enforce liability of stockholder for call on stock of corporation formed under English companies act; *Ware Cattle Co. v. Anderson*, 107 Iowa, 234, 77 N. W. 1026, upholding right of foreign corporation, without permit to do business in state, to maintain action against nonresident on contract made outside state; *Crofoot v. Thatcher*, 19 Utah, 222, 75 Am. St. Rep. 725, 57 Pac. 171, hold-

ing demand note for unpaid stock subscription, made in Nebraska, to be interpreted according to laws of that state.

Cited in note (34 L. R. A. 738) on right to enforce stockholder's liability outside of state of incorporation.

Proof of records.

Cited in *Chicago v. English*, 80 Ill. App. 166, holding certificate of comptroller not competent evidence of indebtedness of city; *Cleveland, C. C. & St. L. R. Co. v. Bender*, 69 Ill. App. 265, holding uncertified copies of ordinances admissible, where witness testifies he has compared them with originals and that they are correct; *Cantwell v. Stockmen's Bldg. L. & Sav. Union*, 88 Ill. App. 249, holding copy of resolution of corporation directors admissible where proved by credible witness.

What constitutes "doing business" in state.

Cited in *Earle v. Chesapeake & O. R. Co.* 127 Fed. 241, holding through shipment by foreign carrier and maintenance of agency in state for solicitation of through freight not transaction of business within state so as to authorize service of process.

27 L. R. A. 322, *PEABODY v. DEWEY*, 153 Ill. 657, 39 N. E. 977.

Contracts for payment in coin.

Cited in note (29 L. R. A. 520) on special contracts and obligations to make payment in gold and silver.

27 L. R. A. 324, *HOLBROOK v. FORD*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091.

Foreign receivers and receiverships.

Cited in *Corn Exch. Bank v. Rockwell*, 58 Ill. App. 511, and *Frowert v. Blank*, 205 Pa. 303, 54 Atl. 1600, holding claims of domestic creditors are to be preferred over claims of foreign receivers of insolvent corporations.

Cited in footnotes to *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors; *Ward v. Connecticut Pipe Mfg. Co.* 42 L. R. A. 706, which requires attachment creditor to account for fair value of goods at time of attachment before sharing in benefit of receivership in other state; *Linvill v. Hadden*, 43 L. R. A. 222, which holds nonresident creditor of foreign corporation in hands of receiver entitled to same protection as resident creditors against receiver's claim to property.

Situs of debt or property.

Cited in *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 596, 36 L. R. A. 642, 56 Am. St. Rep. 275, 46 N. E. 631, holding situs of debt to be at domicile of owner of the credit; *Upson v. Davis*, 110 Ill. App. 378, holding bonds belonging to non-resident not property situated in Illinois, within statute relating to probate of wills.

27 L. R. A. 330, *LANGHAMMER v. MUNTER*, 80 Md. 518, 31 Atl. 300.

Voting residence.

Cited in *Turner v. Crosby*, 85 Md. 181, 36 Atl. 760, holding voting residence

in one county not lost by absence therefrom for business for considerable periods of time; *Black v. Pate*, 136 Ala. 607, 34 So. 844, holding negroes, not shown to have resided outside of state, legal voters of district in which they had resided more than thirty days before election.

Cited in footnote to *Jones v. Skinner*, 40 L. R. A. 752, which denies purser's power by living on boat, to change voting residence to other district of same city.

27 L. R. A. 332, *FIRST NAT. BANK v. BUCKHANNON BANK*, 80 Md. 475, 31 Atl. 302.

Negligence in collection of checks and drafts.

Cited in *Gregg v. Beane*, 69 Vt. 29, 37 Atl. 248, holding drawer of check released by negligence of payee in forwarding it through various collecting banks; *Herider v. Phoenix Loan Asso.* 82 Mo. App. 434, holding bank negligent in sending check for collection in indirect course to bank.

Cited in footnote to *Bank of Gilby v. Farnsworth*, 38 L. R. A. 843, which holds drawer of draft lost in mails during transportation from payee for collection discharged by delay in discovering loss.

27 L. R. A. 335, *DECKER v. SCHULZE*, 11 Wash. 47, 48 Am. St. Rep. 858, 39 Pa. 261.

Rescission of executed sale of land.

Cited in footnote to *McGhee v. Bell*, 59 L. R. A. 761, which sustains equity jurisdiction to cancel trust deed by one induced by fraud to take deed for tract containing only three fourths of quantity represented.

27 L. R. A. 340, *WOODWARD-HOLMES CO. v. NUDD*, 58 Minn. 236, 49 Am. St. Rep. 503, 59 N. W. 1010.

Partnership real estate.

Cited in *Sternberg v. Larkin*, 58 Kan. 206, 37 L. R. A. 197, 48 Pac. 861, holding real estate used for partnership purposes, to be treated as personal property upon dissolution of partnership by death; *Coolidge v. Burke*, 69 Ark. 243, 62 S. W. 583, holding deceased partner's interest in lands taken by surviving partner for debts goes as realty to heirs.

Cited in footnote to *Darrow v. Calkins*, 48 L. R. A. 299, which holds intent to change grantor's interest from land to surplus shown by partner's conveyance of undivided half interest in lands to copartner for partnership uses.

Cited in notes (27 L. R. A. 449) as to when real estate will be considered partnership property; (28 L. R. A. 86) on rights of partners *inter se* in partnership real estate; (28 L. R. A. 129) on position of surviving partners in partnership real estate; (28 L. R. A. 173) on rights and position of creditors, purchasers, and other third parties in partnership real estate.

27 L. R. A. 356, *Re WEBB*, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177.

Criminal sentences; suspension.

Cited in *Miller v. Evans*, 115 Iowa, 103, 56 L. R. A. 102, footnote p. 101, 91 Am. St. Rep. 143, 88 N. W. 198, denying defendant's right to relief for failure to execute mittimus until lapse of time of imprisonment, under judgment sen-

tencing to imprisonment on failure to pay fine; *Neal v. State*, 104 Ga. 512, 42 L. R. A. 192, footnote p. 190, 69 Am. St. Rep. 175, 30 S. E. 858, holding void, attempt to suspend execution of sentence after pronouncing it.

Cited in footnotes to *State v. Crook*, 29 L. R. A. 260, which holds power of court after suspension of sentence not lost by committing for refusal to pay costs as ordered; *Weber v. State*, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term; *People ex rel. Boenert v. Barrett*, 63 L. R. A. 82, which denies court's power indefinitely to suspend sentence after conviction; *Miller v. State*, 40 L. R. A. 109, which upholds statute for indeterminate sentence of criminals.

27 L. R. A. 357, *BALLIN v. MERCHANTS' EXCH. BANK*, 89 Wis. 278, 46 Am. St. Rep. 834, 61 N. W. 1118.

Appeal from order settling receiver's accounts in *Speiser v. Merchants' Exch. Bank*, 110 Wis. 510, 86 N. W. 243.

Insolvency and "trust fund" doctrine.

Cited in *Ford v. Hill*, 92 Wis. 193, 53 Am. St. Rep. 902, 66 N. W. 115, holding corporate property not converted into trust fund by mere fact of insolvency; *Gilman v. Gross*, 97 Wis. 228, 72 N. W. 885, upholding power of going corporation to secure debt by delivery of its stock as collateral security; *Barth v. Koetting*, 99 Wis. 247, 75 N. W. 395, holding assets of insolvent going bank not trust fund for creditors; *Slack v. Northwestern Nat. Bank*, 103 Wis. 63, 74 Am. St. Rep. 841, 79 N. W. 51, upholding right of creditors to proceed against insolvent corporation by ordinary process of law; *Goetz v. Knie*, 103 Wis. 369, 79 N. W. 401, upholding power of corporation to make voluntary assignment for benefit of creditors; *Cass v. Sutherland*, 98 Wis. 553, 74 N. W. 337, upholding judgment of court directing sale on execution of land in hands of receiver; *Boyd v. Mutual Fire Asso.* 116 Wis. 173, 61 L. R. A. 926, 96 Am. St. Rep. 948, 90 N. W. 1086, holding on rehearing that corporation officers and directors not trustees of express trust so as to prevent them from taking benefit of statute of limitations, where liable for misfeasance or malfeasance in office.

— Preferences to officers or directors.

Cited in *Hinz v. Van Dusen*, 95 Wis. 508, 70 N. W. 657, holding knowledge of insolvency and impending suspension necessary to be shown to impeach preference of directors; *South Bend Chilled Plow Co. v. George C. Cribb Co.* 97 Wis. 236, 72 N. W. 749, upholding power of going corporation to prefer directors as creditors; *Rowe v. Leuthold*, 101 Wis. 246, 77 N. W. 153, denying power of insolvent corporation to prefer officers and directors over general creditors; *Corey v. Wadsworth*, 118 Ala. 534, 44 L. R. A. 782, 25 So. 503 (dissenting opinion), majority upholding power of corporation to prefer directors over other creditors.

Cited in footnotes to *Illinois Steel Co. v. O'Donnell*, 31 L. R. A. 265, which holds valid, securities given to directors by insolvent going concern for money loaned at the time; *Adams & Westlake Co. v. Deyette*, 31 L. R. A. 497, which denies right to prefer debt for money borrowed by corporation to purchase its own stock.

Pleading.

Cited in *Kollock v. Scribner*, 98 Wis. 118, 73 N. W. 770, holding facts entitling defendant to relief against codefendant should be set up in answer.

27 L. R. A. 362, *SEAMANS v. KNAPP, S. & CO.* CO. 89 Wis. 171, 61 N. W. 757.
Contracts of insurance.

Cited in *Commonwealth Mut. F. Ins. Co. v. William Knabe & Co. Mfg. Co.* 171 Mass. 270, 50 N. E. 516, holding policy issued on property in Maryland through insurance brokers, applying at request of insured to Massachusetts insurer, Massachusetts contract; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.* 101 Wis. 466, 77 N. W. 893, holding ordinary insurance contract to be mere contract of indemnity.

Cited in footnotes to *Seamans v. Temple Co.* 28 L. R. A. 430, which holds that insurance contract through mails by corporation not authorized to do business does not support action against insured for assessment; *Union Cent. L. Ins. Co. v. Pollard*, 36 L. R. A. 271, which holds that express provision in insurance contract that it shall be construed to have been made in certain state makes it subject to laws of that state.

Cited in note (63 L. R. A. 835, 852) on conflict of laws as to contracts of insurance.

Distinguished in *Rose v. Kimberby & C. Co.* 89 Wis. 549, 27 L. R. A. 557, 46 Am. St. Rep. 855, 62 N. W. 526, holding contract for insurance made outside on property within state, violation of statute forbidding company to take risks directly or indirectly in state.

Residence of corporation.

Cited in *Combes v. Keyes*, 89 Wis. 308, 27 L. R. A. 373, 46 Am. St. Rep. 839, 62 N. W. 89, holding that corporation must dwell in state of its creation.

Broker as agent of insurer.

Cited in footnote to *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, which holds insurance broker authorized to procure certain amount of insurance in companies to be chosen by him not insurer's agent.

27 L. R. A. 365, *BLOCK v. MILWAUKEE STREET R. CO.* 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101.

Expert testimony.

Cited in *Viellesse v. Green Bay*, 110 Wis. 163, 85 N. W. 665, holding admission of expert testimony as to probability of plaintiff's injuries being caused by stepping into hole not reversible error; *Louisville & N. R. Co. v. Banks*, 132 Ala. 488, 31 So. 573, holding answer to hypothetical question based upon relevant facts established by evidence, properly admitted.

— As to probable duration or consequences of injury.

Cited in *Viellesse v. Green Bay*, 110 Wis. 163, 85 N. W. 665, upholding admission of expert testimony as to probability of permanency of plaintiff's injury; *Nichols v. Brabazon*, 94 Wis. 551, 69 N. W. 342, upholding admission of physician's testimony as to probability of plaintiff's recovery from injury; *Collins v. Janesville*, 99 Wis. 465, 75 N. W. 88, holding testimony that plaintiff was "quite likely" to be bothered by injury for several years, and "might be" always, improper; *Western U. Teleg. Co. v. Church (Neb.)* 57 L. R. A. 908, 90 N. W. 878, holding physician's testimony as to probable duration of confinement had he reached mother at certain time, admissible; *Pittsburgh, Ft. W. & C. R. Co. v. Moore*, 110 Ill. App. 310, holding evidence as to probability of injury producing epilepsy incompetent upon question of damages.

Proximate cause of injury.

Cited in *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 483, 33 L. R. A. 658, 57 Am. St. Rep. 935, 67 N. W. 16, holding special verdict that ties were not in good condition insufficient to show such condition to be proximate cause of injury caused by derailment of train; *Schiffler v. Chicago & N. R. Co.* 96 Wis. 147, 65 Am. St. Rep. 35, 71 N. W. 97, holding failure to stop train not proximate cause of injuries received by jumping therefrom; *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 356, 71 N. W. 372, holding negligence not proximate cause of injury, unless such injury could have been reasonably expected to result from the negligence; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 286, 72 N. W. 735, holding instruction that proximate cause is the direct and efficient cause producing the result, erroneous; *O'Connor v. Chicago & N. W. R. Co.* 92 Wis. 615, 66 N. W. 795, holding complaint not amendable to include injury from fire a mile distant from that specified in original complaint, unless defendant's negligence proximate cause of resulting injury; *Huber v. La Crosse City R. Co.* 92 Wis. 646, 31 L. R. A. 587, 53 Am. St. Rep. 940, 66 N. W. 708, holding negligent charging of span wire attached to iron pole not proximate cause of injury to lineman climbing wooden pole near by and coming in contact with wire and iron pole; *New Orleans & N. E. R. Co. v. McEwen*, 49 La. Ann. 1197, 38 L. R. A. 140, 22 So. 675, holding floating logs driven in storm against revetment not proximate cause of injury thereto; *Missouri P. R. Co. v. Columbia*, 65 Kan. 399, 58 L. R. A. 403, footnote p. 399, 69 Pac. 338, holding placing on platform, of heavy doors which were blown on track by severe gale not proximate cause of resulting derailment of engine; *Saxton v. Missouri P. R. Co.* 98 Mo. App. 501, 72 S. W. 717, holding failure to hold train at station not proximate cause of injury resulting from passenger's attempt to step off while it was in motion.

Damages for permanent injury.

Cited in *McBride v. St. Paul City R. Co.* 72 Minn. 293, 75 N. W. 231; *Boelter v. Ross Lumber Co.* 103 Wis. 330, 79 N. W. 243; *Chicago & N. W. R. Co. v. DeClow*, 61 C. C. A. 35, 124 Fed. 143,—holding that continued or permanent disability must be reasonably certain to result from injury to authorize assessment of damages therefor; *Raymond v. Keseberg*, 91 Wis. 195, 64 N. W. 861, holding erroneous, instruction that plaintiff entitled to recover for suffering he "may have to endure;" *Smith v. Milwaukee Builders' & T. Exchange*, 91 Wis. 368, 30 L. R. A. 507, 51 Am. St. Rep. 912, 64 N. W. 1041, holding erroneous, instruction that plaintiff is entitled to recover for suffering she may be "likely to," or there is "reasonable probability" she will, endure; *Groundwater v. Washington*, 92 Wis. 61, 65 N. W. 871, holding instruction that for permanent injuries plaintiff could recover what it was reasonably to be expected he could earn, erroneous; *Bailey v. Centerville*, 108 Iowa, 27, 78 N. W. 831, holding instruction that jury ascertain whether injury would "probably" continue not erroneous when charge otherwise covered ground as to reasonable certainty of permanent injury; *Illinois C. R. Co. v. Davidson*, 22 C. C. A. 313, 46 U. S. App. 300, 76 Fed. 524, holding use of words "may" or "likely to," in regard to future suffering, when jury not misled as to reasonable certainty of permanent injury, not reversible error.

Care required in use of electricity.

Cited in *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 377, 31 L. R. A. 570,

41 Pac. 499, holding instruction that electric company was bound to use highest care and diligence to prevent accidents not prejudicial error; *City Electric Street R. Co. v. Conery*, 61 Ark. 386, 54 Am. St. Rep. 262, 33 S. W. 426, holding street railway company bound to use reasonable care to prevent injury by escape of electricity from its wires.

Cited in note (31 L. R. A. 584) on liability for injuries by electric wires in highways.

27 L. R. A. 369, *COMBES v. MILWAUKEE & M. R. Co.* 89 Wis. 297, 46 Am. St. Rep. 839, 62 N. W. 89.

Dissolution or liquidation of corporations.

Cited in *Atty. Gen. v. Superior & Ct. C. R. Co.* 93 Wis. 610, 67 N. W. 1138, holding that suspension of its lawful and ordinary business for one year does not itself dissolve corporation; *Stolze v. Manitowoc Terminal Co.* 100 Wis. 212, 75 N. W. 987, holding that insolvency and receivership do not of themselves operate as dissolution of corporation; *Fitts v. National Life Assn.* 130 Ala. 415, 30 So. 374, holding that corporation legally dissolved cannot be sued; *Frankfort v. Deposit Bank*, 120 Fed. 167, holding bill of review to set aside decree in favor of corporation not maintainable after dissolution of corporation.

Cited in footnotes to *Marion Phosphate Co. v. Perry*, 33 L. R. A. 252, which holds judgment against corporation after dissolution invalid; *Schayne v. Evening Post Pub. Co.* 55 L. R. A. 777, which holds libel suit against dissolved corporation properly revived against trustees.

Distinguished in *Pritchard v. Barnes*, 101 Wis. 90, 76 N. W. 1106, holding national bank, after voluntary liquidation, still capable of suing and being sued.

Transfer or surrender of corporate rights or franchises.

Cited in *State ex rel. Rose v. Superior Court*, 105 Wis. 672, 48 L. R. A. 827, 81 N. W. 1046, holding that corporate rights and franchises can only be sold, assigned, and transferred when and as authorized by statute.

Distinguished in *Wright v. Milwaukee Electric R. & Light Co.* 95 Wis. 33, 36 L. R. A. 50, 60 Am. St. Rep. 74, 69 N. W. 791, holding street railway franchise not presumed surrendered by nonuser on two blocks for four years and eight months.

27 L. R. A. 374, *SWEETSER v. MATSON*, 153 Ill. 568, 46 Am. St. Rep. 911, 30 N. E. 1086.

Loss of lien of execution.

Cited in *Western Union Cold Storage Co. v. Rose*, 60 Ill. App. 456, holding lien of execution lost as to junior liens, where creditor relieves officer of duty of making levy; *McHale v. Westover*, 101 Ill. App. 278, holding preference given to lien of subsequent chattel mortgage by creditor's consent to postponement of execution sale.

Judgment on stipulated facts.

Cited in *People use of Sterling v. Huffman*, 182 Ill. 410, 55 N. E. 981, holding finding and judgment of appellate court on stipulated facts not binding on supreme court.

27 L. R. A. 383, HOMESTEAD STREET R. CO. v. PITTSBURG & H. ELECTRIC STREET R. CO. 166 Pa. 162, 30 Atl. 950, 955.

Railway franchises and rights thereunder.

Followed without special discussion in Long v. Homestead Street R. Co. 166 Pa. 176, 30 Atl. 955.

Cited in Philadelphia & M. R. Co.'s Petition, 187 Pa. 129, 42 W. N. C. 422, 40 Atl. 967, holding new company without right to construct railway on road-bed covered by franchise of turnpike company; Coatesville & D. Street R. Co. v. Uwchlan Street R. Co. 18 Pa. Super. Ct. 525, holding railway, in failing to get consent of municipality to use of streets, powerless to enjoin another railway, chartered later, from building in same streets; West Chester R. Co. v. Rock Glen Street R. Co. 4 Dauphin Co. Rep. 207, 25 Pa. Co. Ct. 560, refusing charter to proposed corporation desiring to lay track in streets included in filed extensions of routes of existing corporation; Babcock v. Scranton Traction Co. 1 Lack. Legal News, 228, holding that under act of 1889 but one railway franchise can be granted for any street; Com. *ex rel.* Elkin v. Sycamore Street R. Co. 30 Pittsb. L. J. N. S. 337, 3 Dauphin Co. Rep. 104, denying right of traction company under act of 1889 to exclusive use of bridge over river; Africa v. Knoxville, 70 Fed. 733, denying right of municipality to revoke franchise of railway company after giving consent to use of streets; Com. *ex rel.* Elkin v. Uwchlan Street R. Co. 203 Pa. 613, 53 Atl. 513, Affirming 8 Northampton Co. Rep. 223, denying right of company to franchise for streets included in resolution of extension previously filed by another company; Coatesville & D. Street R. Co. v. West Chester R. Co. 206 Pa. 45, 55 Atl. 844, denying right of old company to extend lines over streets included in charter of new company during two-year period allowed for construction; VanVoorhis v. Pittsburg & C. Street R. Co. 34 Pittsb. L. J. N. S. 153, holding that municipality cannot grant franchise to railroad company to lay tracks in streets not included in company's charter; Butler Railway Cos. 28 Pa. Co. Ct. 136, holding that extension of route of railroad company pending decision of governor upon previous charter application for franchise covering same route will defeat right to charter; Allen v. Clausen, 114 Wis. 253, 90 N. W. 181, holding authorization of municipality to grant railway franchises only to corporations excludes power to confer one on individuals.

Cited in footnote to Detroit Citizens' Street R. Co. v. Detroit, 35 L. R. A. 859, which holds power to grant exclusive privilege for street railways not conferred on city by statute.

Distinguished in Pennsylvania R. Co. v. Greensburg & N. Electric Street R. Co. 176 Pa. 576, 36 L. R. A. 846, upholding right of passenger railway, under statute, to build through streets of boroughs and townships and over private property.

Who may question ultra vires acts.

Cited in Seattle Gas & Electric Co. v. Citizens' Light & P. Co. 123 Fed. 596, upholding right of private individual to invoke want of charter power against acts of corporation which would do him irreparable injury.

Estoppel to deny constitutionality of act.

Cited in Philadelphia, M. & S. Street R. Co.'s Petition, 203 Pa. 368, 53 Atl. 191, holding that street railroad company may assail constitutionality of section of act under which it was incorporated.

27 L. R. A. 388, *COM. v. HARMEL*, 166 Pa. 89, 5 Inters. Com. Rep. 89, 30 Atl. 1036.

Police power with reference to commerce.

Cited in footnote to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

— Regulation of hawking, peddling, and other occupations.

Cited in *Com. v. Percival*, 11 Pa. Super. Ct. 613, and *Com. v. Dunham*, 191 Pa. 75, 44 W. N. C. 102, 43 Atl. 84, Affirming 4 Pa. Super. Ct. 76, upholding constitutionality of acts requiring license for hawking and peddling; *Com. v. Swift & Co.* 19 Pa. Co. Ct. 574, 6 Pa. Dist. R. 665, holding foreign corporation with place of business in sister state liable to pay mercantile tax required for sale of meal and lard; *Burnell v. Clark*, 20 Pa. Co. Ct. 102, holding act of 1859, imposing penalties for selling goods at auction, unconstitutional; *Com. v. De-inno*, 20 Pa. Co. Ct. 372, upholding constitutionality of act forbidding hawking and peddling, except by persons selling goods of their own manufacture; *South Bethlehem v. Hackett, C. & Co.* 12 Lanc. L. Rev. 200, holding ordinance prohibiting transient unlicensed mercantile business unconstitutional; *Brownback v. North Wales (Pa.)* 49 L. R. A. 446, 45 Atl. 660, Affirming 10 Pa. Super. Ct. 229, 44 W. N. C. 259, Which Reversed 7 Pa. Dist. R. 326, 14 Montg. Co. L. Rep. 81, 16 Lanc. L. Rev. 151, holding valid as to residents, ordinance requiring license for sale of goods on street, or by soliciting orders from house to house.

Cited in footnotes to *South Bend v. Martin*, 29 L. R. A. 531, which holds ordinance imposing license on peddlers not interference with commerce as to peddling of chairs imported before employment begun; *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; *State v. Coop*, 41 L. R. A. 501, which holds purchase of frame for portrait in accordance with option included in order for making portrait in other state not within statute against peddling; *Re Wilson*, 48 L. R. A. 417, which holds void as applied to sale of original packages, territorial statute requiring license for sale of coal oil.

Sales of personal property.

Cited in *Goss Printing Press Co. v. Jordan*, 171 Pa. 478, 44 W. N. C. 177, 32 Atl. 1031, holding that executory contract of sale may be changed into bailment, so as to prevent seizure of property under execution by vendee's creditors.

27 L. R. A. 390, *STURGIS v. KOUNTZ*, 165 Pa. 358, 30 Atl. 976.

Proximate cause of injury.

Cited in *Webster v. Monongahela River Consol. Coal & Coke Co.* 201 Pa. 284, 50 Atl. 964, holding broken timber, knocking servant under car wheels, proximate cause of resulting injury; *Hoehle v. Allegheny Heating Co.* 5 Pa. Super. Ct. 29, 28 Pittsb. L. J. N. S. 68, 40 W. N. C. 557, holding question whether shutting off of natural gas proximate cause of death from pneumonia, one for jury; *Willis v. Providence Telegram Pub. Co.* 20 R. I. 287, 38 Atl. 947, holding collision frightening plaintiff's horse, proximate cause of injury caused by throwing plaintiff against shafts of wagon while trying to hold horse; *Maryland Clay Co. v. Goodnow*, 95 Md. 353, 51 Atl. 292 (dissenting opinion by Pearce, J.), who holds lack of proper bumper, allowing standing cars to be pushed over trestle by collision with runaway cars, proximate cause of resulting injury to servant.

Cited in footnote to *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning of approach of train not proximate cause of injury to one struck by body of another person hit by train.

27 L. R. A. 392, *STATE ex rel. INDEPENDENT DIST. TELEG. CO. v. SECOND JUDICIAL DIST. COURT*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316.

Right to appointment of receiver.

Cited in *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Court*, 22 Mont. 239, 56 Pac. 219, and *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Court*, 22 Mont. 382, 56 Pac. 687, upholding right of shareholder of corporation to appointment of receiver pending charges of fraud against trustees; *Vila v. Grand Island E. L. I. & C. S. Co. (Neb.)* 63 L. R. A. 802, 97 N. W. 613, holding equity courts without jurisdiction, in absence of statute, to appoint receiver of corporation on application of private parties.

Cited in footnotes to *State ex rel. St. Louis, K. & S. R. Co. v. Wear*, 33 L. R. A. 341, which denies right to have temporary receiver appointed, without affording hearing to party affected; *Sternberg v. Wolff*, 39 L. R. A. 762, which authorizes appointment of receiver of trading corporation in case of deadlock from dissensions of stockholders.

27 L. R. A. 398, *WHITE v. PROVIDENCE SAV. LIFE ASSUR. SOC.* 163 Mass. 108, 39 N. E. 771.

Warranties or representations by insured.

Cited in *Levie v. Metropolitan L. Ins. Co.* 163 Mass. 118, 39 N. E. 792, holding questions of truth or falsity of statement in application, and of intent to deceive, for jury; *Hogan v. Metropolitan L. Ins. Co.* 164 Mass. 449, 41 N. E. 663, holding evidence admissible to show statement in application was true, although proof of death signed by plaintiff tended to show it was untrue; *Stocker v. Boston Mut. Life Asso.* 170 Mass. 225, 49 N. E. 116, holding provisions of Mass. Stat. 1887, chap. 214, § 21, applicable to assessment insurance companies; *Dolan v. Mutual Reserve Fund Life Asso.* 173 Mass. 198, 53 N. E. 398, holding term "misrepresentation" includes representations made in such form as to constitute warranties; *Fidelity Mut. Life Asso. v. McDaniel*, 25 Ind. App. 621, 57 N. E. 645, holding untrue statement in application that applicant had not been attended or treated by a physician, material; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 153, 36 L. R. A. 273, 64 Am. St. Rep. 715, 26 S. E. 421, holding statutory rule for regulation of contracts of insurance, part of contract; *Fidelity Mut. Life Asso. v. Miller*, 34 C. C. A. 219, 63 U. S. App. 717, 92 Fed. 71, holding insurer and insured cannot contract as to what statements are material to defeat statute; *Nugent v. Greenfield Life Asso.* 172 Mass. 280, 52 N. E. 440, holding defense of false statements in application properly refused, where copy of application annexed to policy was inaccurate; *Dwyer v. Mutual L. Ins. Co.* 72 N. H. 574, 58 Atl. 502, holding life policy avoided by falsity of statement warranted to be true, and which parties agreed should constitute material part of contract; *Continental Fire Ins. Co. v. Whitaker (Tenn.)* 64 L. R. A. 454, 79 S. W. 119, holding statute providing that policies shall not be avoided for falsity of representations or warranties not made with intent to deceive, justifiable exercise of police power.

Cited in footnotes to *Mutual L. Ins. Co. v. Simpson*, 28 L. R. A. 765, which
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holds frequent sick headaches for several months, though temporary and without effect on general health, sufficient to constitute a breach of warranty against severe, protracted, or frequent headache; *Barnes v. Fidelity Mut. Life Asso.* 45 L.R.A. 264, which holds person in bed with cold may be "in good health" within meaning of policy, though pneumonia, terminating fatally, sets in soon after; *Globe Mut. L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead, unless known to be false; *Black v. Travelers' Ins. Co.* 61 L. R. A. 500, which holds injury not bodily infirmity, as matter of law, unless physical health of insured affected.

27 L. R. A. 401, *GATE CITY BLDG. & L. ASSO. v. NATIONAL BANK OF COMMERCE*, 126 Mo. 82, 47 Am. St. Rep. 633, 28 S. W. 633.

Who are purchasers for value.

Cited in *Dymock v. Midland Nat. Bank*, 67 Mo. App. 103, holding bank receiving draft attached to bill of lading for collection, proceeds to be applied to depositor's indebtedness, purchaser for value; *American Valley Co. v. Wyman*, 92 Mo. App. 299, holding note broker receiving notes for sale not bona fide purchaser of same for value, so as to defeat equities of third parties.

Who may indorse commercial paper.

Cited in footnotes to *Auten v. Manistee Nat. Bank*, 47 L. R. A. 329, which holds bank cashier authorized to indorse paper for bank; *Fay v. Slaughter*, 56 L. R. A. 564, which denies authority of agent empowered to indorse principal's checks for deposit, to ratify deposit of checks received for securities on which agent has forged transfers; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 59 L. R. A. 657, which denies implied authority of superintendent and manager of mill to indorse paper given in payment of mill accounts.

Power of building association to issue negotiable paper.

Cited in note (43 L. R. A. 420) on power of building association to issue negotiable paper.

Check as assignment.

Cited in *Young v. Bank of Princeton*, 97 Mo. App. 584, 71 S. W. 713, holding that depositor's check on hand, credited to payee by bank, operated as assignment.

27 L. R. A. 409, *McMULLAN v. DICKINSON CO.* 60 Minn. 156, 51 Am. St. Rep. 511, 62 N. W. 120.

Report of second appeal in 63 Minn. 406, 65 N. W. 661.

Damages for breach of contract of employment.

Cited in *Smith v. St. Paul & D. R. Co.* 60 Minn. 335, 62 N. W. 392, holding damages not recoverable beyond date of trial in action for wrongful discharge of servant; *Menges v. Milton Piano Co.* 96 Mo. App. 617, 70 S. W. 728, upholding right of plaintiff to successive actions for separate breaches of contract by sales of pianos in his territory.

Cited in footnote to *Hildebrand v. American Fine Art Co.* 53 L. R. A. 826, which sustains right to recover *pro rata* on entire contract of employment terminated by employer for cause.

Disapproved in *Lee v. Dow*, 71 N. H. 328, 51 Atl. 1072; *Hamilton v. Love*, 152 Ind. 647, 71 Am. St. Rep. 384, 53 N. E. 181, upholding right of wrongfully discharged servant immediately to recover damages to end of term.

27 L. R. A. 412, *STATE v. HOSKINS*, 60 Minn. 168, 62 N. W. 270.

27 L. R. A. 414, *FRERE v. VON SCHOELER*, 47 La. Ann. 324, 16 So. 808.

Regulations affecting interstate commerce.

Cited in footnotes to *San Bernardino v. Southern P. Co.* 29 L. R. A. 327, which denies power to impose license tax on right to operate branch forming part of interstate railroad line; *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains state statute requiring fire screens on vessels burning wood in state; *St. Louis v. Consolidated Coal Co.* 51 L. R. A. 850, which holds void, city ordinance requiring license fee for privilege of towing in to harbor, boats having coasting license under United States authority.

Cited in note (60 L. R. A. 693) on corporate taxation and the commerce clause.

27 L. R. A. 416, *GRAHAM v. ST. CHARLES STREET R. CO.* 47 La. Ann. 214, 49 Am. St. Rep. 366, 16 So. 806.

Report of second appeal, affirming judgment against foreman and reversing judgment against railroad, in *Graham v. St. Charles Street R. Co.* 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 So. 707.

Injury by unlawful combinations.

Cited in *Ertz v. Produce Exchange*, 79 Minn. 145, 48 L. R. A. 92, footnote p. 90, 79 Am. St. Rep. 433, 81 N. W. 737, holding malicious, conspiracy to injure dealer by inducing other people not to deal with him; *Chiatovich v. Hanchett*, 96 Fed. 684, holding malicious attempt by employers to influence employees not to trade with third person, actionable; *Martell v. White*, 185 Mass. 262, 64 L. R. A. 260, 69 N. E. 1085, holding action maintainable by quarry owner against members of voluntary associations enforcing by-law forbidding them to deal with him.

Cited in footnotes to *Beck v. Railway Teamsters' Protective Union*, 42 L. R. A. 407, which holds boycott by use of pickets and boycotting circulars unlawful; *Downs v. Bennett*, 55 L. R. A. 560, which denies right of one only remotely affected, to injunction against fining or expelling member for violation of by-law with nonmembers or those dealing with them; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices.

Cited in note (62 L. R. A. 677, 708) on effect of bad motive to make actionable what would otherwise not be.

27 L. R. A. 418, *MURDOCK v. WATERMAN*, 145 N. Y. 55, 64 N. Y. S. R. 520, 39 N. E. 829.

Statute of limitations.

Cited in *Bouton v. Hill*, 4 App. Div. 255, 38 N. Y. Supp. 498, holding indorsement on note as paid, of amount of reduction agreed to be allowed maker, where amount was in dispute, sufficiently to take note out of statute of limitations though indorsed as of date of note; *Knapp v. Crane*, 14 App. Div. 124, 43 N. Y. Supp. 513, holding that payment on mortgage must be made by party liable, or his agent, to extend time for suing thereon; *Grovenor v. Signor*, 10 N. D. 510, 88 N. W. 278; *Martin v. Hyde*, 19 App. Div. 491, 46 N. Y. Supp. 613, holding that payment on joint note by one of the makers on his own account does not extend

statute as to the other; *Burdick v. Hicks*, 29 App. Div. 207, 51 N. Y. Supp. 789, holding outlawed account not revived by part payment, where it is not shown that debtor knew there was a balance due at time of payment; *Simonson v. Nafsa*, 36 App. Div. 475, 55 N. Y. Supp. 449, holding that after alienation of mortgaged property by mortgagor to alienee, payment or new promise by one of the parties does not prevent running of statute against other; *Mack v. Anderson*, 165 N. Y. 532, 59 N. E. 289, and *Boughton v. Harder*, 46 App. Div. 354, 61 N. Y. Supp. 574, holding running of statute not stopped as to mortgagor and as to other parts of mortgaged premises by payments by grantee of part of premises, who assumed payment of mortgage; *Matteeson v. Palser*, 56 App. Div. 97, 67 N. Y. Supp. 612, holding burden is upon one seeking payment to show acts extending statute; *Connecticut Trust & S. D. Co. v. Wead*, 33 Misc. 376, 67 N. Y. Supp. 466, holding acknowledgment by one debtor does not stop running of statute as to another; *McLane v. Allison*, 7 Kan. App. 287, 53 Pac. 781, holding mortgage to secure note barred when statute has run against note; *Regan v. Williams*, 88 Mo. App. 586, holding running of statute not arrested by credits made without consent of debtor.

Cited in footnote to *Cook v. Bramel*, 45 L. R. A. 212, which holds vendor's lien not extended by payments on purchase money made after debtor has deeded or mortgaged his land.

27 L. R. A. 423, *BIRD v. MERKLEE*, 144 N. Y. 544, 64 N. Y. S. R. 243, 39 N. E. 645.

Devises and bequests for charitable uses.

Cited in *Allen v. Stevens*, 161 N. Y. 152, 55 N. E. 568 (dissenting opinion), Reversing 33 App. Div. 490, 54 N. Y. Supp. 8, Which Reversed 22 Misc. 167, 49 N. Y. Supp. 431, majority upholding devise to trustees to found, erect, and maintain home for aged; *Re Griffin*, 167 N. Y. 84, 60 N. E. 284, Reversing 45 App. Div. 106, 61 N. Y. Supp. 639, construing bequest to religious corporation for support and maintenance of institute named, which was separate corporation, absolute gift to former corporation; *Preston v. Howk*, 3 App. Div. 47, 37 N. Y. Supp. 1079, holding bequest to trustees of church for preaching of gospel therein. gift to corporate body; *Re Crane*, 12 App. Div. 275, 42 N. Y. Supp. 904, holding bequest to city, with request that it be used to maintain drinking fountain, absolute gift; *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 401, 51 N. Y. Supp. 704, holding bequest to church society with directions as to use of income not a trust, although word "trust" used in will; *First Presby. Church v. McKallor*, 35 App. Div. 101, 54 N. Y. Supp. 740, holding bequest in legal effect to church not invalidated by direction to use portion of income for maintenance of one church social annually, and for other objects; *Hull v. Pearson*, 36 App. Div. 237, 55 N. Y. Supp. 324 (dissenting opinion), majority upholding bequest to orphanage to be founded by specified association, although no orphanage had been so founded at testator's death; *Re Bogart*, 43 App. Div. 587, 60 N. Y. Supp. 496, holding absolute character of bequest to church not limited by directions as to its use; *Tabernacle Baptist Church v. Fifth Ave. Baptist Church*, 60 App. Div. 336, 70 N. Y. Supp. 181, holding absolute title passes to one religious corporation receiving securities under agreement with donor to pay income to another society; *Pierce v. Phelps*, 75 Conn. 86, 52 Atl. 612, holding bequest to church publication society, for use in counteracting "pernicious doctrine of immortality of the

soul," absolute gift; *Lane v. Eaton*, 69 Minn. 146, 38 L. R. A. 672, 65 Am. St. Rep. 559, 71 N. W. 1031, holding bequest to incorporated church, to be used in aiding home and foreign missions, absolute gift; *Re Graves*, 171 N. Y. 44, 83 N. E. 787, holding bequest to trustees to found home, although estate actually in hands of trustees, and home not founded, not subject to transfer tax; *Butler v. Parochial Fund*, 92 Hun. 101, 36 N. Y. Supp. 562, holding bequest in trust to support clergyman to hold services in private chapel, void for indefiniteness; *Re Leo-Wolf*, 25 Misc. 470, 55 N. Y. Supp. 650, upholding bequest to foreign legatee, competent to take under laws of state where located; *Re Daniels*, 41 Misc. 305, 84 N. Y. Supp. 684, holding bequest to religious society "in trust, to keep invested," income to be applied to repairing church and parsonage, absolute gift; *Danforth v. Oshkosh*, 119 Wis. 296, 97 N. W. 258 (dissenting opinion), majority holding statutes against perpetuities applicable to grants and devises for charitable purposes.

Cited in footnote to *Thompson v. Brown*, 62 L. R. A. 398, which upholds devise of fund for distribution by executor "to the poor, in his discretion."

27 L. R. A. 426, *FIRST NAT. BANK v. ALLEN*, 100 Ala. 476, 46 Am. St. Rep. 80, 14 So. 335.

Payment of forged paper.

Cited in *McKeen v. Boatmen's Bank*, 74 Mo. App. 292, holding action at law proper to recover amount paid on forged check.

Cited in notes (27 L. R. A. 635) on drawee's duty to know signature of drawer; (36 L. R. A. 539) on liability of person whose signature is forged on commercial paper.

Payment to wrong person.

Cited in note (50 L. R. A. 84) as to who must bear loss where check or bill issued or indorsed to impostor.

Negligence of depositor in failing to object to account.

Cited in *Neal v. First Nat. Bank*, 26 Ind. App. 511, 60 N. E. 164, holding failure of depositor to object to account stated, bar to right of action against bank for payment of checks forged by his wife; *Critten v. Chemical Nat. Bank*, 171 N. Y. 227, 57 L. R. A. 533, footnote p. 530, 63 N. E. 969, holding depositor responsible for loss from negligent failure to detect forgeries among vouchers returned by bank; *Hennessey Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. 560 holding corporation liable on demand notes issued without authority by officer for overdrawn account where it failed to object to such notes of which it had notice in balanced pass book.

Liability of principal for acts of dishonest agent.

Cited in *Kelley v. Chenango Valley Sav. Bank*, 21 Misc. 244, 45 N. Y. Supp. 651, holding savings bank liable for acts of its treasurer in fraudulently diverting deposits to national bank.

Cited in footnote to *Shepard & M. Lumber Co. v. Eldridge*, 41 L. R. A. 617, which holds payee of indorsed check not deprived of remedy against drawer by intrusting it to dishonest clerk, who forged indorsement of the same.

Disapproved in effect in *Kenneth Invest. Co. v. National Bank*, 96 Mo. App.

142, 70 S. W. 173, holding knowledge of depositor's clerk, himself the forger of forged checks paid by bank, not imputable to depositor.

27 L. R. A. 434, *MAGNETIC ORE CO. v. MARBURY LUMBER CO.* 104 Ala. 465, 53 Am. St. Rep. 73, 16 So. 632.

Report of second appeal in 113 Ala. 309, 21 So. 36.

Removal of timber after sale.

Cited in *McRae v. Stillwell*, 111 Ga. 70, 55 L. R. A. 523, 36 S. E. 604, holding that instrument conveying all pine timber on certain lots for sawmill purposes requires cutting and removal of timber within reasonable time; *Carson v. Three States Lumber Co.* 108 Tenn. 687, 69 S. W. 320, holding, under facts in case, ten years to be reasonable time for cutting growing timber under conveyance of same.

Cited in footnote to *Macomber v. Detroit, L. & N. R. Co.* 32 L. R. A. 102, which holds title to logs not forfeited by failure to remove within time fixed by contract.

Cited in note (55 L. R. A. 533) on conveyance of title to standing timber without conveying title to land.

Interest of vendee of standing trees, in the land itself.

Cited in *Rothschild v. Bay City Lumber Co.* 139 Ala. 576, 36 So. 785, holding that deed to standing trees conveys interest in land, entitling grantee to redeem from mortgage.

27 L. R. A. 436, *LINDSEY v. ANNISTON*, 104 Ala. 257, 53 Am. St. Rep. 44, 16 So. 545.

Rights of hackmen and similar persons at railroad stations.

Cited in *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, footnote p. 140, 57 C. A. 363, 120 Fed. 216, sustaining carrier's power to give exclusive right to one hackman to solicit patrons within station.

Cited in footnotes to *New York, N. H. & H. R. Co. v. Scovill*, 42 L. R. A. 157, which sustains railroad company's right to give exclusive privilege of soliciting passengers or baggage on station grounds; *State v. Reed*, 43 L. R. A. 134, which denies railroad company's right to give one hackman exclusive privilege to enter station grounds; *Kates v. Atlanta Baggage & Cab Co.* 46 L. R. A. 431, which sustains contract giving cab company exclusive privilege of soliciting patronage on trains and in depot; *Godbout v. St. Paul Union Depot Co.* 47 L. R. A. 532, which authorizes discrimination by carrier between hackmen within, but not outside of, depot; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* 50 L. R. A. 732, which sustains special privilege to baggage transfer company to enter depot to solicit business; *Boston & A. R. Co. v. Brown*, 52 L. R. A. 418, which holds driver of public carriage entering railroad grounds to get passenger ordering carriage a trespasser on soliciting other passengers; *Pennsylvania Co. v. Chicago*, 53 L. R. A. 223, which denies carrier's power to prevent others than lessee occupying hack stands in street; *Cosgrove v. August*, 42 L. R. A. 711, which holds ordinance prohibiting hackmen, etc., from entering depot to solicit custom not authorized by general welfare clause in city charter; *Hedding v. Gallagher*, 64 L. R. A. 811, which sustains right of railroad company to give to one teamster exclusive right to enter railroad property to solicit privilege of carrying baggage and passengers.

27 L. R. A. 437, *PEOPLE v. MILK EXCHANGE*, 145 N. Y. 267, 45 Am. St. Rep. 609, 39 N. E. 1062.

Combinations and agreements in restraint of trade.

Cited in *Cummings v. Union Blue Stone Co.* 164 N. Y. 405, 52 L. R. A. 263, footnote p. 262, 79 Am. St. Rep. 655, 58 N. E. 525, Affirming 15 App. Div. 605, 44 N. Y. Supp. 787, holding void agreement by persons controlling 90 per cent of sale of blue stone, to sell through common agent and maintain agreed prices; *Re Davies*, 168 N. Y. 101, 56 L. R. A. 860, 61 N. E. 118, holding anti-monopoly act of 1899 applicable to combination formed before its enactment; *National Harrow Co. v. E. Bement & Sons*, 21 App. Div. 295, 47 N. Y. Supp. 462, holding contract limiting manufacture and fixing price of harrows, illegal; *Cohen v. Berlin & J. Envelope Co.* 38 App. Div. 500, 56 N. Y. Supp. 588, upholding validity of contract designed merely to stop ruinous competition in sale of envelopes; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 36, 62 L. R. A. 647, footnote p. 632, 96 Am. St. Rep. 598, 67 N. E. 136, Affirming 54 App. Div. 231, 66 N. Y. Supp. 615, note containing special term opinion 30 Misc. 679, 64 N. Y. Supp. 276, sustaining plan by which manufacturers of proprietary medicines shall sell at fixed prices, with rebate only to concerns which can be relied on to maintain selling price decided upon; *Re Atty. Gen.* 21 Misc. 106, 47 N. Y. Supp. 20, raising, but not deciding, question as to constitutionality of anti-monopoly act of 1897; *Excelsior Quilting Co. v. Creter*, 36 Misc. 701, 74 N. Y. Supp. 361, upholding agreement to manufacture no more quilting machines of kind on which patents had expired; *Wittenberg v. Mollyneaux*, 60 Neb. 585, 83 N. W. 842, holding agreement not to use specified building for hotel for two years, valid; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 620, 56 L. R. A. 809, 88 Am. St. Rep. 895, 40 S. E. 591, upholding right of corporation to refuse to buy oil unless shipped in specified way, to injury of rival; *State ex rel. Durner v. Huegin*, 110 Wis. 253, 62 L. R. A. 742, 85 N. W. 1046, holding agreement by three publishers to compel fourth to reduce rates of advertising, illegal; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, holding agreement to prevent competition and control prices of iron pipe in specified localities, void; *Gibbs v. McNeeley*, 60 L. R. A. 155, 55 C. C. A. 73, 118 Fed. 123, holding combination of manufacturers of red cedar shingles, to limit production and raise price, illegal.

Cited in footnotes to *Ford v. Chicago Milk Shippers' Asso.* 27 L. R. A. 298, which holds corporation and its members may constitute unlawful combination to fix price of merchandise; *Hartnett v. Plumber's Supply Asso.* 38 L. R. A. 194, which holds plumbers' supply association subject to quo warranto for assuming to prevent giving credit by members to delinquent dealer; *Hawarden v. Youghiogeny & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers combining to drive other retailers out of business; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *State ex rel. Crow v. Armour Packing Co.* 61 L. R. A. 464, which holds that unlawful combination to fix prices may be shown by acts of competing dealers.

Distinguished in *Booth v. Seibold*, 37 Misc. 103, 74 N. Y. Supp. 776, upholding contract not to sell fish, limited as to time and territory.

Quo warranto.

Distinguished in *Stockton v. American Tobacco Co.* 55 N. J. Eq. 376, 36 Atl. 971, holding quo warranto, and not injunction, proper proceeding to question right of corporation to act under its franchises.

27 L. R. A. 441, *STEINHAUSER v. SPRAUL*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102.

Master's duty to furnish safe places and appliances.

Cited in *Beard v. American Car Co.* 63 Mo. App. 387, holding master furnishing plank for unloading cask from wagon liable for injury to servant unacquainted with, and not strong enough for proper use thereof; *Minnier v. Sedalia, W. & S. W. R. Co.* 167 Mo. 113, 66 S. W. 1072, holding that evidence failed to disclose negligence in use of broad gauge car on narrow gauge trucks; *Beckman v. Anheuser-Busch Brewing Asso.* 98 Mo. App. 560, 72 S. W. 710, holding master not liable for injury to servant, resulting from accident to skid, secured and used in usual manner; *Holmes v. Brandenbaugh*, 172 Mo. 65, 72 S. W. 550, holding master not liable for injury to servant, due to unsafe method used by latter in shifting belt.

Risks of employment.

Cited in *Marshall v. Kansas City Hay Press Co.* 69 Mo. App. 263, holding risk of obviously defectively constructed privy assumed by servant; *McKee v. Chicago, B. & Q. R. Co.* 96 Mo. App. 678, 70 S. W. 922, holding that servant assumes risk in attempting to pass between cars of standing train; *Epperson v. Postal Teleg. Cable Co.* 155 Mo. 381, 50 S. W. 795, holding risk assumed by lineman handling wire knowing it was "alive;" *Harff v. Green*, 168 Mo. 314, 67 S. W. 576, holding risk of being struck by falling of wheelbarrow of bricks assumed by carpenters working on building; *Roberts v. Missouri & K. Teleph. Co.* 166 Mo. 378, 66 S. W. 155, holding risk of resting on cross arm while tightening wire assumed by experienced lineman; *St. Louis Cordage Co. v. Miller*, 63 L. R. A. 559, 61 C. C. A. 481, 126 Fed. 499, holding that servant assumes risk of unguarded cog wheels, notwithstanding statute requiring them to be guarded.

Contributory negligence.

Cited in *St. Louis Cordage Co. v. Miller*, 126 Fed. 499, 63 L. R. A. 555, 61 C. C. A. 481, holding assumption of risk and contributory negligence, distinct defenses.

Cited in note (49 L. R. A. 46) on contributory negligence in entering or remaining in employment.

Liability of servant to third person for negligence.

Cited in *Kelly v. Chicago & A. R. Co.* 122 Fed. 290, holding servant of carrier not liable to passenger for injury resulting from failure to inspect boiler.

27 L. R. A. 448, *PEOPLE v. KETCHUM*, 103 Mich. 443, 50 Am. St. Rep. 383, 61 N. W. 776.

27 L. R. A. 449, *ROBINSON BANK v. MILLER*, 153 Ill. 244, 46 Am. St. Rep. 883, 38 N. E. 1078.

Second appeal in 47 Ill. App. 310.

Partnership real estate.

Cited in footnotes to *Darrow v. Calkins*, 48 L. R. A. 299, which holds intent to change grantor's interest from land to surplus shown by partner's conveyance of undivided half interest in lands to copartner for partnership uses; *Adams v. Church*, 59 L. R. A. 782, which holds timber culture claims exempt from debts of owner or firm of which he is member, notwithstanding decree requiring him to convey to firm according to agreement.

Cited in notes (27 L. R. A. 340) on position of tenants in dower and by curtesy and of heirs and personal representatives of deceased partner in partnership real estate; (28 L. R. A. 86, 106) on rights of partners *inter se* in partnership real estate; (28 L. R. A. 129) on position of surviving partners in partnership real estate; (28 L. R. A. 161) on rights and position of creditors, purchasers, and other third parties in partnership real estate.

Agreements by grantee of encumbered land.

Cited in *Siegel v. Borland*, 93 Ill. App. 326, holding that mortgage debt must be assumed to charge grantee with its payment.

Cited in footnotes to *Knapp v. Connecticut Mut. L. Ins. Co.* 40 L. R. A. 861, which upholds mortgagee's right to compel grantee to keep engagement assuming mortgage by suit in equity; *McKay v. Ward*, 46 L. R. A. 623, which sustains personal liability of purchaser agreeing to pay mortgage debt, though mortgagor not liable.

Proof of good faith in transfer of property.

Cited in *Martin v. Duncan*, 156 Ill. 280, 41 N. E. 43, holding clearer and more convincing proof of good faith needed in transfer of property by insolvent to relative than in case of conveyance to stranger.

27 L. R. A. 476, *NATIONAL UNION BANK v. NATIONAL MECHANICS' BANK*, 80 Md. 371, 45 Am. St. Rep. 350, 30 Atl. 913.

Rights of secured creditors to dividends from insolvent's estate.

Cited in *Merrill v. National Bank*, 173 U. S. 168, 43 L. ed. 654, 19 Sup. Ct. Rep. 360, holding secured creditor of bankrupt bank entitled to receive face value of claim as it stood at declaration of insolvency.

Cited in footnotes to *Levy Bros. v. Chicago Nat. Bank*, 30 L. R. A. 380, which requires deduction of amount realized on collateral to time of making proofs before participating in dividends; *Sacramento Bank v. Pacific Bank*, 45 L. R. A. 863, which holds creditor of insolvent bank receiving part of claim from dividends, and also by enforcing stockholder's liability, entitled to have subsequent dividends computed on original claim.

Distinguished in *Rogers v. Citizens' Nat. Bank*, 93 Md. 617, 49 Atl. 843, not requiring holders of collateral security given by stockholders of insolvent corporation to deduct value of same from claim against corporation.

Partnership real estate.

Cited in notes (27 L. R. A. 340) on position of tenants in dower and by curtesy and of heirs and personal representatives of deceased partner in partnership real estate; (28 L. R. A. 86) on rights of partners *inter se* in partner-

ship real estate; (28 L. R. A. 129) on position of surviving partners in partnership real estate; (28 L. R. A. 161) on rights and position of creditors, purchasers, and other third parties in partnership real estate.

27 L. R. A. 498, *STATE v. LEE*, 65 Conn. 265, 48 Am. St. Rep. 202, 30 Atl. 1110.

Former jeopardy.

Cited in *State v. Ellsworth*, 131 N. C. 776, 92 Am. St. Rep. 790, 42 S. E. 699, upholding right of court on trial of plea of former conviction, to set aside verdict.

State's right of appeal.

Cited in *State v. Cole*, 132 N. C. 1090, 44 S. E. 391 (dissenting opinion), as to right of state to appeal from verdict in criminal case.

Cited in footnote to *State v. Meyer*, 52 L. R. A. 346, which sustains state's right to writ of error to review judgment reversing conviction.

27 L. R. A. 502, *TOMBLER v. KOELLING*, 60 Ark. 62, 46 Am. St. Rep. 146, 28 S. W. 795.

27 L. R. A. 503, *STATE v. NEELLY*, 60 Ark. 66, 46 Am. St. Rep. 148, 28 S. W. 800.

27 L. R. A. 505, *FLORSHEIM BROS. DRY GOODS CO. v. LESTER*, 60 Ark. 120, 46 Am. St. Rep. 162, 29 S. W. 34.

Transaction of business within meaning of statutes.

Cited in *Sunny South Lumber Co. v. Neimeyer Lumber Co.* 63 Ark. 278, 38 S. W. 902, holding securing of debt by mortgage not "doing business" within meaning of statute relating to business by foreign corporations; *Commercial Bank v. Sherman*, 28 Or. 577, 52 Am. St. Rep. 811, 43 Pac. 658, holding foreign banking corporation purchasing note in state not "transacting business" within meaning of Code; *State v. Bradford Sav. Bank & T. Co.* 71 Vt. 239, 44 Atl. 349, holding corporation in hands of receiver winding up its business not transacting business within meaning of tax law; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* 55 C. C. A. 99, 118 Fed. 239, holding question whether foreign corporation was transacting business within state, for jury; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 264, holding writing by foreign insurance company of four policies negotiated by correspondence on risks within state, not "transacting business" within statute relating to service of process.

27 L. R. A. 507, *HATCHER v. BUFORD*, 60 Ark. 169, 29 S. W. 641.

Gifts causa mortis.

Cited in *Leyson v. Davis*, 17 Mont. 273, 31 L. R. A. 446, 42 Pac. 775, holding gift made at beginning of journey and in contemplation of death, *causa mortis*, although donor returned and lived some time after.

Gift inter vivos.

Cited in *Wilson v. Jourdan*, 79 Miss. 141, 28 So. 823, holding gift made during last illness, but intended to take effect at once, gift *inter vivos*; *Leonard v. Leonard*, 181 Mass. 461, 92 Am. St. Rep. 426, 63 N. E. 1068, holding deed by husband reserving life estate passed title to grantee in grantor's lifetime.

Gift to defeat wife's dower.

Cited in *Brownell v. Briggs*, 173 Mass. 532, 54 N. E. 251, holding deed without consideration by husband to niece, not recorded until former's death, void as against wife; *Huber's Estate*, 25 Pa. Co. Ct. 373, denying right of donor to defeat widow's right of dower by gift *causa mortis*.

27 L. R. A. 511, *CRAIG v. GUNN*, 67 Vt. 92, 30 Atl. 860.

Liability of trustee on debt due nonresident.

Cited in *Hawley v. Hurd*, 72 Vt. 123, 52 L. R. A. 197, 82 Am. St. Rep. 922, 47 Atl. 401, holding resident trustee chargeable upon debt payable to nonresident in state of latter's domicile.

27 L. R. A. 512, *BEEHLER v. DANIELS*, 18 R. I. 563, 49 Am. St. Rep. 790, 29 Atl. 6.

Liability for injury to strangers or licensees on premises.

Cited in *Berlin Mills Co. v. Croteau*, 32 C. C. A. 128, 50 U. S. App. 419, 88 Fed. 860, denying liability of owner for injury to stranger on premises, hurt by collision of cars; *Paolino v. McKendall*, 24 R. I. 436, 60 L. R. A. 135, 96 Am. St. Rep. 736, 53 Atl. 268, holding occupier of land, burning rubbish thereon, not liable for injury to trespassing children approaching too near fire; *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 318, 65 N. E. 591, holding carrier not liable for death of licensee, due to negligence in failing to block wheels of car.

Accidents at elevator shafts.

Cited in footnotes to *Malloy v. New York Real Estate Asso.* 41 L. R. A. 487, which denies owner's liability for injury to one falling into elevator shaft, insufficient railing for which has been left out of place by third person; *Gibson v. International Trust Co.* 52 L. R. A. 928, which denies liability for injury to passenger from involuntary starting of elevator by conductor's grasping mechanism to prevent falling.

Right of servant to recover damages from third persons for injuries.

Cited in note (46 L. R. A. 60, 81) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

27 L. R. A. 514, *INDIANAPOLIS v. CONSUMERS' GAS TRUST CO.* 140 Ind. 107, 49 Am. St. Rep. 183, 39 N. E. 433.

Powers of municipalities.

Cited in *Gosport v. Pritchard*, 156 Ind. 406, 59 N. E. 1058, holding formal ordinance or resolution not required for contract of municipality for lighting streets; *Wabash R. Co. v. Defiance*, 167 U. S. 100, 42 L. ed. 93, 17 Sup. Ct. Rep. 748, upholding power of municipality to change overhead railroad crossing to grade crossing after rebuilding of bridge by railroad company under ordinance.

Conditions in ordinances.

Cited in *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 169, 60 N. E. 1032, holding gas company bound by accepted ordinance, fixing rates; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 543, 41 N. E. 1033, and *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 101, 60 L. R. A. 827, 66 N. E. 436, holding that gas company using streets under ordinance limiting price may be enjoined from

charging higher rates; *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 297, 48 L. R. A. 45, 55 N. E. 745, holding railway company bound by condition in franchise ordinance requiring it to pave streets between its tracks.

Questions as to jurisdiction.

Cited in *Hiatt v. Darlington*, 152 Ind. 578, 53 N. E. 825, and *Jones v. Cullen*, 142 Ind. 344, 40 N. E. 124, holding determination of tribunal having jurisdiction of a general subject, that jurisdictional facts exist, conclusive against collateral attack; *Greensburg v. Cleveland, C. C. & St. L. R. Co.* 23 Ind. App. 144, 55 N. E. 46 (dissenting opinion), majority denying jurisdiction of appellate court in action to recover penalty for violation of ordinance, amount in controversy not exceeding \$50.

Reserved powers of legislature in respect to franchises.

Cited in *New Orleans Gaslight Co. v. Drainage Commission*, 111 La. 843, 35 So. 929, holding grant of right to lay gas mains in streets subject to reserved power of legislature to require location to be changed to permit construction of sewers.

27 L. R. A. 519, *NASHVILLE LUMBER CO. v. FOURTH NAT. BANK*, 94 Tenn. 374, 45 Am. St. Rep. 727, 29 S. W. 368.

Liability for loss due to transfer of note to bona fide purchaser.

Cited in *Mader v. Cool*, 14 Ind. App. 303, 56 Am. St. Rep. 304, 42 N. E. 945, holding payee of note without consideration liable to maker for loss due to transfer to bona fide purchaser; *Jones v. Crawford*, 107 Ga. 323, 45 L. R. A. 107, footnote p. 105, 33 S. E. 51, holding it actionable fraud to sell to innocent purchaser, note person was induced to sign as coprincipal under promise that no liability should be enforced.

27 L. R. A. 523, *STROUP v. STROUP*, 140 Ind. 179, 39 N. E. 864.

Conveyances affecting widow's rights in husband's estate.

Cited in *Frain v. Burgett*, 152 Ind. 60, 50 N. E. 873, holding that deed vesting legal title related back to date of equitable ownership, carrying right of dower with it; *Murray v. Cazier*, 23 Ind. App. 603, 53 N. E. 476, holding provision in lease by husband, that rents accruing after death be paid his widow, invalid.

Cited in footnotes to *Walker v. Walker*, 27 L. R. A. 799, which holds fraudulent, transfer of corporate stock to defeat wife's distributive share; *Smith v. Smith*, 34 L. R. A. 49, which holds delivery by husband just before death, of deed of all realty, made years before, fraudulent as to wife; *Arnegaard v. Arnegaard*, 41 L. R. A. 258, which holds secret unrecorded deed to son on eve of grantor's marriage, fraudulent as to wife; *Ward v. Ward*, 51 L. R. A. 858, which holds second wife's right to dower not defeated by fraudulent antenuptial conveyance to sons by former marriage.

Testamentary dispositions by deed.

Cited in *Mortgage Trust Co. v. Moore*, 150 Ind. 469, 50 N. E. 72, holding deed directed in will to be delivered to son should be construed with the will.

Pleading fraud.

Cited in *Cotterell v. Koon*, 151 Ind. 186, 51 N. E. 235, and *Guy v. Blue*, 146 Ind. 632, 45 N. E. 1052, holding use of epithets in pleading insufficient to show fraud.

27 L. R. A. 527, *JACKSON v. GREENVILLE*, 72 Miss. 220, 48 Am. St. Rep. 553, 16 So. 382.

27 L. R. A. 529, *Re FLAHERTY*, 105 Cal. 558, 38 Pac. 981.

Delegation of power.

Cited in *Wilson v. Eureka City*, 173 U. S. 36, 43 L. ed. 605, 19 Sup. Ct. Rep. 317, upholding constitutionality of ordinance forbidding the moving, without permission of mayor, of any building into public street; *Los Angeles County v. Spencer*, 126 Cal. 673, 77 Am. St. Rep. 217, 59 Pac. 202, upholding act empowering horticultural commissioners to determine certain class of nuisances and to abate same; *State v. Williams*, 160 Mo. 346, 54 L. R. A. 953, 83 Am. St. Rep. 468, 60 S. W. 1077, upholding act giving power to state auditor to license book-making on horse races.

Distinguished in *Knight v. Eureka*, 123 Cal. 195, 55 Pac. 768, denying power of common council to delegate authority to city attorney to employ assistant.

Nuisances.

Cited in note (39 L. R. A. 673) on municipal power over nuisances affecting highways and waters.

27 L. R. A. 534, *STATE ex rel. FUNCK v. McCARTY*, 52 Ohio St. 363, 39 N. E. 1041.

Mandamus to compel lower court to exercise jurisdiction.

Cited in *State ex rel. Smith v. Smith*, 69 Ohio St. 201, 68 N. E. 1044, holding that mandamus will lie to compel justice of peace to exercise jurisdiction.

27 L. R. A. 536, *CINCINNATI v. BATSCHE*, 52 Ohio St. 324, 40 N. E. 21.

Assessments for local improvements.

Cited in *Cincinnati v. Anderson*, 52 Ohio St. 600, 43 N. E. 1040, enjoining assessment for local improvement on property not abutting on same; *Cincinnati, L. & N. R. Co. v. Cincinnati*, 62 Ohio St. 482, 49 L. R. A. 571, 57 N. E. 229, denying right to assess compensation for lands taken for public improvement upon owner's remaining land.

27 L. R. A. 540, *SMILEY v. MacDONALD*, 42 Neb. 5, 47 Am. St. Rep. 384, 60 N. W. 355.

Police powers and creation of monopolies.

Cited in *Littlefield v. State*, 42 Neb. 226, 28 L. R. A. 590, 47 Am. St. Rep. 697, 60 N. W. 724, upholding ordinance requiring milkmen to pay license fee of \$10; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 565, 41 L. R. A. 484, 53 Am. St. Rep. 557, 66 N. W. 624, upholding charter act permitting city to compel railroad companies to erect and keep in repair viaducts over streets; *West Point Water Power & L. Improv. Co. v. State*, 49 Neb. 223, 68 N. W. 507, upholding act requiring milldam owners to construct and maintain fishways; *Iler v. Ross*, 64 Neb. 721, 57 L. R. A. 898, footnote p. 895, 97 Am. St. Rep. 676, 90 N. W. 869, denying city's right under police powers to grant monopoly by contract for removal of ashes, etc.; *Schoen v. Atlanta*, 97 Ga. 702, 33 L. R. A. 806, 25 S. E. 380, holding city without power to compel removal of dead animals to specified contractor's place outside city limits; *Coombs v. MacDonald*, 43 Neb. 633, 62

N. W. 41, holding choice between sanitary measures a function of legislative department of government; *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 98, 126 Fed. 36, holding grant of exclusive privilege for fifty years to destroy garbage of city, within police powers, and referring particularly to annotation in 27 L. R. A. 540.

Cited in footnotes to *Re Lowc*, 27 L. R. A. 545, which holds unconstitutional requirement of license to remove garbage; *Walker v. Jameson*, 28 L. R. A. 679, which holds valid as sanitary measure, exclusive contract for collection of garbage; *Schoen Bros. v. Atlanta*, 33 L. R. A. 804, which denies right to give city monopoly in business of removing dead animals; *State v. Orr*, 34 L. R. A. 279, which sustains ordinance prohibiting transportation of garbage without license; *State v. Hill*, 50 L. R. A. 473, which holds void, ordinance requiring license for scavenger work and empowering health board to decide who are competent bidders.

Cited in notes (36 L. R. A. 598, 609) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 316, 332) on municipal power over nuisances affecting safety, health, and personal comfort; (39 L. R. A. 653) on municipal power over nuisances affecting highways and waters; (53 L. R. A. 764) on constitutionality of statute attempting to grant monopoly.

27 L. R. A. 545, *Re LOWE*, 54 Kan. 757, 39 Pac. 710.

Police powers and creation of monopolies.

Cited in *Schoen v. Atlanta*, 97 Ga. 702, 33 L. R. A. 806, 25 S. E. 380, holding city without power to compel removal of dead animals to specified contractor's place outside city limits; *Iler v. Ross*, 64 Neb. 725, 57 L. R. A. 901, 97 Am. St. Rep. 676, 90 N. W. 869, denying city's right to grant monopoly by contract for removal of ashes, etc.; *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 101, 126 Fed. 39, holding grant of exclusive privilege for fifty years to destroy garbage of city, within police powers.

Cited in footnote to *State v. Hill*, 50 L. R. A. 473, which holds void, ordinance requiring license for scavenger work and empowering health board to decide who are competent bidders.

Cited in notes (27 L. R. A. 540) on monopoly in contract for removal of garbage; (36 L. R. A. 598) on power of municipal corporation to define, prevent, and abate nuisances; (39 L. R. A. 653) on municipal power over nuisances affecting highways and waters.

27 L. R. A. 549, *LOUISVILLE & N. R. CO. v. HAILEY*, 94 Tenn. 383, 29 S. W. 367.

Injuries to persons riding in forbidden places.

Cited in *Mobile & O. R. Co. v. Bogle*, 101 Tenn. 44, 46 S. W. 760, denying right of recovery where passenger mounted engine to prevent being left behind, and was hurt; *Sands v. Southern R. Co.* 108 Tenn. 11, 64 S. W. 478, denying liability for injury to boy collusively allowed to ride by brakeman upon payment of 25 cents; *Baltimore & O. S. W. R. Co. v. Cox*, 66 Ohio St. 289, 90 Am. St. Rep. 583, 64 N. E. 119, denying liability for negligent killing of former employee, invited, without authority, on freight train; *Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 9, 90 N. W. 346, holding person accepted as passenger on construction train

by conductor although contrary to orders, entitled to recover for injuries due to carrier's negligence.

Who are passengers.

Cited in *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 465, 51 L. R. A. 888, footnote p. 886, 58 S. W. 861, holding night watchman at depot, getting on train to announce readiness to resume duty, a passenger.

Cited in footnotes to *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, a passenger; *Mendenhall v. Atchison, T. & S. F. R. Co.* 61 L. R. A. 120, which holds one riding on platform of baggage car at direction of brakeman, to whom money paid, not a passenger.

27 L. R. A. 551, *HOME BLDG. & CONVEYANCE CO. v. ROANOKE*, 91 Va. 52, 20 S. E. 895.

Damage to abutting owners.

Cited in *Harrisonburg v. Roller*, 97 Va. 584, 34 S. E. 523, holding municipal corporation not liable for consequential injury to abutting owner from change in grade of streets and sidewalks; *Reid Bros. v. Norfolk City R. Co.* 94 Va. 125, 36 L. R. A. 277, 64 Am. St. Rep. 708, 26 S. E. 428, holding substitution of double-track electric line for single-track horse car line not additional servitude; *Meyer v. Richmond*, 172 U. S. 95, 43 L. ed. 379, 19 Sup. Ct. Rep. 106, denying right of abutting owner to recover damages for authorized partial obstruction of street by railroad; *Powell v. Wytheville*, 95 Va. 75, 27 S. E. 805, holding municipality liable for damage due to negligent performance of work of improving street.

Cited in footnote to *Boston & A. R. Co. v. Worcester*, 55 L. R. A. 623, which holds use of part of railroad location outside of tracks for approach of highway bridge over tracks to abolish grade crossing not new easement on right of way.

Award of contracts to lowest bidder.

Cited in footnotes to *Mulnix v. Mutual Ben. L. Ins. Co.* 33 L. R. A. 827, which denies legislative right to authorize secretary of state to purchase in open market, instead of from lowest bidder; *Colorado Paving Co. v. Murphy*, 37 L. R. A. 630, which denies absolute right of lowest responsible bidder, to city contract.

27 L. R. A. 556, *ROSE v. KIMBERLY & C. CO.* 89 Wis. 545, 46 Am. St. Rep. 855, 62 N. W. 526.

Contracts with foreign corporations.

Cited in *Commonwealth Mut. F. Ins. Co. v. Hayden Bros.* 60 Neb. 638, 83 Am. St. Rep. 545, 83 N. W. 922; *Buell v. Breese Mill & Grain Co.* 65 Ill. App. 276; *Cowan v. London Assur. Corp.* 73 Miss. 328, 55 Am. St. Rep. 535, 19 So. 298, — denying right of foreign insurance company not complying with statutes to recover premiums or assessments; *Maine Guarantee Co. v. Cox*, 146 Ind. 109, 42 N. E. 915, upholding right of foreign building and loan association not complying with statutes, to loan money and take mortgage security therefor; *Swing v. Munson*, 191 Pa. 588, 58 L. R. A. 226, 71 Am. St. Rep. 772, 43 Atl. 342, refusing to enforce contract with foreign insurance company, valid where made, but invalid at domicile of insured.

Cited in footnotes to *Seamans v. Temple Co.* 28 L. R. A. 430, which holds insurance contract made through mails by corporation not authorized to do busi-

ness will not support action against insured for assessment; *Bankers' L. Ins. Co. v. Howland*, 57 L. R. A. 374, which denies insurance commissioners' power to question foreign company's mode of computing reserve set forth in statement for license; *Pope v. Hanke*, 28 L. R. A. 568, which holds comity does not require execution of law against public policy; *Union Cent. L. Ins. Co. v. Pollard*, 36 L. R. A. 271, as to law governing effect of answers in application for policy and their use in evidence.

Cited in note (63 L. R. A. 837, 851, 855) on conflict of laws as to contracts of insurance.

Inferences from contract of insurance.

Cited in *State v. Phelan*, 66 Mo. App. 555, inferring from contract of insurance that corporation for which it was made was engaged in insurance business.

27 L. R. A. 558, *CHAFEY v. MATHEWS*, 104 Mich. 103, 62 N. W. 141.

Participation of creditors in debtor's fraudulent intent.

Cited in note (31 L. R. A. 640) on participation by creditor in fraudulent intent of debtor which will make transfer to pay or secure debt invalid as to other creditors.

27 L. R. A. 560, *LAWRENCE v. LOUISVILLE*, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 450.

Statute of limitations.

Cited in note (45 L. R. A. 611) on vested right in defense of statute of limitations.

Power of legislature over municipalities.

Cited in note (48 L. R. A. 489) on power of legislature to impose burdens upon municipalities and to control their local administration and property.

27 L. R. A. 562, *CRANE v. PACIFIC BANK*, 106, Cal. 64, 39 Pac. 215.

Insolvent corporations.

Cited in *Dyer v. Sebrell*, 135 Cal. 598, 67 Pac. 1036, denying right of debtor to set off claims against insolvent bank, purchased after insolvency; *Argues v. Union Sav. Bank*, 133 Cal. 144, 65 Pac. 307, denying right of action by creditor to collect debt against insolvent bank in process of liquidation.

Distinguished in *Lanz v. Fresno Loan & Sav. Bank*, 125 Cal. 459, 58 Pac. 63, holding liquidation under advice of bank commissioners no defense to depositor's action to recover amount of deposit; *Dodson v. Wightman*, 6 Kan. App. 841, 49 Pac. 790, holding attachment of property of insolvent private bank, before bank commissioners had taken actual possession, valid; *Bories v. Union Bldg. & L. Asso.* 141 Cal. 77, 74 Pac. 552, holding possession of receiver of building and loan association subject to valid liens existing at time of his appointment.

27 L. R. A. 565, *FIRST NAT. BANK v. MANN*, 94 Tenn. 17, 27 S. W. 1015.

Usurious contracts.

Cited in *Stewart v. Lathrop Mfg. Co.* 95 Tenn. 501, 32 S. W. 464, upholding right of lender of money to abandon usurious note and recover on original consideration.

Cited in note (62 L. R. A. 55) on conflict of laws as to interest and usury.

Distinguished in *Bang v. Phelps & B. Windmill Co.* 96 Tenn. 364, 34 S. W.

516, holding note for windmill, providing for 10 per cent interest after maturity, usurious.

27 L. R. A. 569, *PEOPLE'S BANK v. JACKSON*, 43 S. C. 86, 49 Am. St. Rep. 823, 20 S. E. 786.

27 L. R. A. 572, *ROBERTS v. DETROIT*, 102 Mich. 64, 60 N. W. 450.

Injuries due to defective sidewalks and highways.

Cited in *McDevitt v. St. Paul*, 66 Minn. 15, 33 L. R. A. 602, footnote p. 601, 68 N. W. 178, sustaining husband's right to maintain action against city for personal injury to wife on sidewalk.

Cited in footnotes to *Bartram v. Sharon*, 46 L. R. A. 144, which denies right to recover for injury by defective highway, to which negligence of third person contributes; *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians.

Construction of statutes.

Cited in *Re Yell*, 107 Mich. 230, 65 N. W. 97, supplying word "like" in construction of statute, holding it to have been omitted by mistake.

27 L. R. A. 573, *RICH v. CHAMBERLAIN*, 104 Mich. 436, 62 N. W. 584.

Statutes relating to punishment for crime.

Cited in *Rich v. Chamberlain*, 107 Mich. 383, 65 N. W. 235, upholding power of governor, under statute, to commute sentence of life imprisonment in state prison to imprisonment in house of correction; *Re Linden*, 112 Wis. 527, 88 N. W. 645, upholding statute permitting transfer of prisoners from reformatory to state prison on recommendation of board of control and approval of governor.

Cited in footnote to *Re Conditional Discharge of Convicts*, 56 L. R. A. 658, which sustains statute empowering board to grant paroles after expiration of minimum sentence provided for.

Statutes relating to pardons.

Cited in footnote to *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations on pardoning power of governor.

Cited in note (34 L. R. A. 255) on legislative power to grant pardon or amnesty.

Mandamus.

Cited in note (58 L. R. A. 841) on original jurisdiction of court of last resort in mandamus case.

27 L. R. A. 577, *ROUSE, H. & CO. v. DONOVAN*, 104 Mich. 234, 53 Am. St. Rep. 457, 62 N. W. 359.

Due process of law.

Cited in *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 709, 84 Am. St. Rep. 589, 85 N. W. 96, holding action of common council in reviewing assessment not invalidated by failure to notify relator when to attend.

Distinguished in *Fisher v. Wineman*, 125 Mich. 645, 52 L. R. A. 194, 84 N. W. 1111, holding act making debt for labor preferred claim, without providing for bringing in lienors, void.

Execution against stockholders.

Cited in *Rouse v. Detroit Cycle Co.* 111 Mich. 253, 38 L. R. A. 795, footnote p. 794, 69 N. W. 511, denying right to maintain statutory proceeding for execution for unpaid subscriptions, after appointment of receiver.

Right to jury trial.

Cited in *Rider-Wallis Co. v. Fogo*, 102 Wis. 540, 78 N. W. 767, upholding constitutionality of act authorizing appointment of receiver on determination of necessary facts by court without jury.

27 L. R. A. 580, *MT. CARMEL v. SHAW*, 155 Ill. 37, 46 Am. St. Rep. 311, 39 N. E. 584.

Followed on substantially same issues in *Mt. Carmel v. Bell*, 155 Ill. 44, 39 N. E. 586.

Municipal powers.

Cited in *House of Reform v. Lexington*, 112 Ky. 181, 65 S. W. 350, holding that city authorized to maintain house of correction can make appropriation to secure location near city of state house of reform, to which it may send its prisoners, instead.

— Over streets and highways.

Cited in notes (26 L. R. A. 833) on discontinuance or vacation of highway by acts of public authorities; (39 L. R. A. 670) on municipal power over nuisance affecting highways and waters.

— As to cutting, trimming, and removal of trees.

Cited in footnotes to *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280, which denies power of selectmen to cut and trim trees overhanging highway, without owner's consent; *Vanderhurst v. Tholcke*, 35 L. R. A. 267, which holds determination of city counsel that trees on sidewalk are obstruction, conclusive; *Wyant v. Central Teleph. Co.* 47 L. R. A. 497, which sustains telephone company's right to do necessary trimming of trees in highway without giving owner opportunity to do so; *Stretch v. Cassopolis*, 51 L. R. A. 345, which denies right to remove shade trees from street without notice to abutter; *Miller v. Detroit, Y. & A. A. R. Co.* 51 L. R. A. 955, which sustains street railway company's right to remove obstructing shade trees without compensation to abutter.

When injunction will not be granted.

Cited in *Canal Comrs. v. East Peoria*, 179 Ill. 234, 53 N. E. 633, refusing to enjoin municipality from deepening and straightening channel of creek for better drainage; *Chicago Teleph. Co. v. Northwestern Teleph. Co.* 199 Ill. 365, 65 N. E. 329, refusing to enjoin building of parallel telephone system in streets of city; *Hildrup v. Windfall City*, 29 Ind. App. 595, 64 N. E. 942, holding injunction to restrain town from removing shade tree which is an obstruction to travel in street, properly denied.

27 L. R. A. 583, *GOODLANDER MILL CO. v. STANDARD OIL CO.* 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400.

Proximate or contributory cause of damage.

Cited in *Thomas v. Lancaster Mills*, 19 C. C. A. 92, 34 U. S. App. 404, 71 Fed. 484, holding delay in transportation not proximate cause of destruction of cotton

by fire from spark of passing steamer; *Stone v. Boston & A. R. Co.* 171 Mass. 540, 41 L. R. A. 798, 51 N. E. 1, holding negligent and unlawful storage of oil on station platform not proximate cause of damage by fire caused by dropping of match by stranger; *Missouri P. R. Co. v. Columbia*, 65 Kan. 400, 53 L. R. A. 404, 69 Pac. 338, holding heavy gale blowing grain doors across track proximate cause of death due to derailment of engine thereby; *Southern P. Co. v. Yeargin*, 48 C. C. A. 506, 109 Fed. 436 (dissenting opinion), majority holding it question for jury whether failure to equip locomotive with headlight was contributory cause of collision at night; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 422, footnote p. 416, 59 C. C. A. 601, 124 Fed. 121, holding act of strange boy in opening door in dark hall, proximate cause of injury to one walking through into elevator well.

Cited in footnotes to *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning of approach of train not proximate cause of injury to one struck by body of another person hit by train; *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, which holds death by suicide of one rendered insane by negligent act, not proximate result of the negligent act.

Dangerous agencies.

Cited in *Burke v. Anderson*, 16 C. C. A. 445, 34 U. S. App. 132, 69 Fed. 818, holding master liable for injury to unwarned servant, caused by striking exploded dynamite cartridge with pick; *Standard Oil Co. v. Murray*, 57 C. C. A. 3, 119 Fed. 573, denying liability of vendor to servant of vendee for injury due to burning of oil with explosive effect.

Cited in footnote to *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence.

Injury to strangers.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Ballentine*, 28 C. C. A. 754, 56 U. S. App. 266, 84 Fed. 937, holding carrier not liable for injury to boy going on premises to see burning of train of tank cars; *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 571, 58 U. S. App. 91, 87 Fed. 113, denying liability of vendor to stranger for injury due to defective saddle; *Fowles v. Briggs*, 116 Mich. 428, 40 L. R. A. 530, footnote p. 528, 72 Am. St. Rep. 537, 74 N. W. 1046, denying shipper's liability for injury to brakeman by shunting of lumber negligently loaded.

Cited in note (46 L. R. A. 119), on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

Distinguished in *Glynn v. Central R. Co.* 175 Mass. 512, 78 Am. St. Rep. 507, 56 N. E. 698, denying liability of carrier passing car to another road for accident to employee of latter road, occurring after point of passing on such road for inspecting foreign cars; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 306, 57 C. C. A. 240, 120 Fed. 868, holding manufacturer of imminently dangerous threshing machine liable to third person for injuries sustained in operation thereof.

27 L. R. A. 588, *SCOTT v. SCHOOL DIST. NO. 9*, 67 Vt. 150, 31 Atl. 145.

Interest of public officers in official contracts.

Cited in *McFarland v. Gordon*, 70 Vt. 458, 41 Atl. 507, denying right of alder-

man to recover for services rendered under authority of ordinance of common council providing compensation therefor.

Cited in footnote to *Sylvester v. Webb*, 52 L. R. A. 518, which sustains contract to erect school building by member of building committee and selectmen of town.

Usage and custom as affecting contracts.

Distinguished in *Pennsylvania R. Co. v. Naive* (Tenn.) 64 L. R. A. 448, 79 S. W. 124, holding contract to transport perishable goods to destination with all reasonable despatch not violated by custom to suspend business on holiday.

27 L. R. A. 590, *COLGROVE v. SMITH*, 102 Cal. 220, 36 Pac. 411.

Negligence of independent contractor.

Cited in *Hoff v. Shockley*, 122 Iowa, 728, 64 L. R. A. 542, footnote p. 538, 101 Am. St. Rep. 289, 98 N. W. 573, holding property owner not liable for injuries to traveler by obstructions placed in street without danger signals by independent contractor for construction of building.

Cited in footnotes to *Sanford v. Pawtucket Street R. Co.* 33 L. R. A. 564, which denies liability of street railway company for negligence of contractor building road; *Leavitt v. Bangor & A. R. Co.* 36 L. R. A. 382, which denies liability of railroad company for contractor's negligence in communicating fire from cooking car while cutting wood for railroad company; *Wertheimer v. Saunders*, 37 L. R. A. 146, which holds landlord liable for independent contractor's negligence in putting new roof on building; *Thompson v. Lowell, L. & H. Street R. Co.* 40 L. R. A. 345, which holds street railway company liable for injury to spectator at free exhibition of marksmanship given by independent contractor on company's grounds; *Bonaparte v. Wiseman*, 44 L. R. A. 482, which requires one employing independent contractor to excavate near neighbor's house, to notify neighbor or see that contractor exercises due care; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former, though building heated by independent contractor.

Distinguished in *Frassi v. McDonald*, 122 Cal. 403, 55 Pac. 139, holding owner with power to alter building contract not liable for negligence of independent contractor working thereunder; *Louthan v. Hewes*, 138 Cal. 119, 70 Pac. 1665, denying liability of owner for negligence of independent contractor in construction of stairway.

27 L. R. A. 593, *TOPEKA v. BOUTWELL*, 53 Kan. 20, 35 Pac. 819.

Punishment of criminals.

Cited in *St. Louis v. Karr*, 85 Mo. App. 613, sustaining judgment for false imprisonment against superintendent of workhouse, detaining plaintiff under invalid city ordinance.

Cited in footnotes to *State v. Yandle*, 34 L. R. A. 392, which sustains right of employment of convict on public roads; *Simmons v. Georgia Iron & Coal Co.* 61

L. R. A. 730, which denies right to work convicts in private chain gangs controlled by private individuals.

Cited in note (35 L. R. A. 566, 578) on cruel and unusual punishments.

Poll taxes.

Cited in note (29 L. R. A. 412) on poll taxes.

27 L. R. A. 614, **SYNDICATE INS. CO. v. BOHN**, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165.

Corporation as a distinct entity.

Cited in *Watson v. Bonfils*, 53 C. C. A. 545, 116 Fed. 167, holding bank owning stock and notes of corporation it had created, without power to transfer, title to real estate held by such corporation.

Conditions in policies as to ownership of insured property.

Cited in *Mechanics & T. Ins. Co. v. Mutual Real Estate & Bldg. Asso.* 98 Ga. 265, 25 S. E. 457, holding conditions in policy as to ownership of insured property binding on insured, unless waived by insurer; *Orient Ins. Co. v. Williamson*, 98 Ga. 466, 25 S. E. 560, holding plea that insured was not owner of property insured when policy was issued improperly rejected; *Rosenstock v. Mississippi Home Ins. Co.* 82 Miss. 687, 35 So. 309, holding vendor admitting vendee into possession of real estate upon part payment of purchase price not sole owner within terms of policy.

Cited in footnotes to *Southwestern Ins. Co. v. Estes*, 52 L. R. A. 915, which holds policy not avoided by existence of vendor's lien, nor institution of foreclosure proceedings; *Steinmeyer v. Steinmeyer*, 59 L. R. A. 319, which holds entry of judgment setting aside voluntary deed does not change grantee's ownership.

Disapproved in effect in *Manchester Fire Assur. Co. v. Abrams*, 32 C. C. A. 431, 61 U. S. App. 276, 89 Fed. 936, holding insured not required to show more than insurable interest, where he does not misrepresent or conceal his interest.

Estoppel.

Distinguished in *Baldwin v. German Ins. Co.* 113 Iowa, 317, 86 Am. St. Rep. 375, 85 N. W. 26, holding insurer not estopped from setting up invalidity of policies, because of mortgage clause attached, without consideration and without knowledge of vacancy of premises.

Mortgage clauses in policies.

Cited in *North British & M. Ins. Co. v. Bohn*, 49 Neb. 573, 68 N. W. 942, and *Hare v. Headley*, 54 N. J. Eq. 556, 35 Atl. 445, upholding validity of clause in policies continuing insurance as to mortgagee, where policy may be avoided as to owner or mortgagor; *Boyd v. Thuringia Ins. Co.* 25 Wash. 450, 55 L. R. A. 166, 65 Pac. 785, holding policy not invalidated by subsequent acts of mortgagor, where mortgagee is party intended to be insured; *Delaware Ins. Co. v. Greer*, 61 L. R. A. 139, footnote p. 137, 57 C. C. A. 191, 120 Fed. 919, holding mortgage clause providing for payment of loss to mortgagee "as his interest may appear" subjects mortgagee to risks of acts or omissions of mortgagor affecting validity of policy.

Cited in footnote to *Oakland Home Ins. Co. v. Bank of Commerce*, 36 L. R. A. 673, which holds policy not avoided as to mortgagee's interest by insured's violation of provision against transfer of property without consent.

27 L. R. A. 622, *WESTERN U. TELEG. CO. v. CALL PUB. CO.* 44 Neb. 326, 48 Am. St. Rep. 729, 62 N. W. 506.

Telegraph companies as public carriers.

Cited in *Perry v. German-American Bank*, 53 Neb. 92, 68 Am. St. Rep. 593, 73 N. W. 538, and *Hughes v. Western U. Teleg. Co.* 79 Mo. App. 136, holding telegraph companies public carriers of intelligence.

Discrimination in rates.

Cited in *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 45 L. ed. 766, 21 Sup. Ct. Rep. 561, Affirming 58 Neb. 194, 78 N. W. 519, upholding right of recovery where dissimilarity in rates was disproportionate to dissimilarity of service; *Nebraska Teleph. Co. v. State*, 55 Neb. 635, 45 L. R. A. 117, 76 N. W. 171, holding telephone company required to furnish telephone service for reasonable compensation, without discrimination.

Cited in footnote to *Inter-Ocean Pub. Co. v. Associated Press*, 48 L. R. A. 563, which denies right of news collecting corporation operating telegraph lines to discriminate between publishers in sale of news.

Regulation of electric companies.

Cited in note (31 L. R. A. 804) on police regulation of electric companies

27 L. R. A. 629, *TRAVELERS' INS. CO. v. MELICK*, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

Proximate cause of injury or death.

Cited in *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 244, 97 Fed. 429, holding it question for jury whether roughness of road was proximate cause of death resulting from explosion of oil flowing from tank broken by collision; *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 407, 100 Fed. 363, holding question of what was proximate cause of injury ordinarily one for jury; *Southern P. Co. v. Yeargin*, 48 C. C. A. 506, 109 Fed. 445, holding it question for jury whether collision in nighttime was caused by failure to read orders correctly, or by failure to equip locomotive with headlight; *Modern Woodman Acci. Asso. v. Shryock*, 54 Neb. 257, 39 L. R. A. 830, 74 N. W. 607, holding question whether death was caused by disease or accident properly submitted to jury, where deceased fell and died from heart disease shortly after; *Little Rock & M. R. Co. v. Barry*, 43 L. R. A. 371, 28 C. C. A. 650, 56 U. S. App. 37, 84 Fed. 950, holding failure of freight train to send back flagman proximate cause of rear-end collision with extra passenger train; *Koch v. Fox*, 71 App. Div. 298, 75 N. Y. Supp. 913, stating, but not deciding, that wrongdoer would be liable for death caused by injury producing insanity leading deceased to jump into river and contract pneumonia, from which he died; *Maryland Casualty Co. v. Glass*, 29 Tex. Civ. App. 161, 67 S. W. 1062, holding administration of chloroform not proximate cause of death of one dying while undergoing surgical operation for appendicitis; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 423, 59 C. C. A. 601, 124 Fed. 121, holding act of strange boy opening door in dark hall, proximate cause of injury to one walking through into elevator well.

Presumption as to suicide.

Cited in note (35 L. R. A. 263) on insanity as affecting condition as to suicide in life insurance policy.

Death or injury due to accident.

Cited in *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 5, 36 U. S. App. 658, 73 Fed. 776, holding under accident policy that insurer not liable for accidental injury hastening death from disease; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 657, 45 U. S. App. 578, 79 Fed. 428, holding insurer against accident not liable for death from accident, where death would not have resulted but for disease of insured; *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 657, 29 C. C. A. 226, 56 U. S. App. 393, 85 Fed. 404, holding death from blood poisoning from abrasion of skin accidental within meaning of policy; *Thornton v. Travelers Ins. Co.* 116 Ga. 127, 94 Am. St. Rep. 99, 42 S. E. 287, holding insurance company liable for injury aggravating a hernia, under policy relieving it from liability for injury resulting "wholly or partly," directly or indirectly, from hernia."

Cited in note (30 L. R. A. 211) on what constitutes an accident within meaning of accident insurance policy.

Conclusiveness of proofs of death or loss.

Cited in *Dischner v. Piqua Mut. Aid & Acci. Asso.* 14 S. D. 438, 85 N. W. 998, upholding right of beneficiary to show that proofs of death were erroneous.

Cited in note (44 L. R. A. 848, 853) on conclusiveness of proof of loss as against insured or his beneficiaries.

Reversal on the evidence.

Cited in *Fidelity & C. Co. v. Egbert*, 28 C. C. A. 283, 55 U. S. App. 200, 84 Fed. 413, refusing to reverse judgment on verdict of accidental death, because evidence pointed strongly to suicide.

27 L. R. A. 635, *GERMANIA BANK v. BOUTELL*, 60 Minn. 189, 51 Am. St. Rep. 519, 62 N. W. 327.

Payment of forged commercial paper.

Cited in *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 329, 44 L. R. A. 132, footnote p. 131, 77 N. W. 1045, holding drawee bank paying forged check liable for loss, though first indorsement also forged; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 215, 41 L. R. A. 586, footnote p. 584, 65 Am. St. Rep. 748, 50 N. E. 723, sustaining, except so far as modified by local custom, general rule that drawee of check knows drawer's signature; *Neal v. Coburn*, 92 Me. 148, 69 Am. St. Rep. 495, 42 Atl. 348, holding that bank cannot recover amount paid on forged check to innocent holder for value; *Woods v. Colony Bank*, 114 Ga. 685, 56 L. R. A. 931, footnote p. 929, 40 S. E. 720, holding presumption of drawee knowing drawer's signature not available to negligent holder; *Canadian Bank of Commerce v. Bingham*, 30 Wash. 492, 60 L. R. A. 958, footnote p. 955, 71 Pac. 43, sustaining drawee's right to recover amount of forged check payable to fictitious person, from one cashing same on indorsement purporting to be that of payee, without requiring identification.

Cited in footnote to *Robb v. Pennsylvania Co. for Ins. on L. & G. Annuities*, 41 L. R. A. 695, which denies depositor's liability in absence of negligence for loss from payment of his deposit on checks forged by use of rubber stamp.

Cited in notes (36 L. R. A. 539) on liability of person whose signature is forged on commercial paper; (49 L. R. A. 315) on guaranty, by one signing obligation as surety, of genuineness of other signatures.

27 L. R. A. 643, *KILPATRICK v. BALTIMORE*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805.

Conditions and covenants in deeds.

Cited in *Faith v. Bowles*, 86 Md. 17, 37 Atl. 711, holding condition subsequent not created by deed of land to county "for a public schoolhouse," etc., "and for no other purpose in fee;" *Baltimore v. Day*, 89 Md. 555, 43 Atl. 798, holding that deed to city granting full control of certain water for "use of inhabitants" of city authorized disposition of water outside; *Ellicott v. Ellicott*, 90 Md. 325, 48 L. R. A. 60, 45 Atl. 183, holding property subject to condition subsequent broken by death of devisee, descends to his heirs; *Ecroyd v. Coggeshall*, 21 R. I. 5, 79 Am. St. Rep. 741, 41 Atl. 280, holding condition subsequent not created by deed to city of land restricted to use for city hall; *Avery v. United States*, 44 C. C. A. 167, 104 Fed. 716, holding condition subsequent not created by deed to city of land "as and for a public street," etc.

Cited in footnotes to *Upington v. Corrigan*, 37 L. R. A. 794, which holds grantor's right of re-entry for condition broken not devisable; *Rowzee v. Pierce*, 40 L. R. A. 402, which sustains right to injunction against erecting schoolhouse on land dedicated for ornamental public park; *Los Angeles University v. Swarth*, 54 L. R. A. 262, which holds covenant, not condition, created by deed conditioned that land shall be used exclusively for college campus.

27 L. R. A. 646, *BALTIMORE v. KEELEY INSTITUTE*, 81 Md. 106, 31 Atl. 437.

Objects of taxation and expenditure of public funds.

Cited in *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 161, 36 L. R. A. 59, footnote p. 55, 60 Am. St. Rep. 105, 79 N. W. 68, holding invalid statute for treatment of habitual drunkards at private institution at county expense.

Cited in footnotes to *Re House*, 33 L. R. A. 832, which sustains right to use county funds to pay for care of indigent inebriates in private establishment; *Murray v. Board of Comrs.* 51 L. R. A. 828, which holds classification of counties by population for treatment of inebriates unconstitutional; *State ex rel. Garrett v. Froehlich*, 61 L. R. A. 345, which denies right of legislature to appropriate funds to redeem warrants issued under invalid law for treatment of inebriates at public expense; *Lund v. Chippewa County*, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble minded; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes tax to aid in building for highway and railway purposes toll bridge owned by private corporation; *Allen v. State Auditors*, 47 L. R. A. 117, which denies right to appropriate public money to pay pardoned convict for alleged wrongful imprisonment; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a public purpose not authorizing taxation.

Constitutional provision as to titles of acts.

Cited in *Mealey v. Hagerstown*, 92 Md. 744, 48 Atl. 746, holding title to act "to provide for establishment of an electric light plant in" town sufficient to warrant provision for establishment of same "by" town.

27 L. R. A. 648, *SHANFELTER v. BALTIMORE*, 80 Md. 483, 31 Atl. 439.

Rule as to judicial notice of municipal ordinances.

Cited in *McIntosh v. Pueblo*, 9 Colo. App. 462, 48 Pac. 969, refusing to take

judicial notice of municipal ordinance; *Royce v. Salt Lake City*, 15 Utah, 405, 49 Pac. 290, holding that city ordinances not pleaded or put in evidence cannot be considered.

Discontinuance of condemnation proceeding.

Cited in *Onondaga County v. White*, 38 Misc. 592, 77 N. Y. Supp. 1074, holding county entitled to discontinuance of condemnation proceedings upon payment of costs and compensation of guardian *ad litem*.

27 L. R. A. 651, *WYETH HARDWARE & MFG. CO. v. H. F. LANG & CO.* 127 Mo. 242, 48 Am. St. Rep. 626, 29 S. W. 1010.

Service by publication.

Cited in *Louisville & N. R. Co. v. Nash*, 118 Ala. 486, 41 L. R. A. 333, footnote p. 331, 72 Am. St. Rep. 181, 23 So. 825, holding garnishment of debt due nonresident not personally served in state, invalid.

Garnishment proceedings.

Cited in *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 478, 36 S. W. 29, holding debts attachable in any state of which debtor is not a resident; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 599, 36 L. R. A. 642, footnote p. 640, 56 Am. St. Rep. 275, 46 N. E. 631, authorizing garnishment of foreign corporation for debt due nonresident; *Nordyke v. Charlton*, 108 Iowa, 419, 79 N. W. 136, holding attachment of promissory notes superior to later garnishment in another state; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 717, 43 L. ed. 1146, 19 Sup. Ct. Rep. 797, reversing judgment for failure to grant continuance on ground of pending appeal in garnishment proceeding in another state; *Cross v. Brown*, 19 R. I. 228, 33 Atl. 147, holding situs of debt for garnishment to be at domicile of garnished debtor; *Tootle v. Coleman*, 57 L. R. A. 124, footnote p. 120, 46 C. C. A. 136, 107 Fed. 45, holding right to garnish debtor not limited to situs of chose in action; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 460, 62 L. R. A. 184, footnote p. 178, 44 S. E. 300, holding nonresident summoned as garnishee while temporarily within state not subject to further proceedings unless he has property within state; *Dinkins v. Crunden-Martin Woodenware Co.* 99 Mo. App. 317, 73 S. W. 246, upholding garnishment of debt due from resident to nonresident of state; *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 392, 42 L. R. A. 283, 75 N. W. 740, denying right of Minnesota creditor to garnish English insurance company, liable for loss on debtor's property in Dakota.

Cited in footnotes to *Reimers v. Seatco Mfg. Co.* 30 L. R. A. 364, which denies right to garnish foreign corporation in case where all parties nonresidents; *Ward v. Boyce*, 36 L. R. A. 549, which holds trustee process in other state to reach note held by nonresident not personally served ineffectual; *Strause Bros. v. Aetna Ins. Co.* 48 L. R. A. 452, which holds debt of insurance company for loss in other state without situs where company has agent, for garnishment purposes, in third state; *Bullard v. Chaffee*, 51 L. R. A. 715, which holds person garnishable only in state where debt payable, if creditor resides there; *Hawley v. Hurd*, 52 L. R. A. 195, which sustains discrimination between banks in and out of state as to attachment of negotiable paper.

Distinguished in *Tourville v. Wabash R. Co.* 148 Mo. 621, 71 Am. St. Rep. 650, 50 S. W. 300, upholding trial court's refusal to admit evidence of foreign garnishment proceedings, where cause had been remanded with directions to enter judgment.

27 L. R. A. 653, *DRAKE v. CRANE*, 127 Mo. 85, 29 S. W. 990.

Construction of wills.

Cited in *McMillan v. Farrow*, 141 Mo. 62, 41 S. W. 890, holding circumstances surrounding testator at time of execution of will are to be taken into consideration in determining his intention; *Turney v. Sparks*, 88 Mo. App. 369, and *Cross v. Hoch*, 149 Mo. 338, 50 S. W. 786, holding that will should be construed so as to give effect to intention of testator as gathered from whole instrument; *Underwood v. Cave*, 176 Mo. 12, 75 S. W. 451, holding devise of life estate not enlarged by use of words "shall be hers absolutely during her natural life."

Powers of trustees under wills and of married women.

Cited in *Garesche v. Levering Invest. Co.* 146 Mo. 446, 46 L. R. A. 235, footnote p. 232, 48 S. W. 653, denying power of trustees, under will, to incorporate trust estate.

Cited in footnote to *Detroit Chamber of Commerce v. Goodman*, 35 L. R. A. 96, which denies married woman's right to subscribe for fund for procuring improvement on property near hers.

27 L. R. A. 660, *GUILD v. GOODWIN*, 94 Tenn. 486, 45 Am. St. Rep. 743, 29 S. W. 721.

Statute of limitations.

Cited in *Morgan v. Duffy*, 94 Tenn. 690, 30 S. W. 735, holding that statute of limitations does not run against action for malicious prosecution until prosecution ends.

27 L. R. A. 662, *BUSH v. McFARLAND*, 94 Tenn. 538, 45 Am. St. Rep. 760, 29 S. W. 899.

Signature of witness to will.

Cited in *Re Crawford* (S. C.) 32 L. R. A. 78, 24 S. E. 69, holding signature to will not insufficient because written by another witness in presence, and at request, of former.

27 L. R. A. 663, *NASHVILLE TRUST CO. v. SMYTHE*, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903.

Rights of holders of notes secured by vendor's liens or mortgages.

Cited in *Hamilton v. Fowler*, 40 C. C. A. 52, 99 Fed. 24, holding that mortgage securing note passes to indorsee without specific assignment; *Douglass v. Blount*, 22 Tex. Civ. App. 496, 55 S. W. 520, holding assignee of one of a series of notes secured by vendor's lien or mortgage entitled to priority as against other notes in hands of vendor; *First Nat. Bank v. Edgar*, 65 Neb. 344, 91 N. W. 404, holding lien of vendor of land assigned *pro tanto* upon assignment by vendor of part of purchase price notes.

Cited in footnotes to *Kernohan v. Manss*, 29 L. R. A. 317, which holds bona fide purchasers before maturity of genuine notes secured by mortgage entitled to priority over previous assignee of genuine mortgage and forged copies of notes; *Owings v. McKenzie*, 40 L. R. A. 154, which holds second note secured by deed of trust not made due by mere nonpayment of first note.

27 L. R. A. 669, *FLINN v. PRAIRIE COUNTY*, 60 Ark. 204, 46 Am. St. Rep. 168, 29 S. W. 459.

Compensation of witnesses.

Cited in *Clark County v. Kerstan*, 60 Ark. 509, 30 S. W. 1046, holding physician making *post mortem* examination not entitled to additional compensation for testifying as to its results; *Dixon v. People*, 168 Ill. 196, 39 L. R. A. 125, 48 N. E. 108, holding physician punishable for contempt on refusal to testify as an expert without being paid; *Barrus v. Phaneuf*, 166 Mass. 125, 32 L. R. A. 620, footnotes p. 619, 44 N. E. 141, sustaining contract to pay extra compensation to expert witness.

Cited in note (39 L. R. A. 120, 121) on right of state to require service of witnesses without compensation.

27 L. R. A. 676, *BROWN v. EPPS*, 91 Va. 726, 21 S. E. 119.

Rights of prisoners as to trial.

Cited in *Re Kinsel*, 64 Kan. 5, 56 L. R. A. 477, 67 Pac. 634, upholding conviction for violation of city ordinance against keeping bawdy house, without trial by jury; *Benton v. Com.* 91 Va. 786, 21 S. E. 495, holding speedy trial not denied where new trial was granted defendant for erroneous continuance.

Cited in footnote to *State v. Gerry*, 38 L. R. A. 228, which holds right to jury trial not satisfied by jury trial on appeal.

Bill of exceptions signed in vacation.

Cited in *Virginia Development Co. v. Rich Patch Iron Co.* 98 Va. 708, 37 S. E. 280, holding bill of exceptions signed by judge in vacation, upon consent of parties, invalid.

27 L. R. A. 680, *SHIELDS v. LOUISVILLE & N. R. CO.* 97 Ky. 103, 29 S. W. 978.

Injuries received in alighting from moving trains.

Cited in *Louisville & N. R. Co. v. Webb*, 99 Ky. 343, 35 S. W. 1117, denying liability of railroad company for injury to boy in jumping from car, which he had boarded without knowledge of conductor; *Berry v. Louisville & N. R. Co.* 109 Ky. 736, 60 S. W. 699, denying liability of carrier for injury received by one not a passenger, in alighting from moving train.

27 L. R. A. 684, *STATE, TIDE WATER PIPE CO., PROSECUTOR, v. STATE ASSESSORS*, 57 N. J. L. 516, 31 Atl. 220.

Affirmed without opinion in 59 N. J. L. 269, 39 Atl. 1114.

Taxation of corporations.

Cited in *Hancock v. Singer Mfg. Co.* 62 N. J. L. 351, 42 L. R. A. 863, 41 Atl. 846, declaring franchise tax void under special charter of defendant corporation.

Cited in notes (60 L. R. A. 685) on corporate taxation and the commerce clause; (57 L. R. A. 60, 92) on taxation of corporate franchises in United States.

Joint stock and unincorporated companies.

Cited in footnotes to *State ex rel. Railroad & W. Commission v. Adams Exp. Co.* 38 L. R. A. 225, which holds service on nonresident joint stock association properly made on local agent; *State ex rel. Railroad & W. Commission v. United States Exp. Co.* 50 L. R. A. 667, which sustains state's right to require informa-

tion as to business within state of unincorporated express company of other state; *Re Jones*, 60 L. R. A. 476, which holds shares in joint stock company owning real estate only, personalty in applying transfer tax law.

Pipe lines.

Cited in footnote to *Clements v. Philadelphia Co.* 39 L. R. A. 532, which sustains gas company's right to enter premises to remove gas pipes on abandoning useless line.

27 L. R. A. 685, *KROESSIN v. KELLER*, 60 Minn. 372, 51 Am. St. Rep. 533, 62 N. W. 438.

Actions for torts by or against married women.

Cited in *Pett-Morgan v. Kennedy*, 62 Minn. 355, 30 L. R. A. 531, 54 Am. St. Rep. 647, 64 N. W. 912, holding common-law rule as to liability of husband for slander by wife not abrogated by statutes relating to married women; *Lockwood v. Lockwood*, 67 Minn. 493, 70 N. W. 784, holding action maintainable by wife for alienation of husband's affections.

Cited in footnotes to *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Brown v. Brown*, 38 L. R. A. 242, which sustains right of action in own name by abandoned wife against person causing abandonment; *Houghton v. Rice*, 47 L. R. A. 311, which denies right of action against other woman for alienating husband's affections, when unaccompanied by adultery; *Dietzman v. Mullin*, 50 L. R. A. 808; *Wolf v. Frank*, 52 L. R. A. 102; *Betser v. Betser*, 52 L. R. A. 630, — which sustains wife's right of action for alienating her husband's affections.

27 L. R. A. 686, *STATE v. KENT*, 4 N. D. 577, 62 N. W. 631.

Report of second appeal in 5 N. D. 529, 35 L. R. A. 523, 67 N. W. 1052.

Bias of trial judge.

Cited in *Lincoln v. Territory*, 8 Okla. 552, 58 Pac. 730, holding defendant entitled to change of judge, upon affidavit positively stating that he cannot have fair trial.

Distinguished in *Cox v. United States*, 5 Okla. 715, 50 Pac. 175, upholding right of court to refuse application for change of trial judges, unless bias or prejudice of judge reasonably appears.

Right of state attorney to outside assistance.

Cited in *Thalheim v. State*, 38 Fla. 184, 20 So. 938, upholding right of state attorney in criminal case to be assisted by attorneys in employ of private corporation; *United States v. Rosenthal*, 121 Fed. 872, holding indictments invalidated by presence of special assistant to district attorney, before grand jury.

Rules as to principals in felonies.

Cited in *State v. Geddes*, 22 Mont. 87, 55 Pac. 919, holding indictment charging defendant as principal, with murder, sustained by proof that he advised and encouraged it.

Inducements for testifying.

Cited in *Territory v. Chavez*, 8 N. M. 537, 45 Pac. 1107, holding exclusion of testimony as to liberty and favor granted witnesses convicted of crime, erroneous.

27 L. R. A. 696, *ERSKINE v. NELSON COUNTY*, 4 N. D. 66, 58 N. W. 348.

Curative statutes.

Cited in *Steele County v. Erskine*, 39 C. C. A. 173, 98 Fed. 220, Affirming 87 Fed. 636, upholding right of legislature by curative statute to validate municipal contract declared void by courts.

27 L. R. A. 710, *HEALTH DEPARTMENT v. TRINITY CHURCH*, 145 N. Y. 32, 64 N. Y. S. R. 507, 45 Am. St. Rep. 579, 39 N. E. 833.

Due exercise of police power.

Cited in *People v. Havnor*, 149 N. Y. 201, 31 L. R. A. 691, 52 Am. St. Rep. 707 43 N. E. 541, upholding constitutionality of act forbidding barbering on Sunday, excepting in city of New York and village of Saratoga; *Department of Buildings v. Field*, 12 App. Div. 260, 42 N. Y. Supp. 691, upholding order requiring boarding-house owner to comply with statute relating to fire escapes; *Cartwright v. Cohoes*, 39 App. Div. 72, 56 N. Y. Supp. 731, upholding ordinance forbidding maintenance of privy vault within 25 feet of door or window of residence; *Brooklyn v. Nassau Electric R. Co.* 44 App. Div. 466, 61 N. Y. Supp. 33, upholding validity of act forbidding use of soft coal within specified district in city; *People v. Lochner*, 177 N. Y. 154, 101 Am. St. Rep. 773, 69 N. E. 373, Affirming 73 App. Div. 125, 76 N. Y. Supp. 396, upholding act regulating hours of labor in bakery and confectionery establishments; *State v. Hogreiver*, 152 Ind. 660, 45 L. R. A. 509, 53 N. E. 921, upholding validity of act prohibiting baseball on Sunday, where any fee is charged; *People v. Smith*, 108 Mich. 532, 32 L. R. A. 856, 62 Am. St. Rep. 715, 66 N. W. 382, upholding validity of act requiring emery wheels to be provided with blowers; *State v. Theriault*, 70 Vt. 627, 43 L. R. A. 294, 67 Am. St. Rep. 695, 41 Atl. 1030, upholding validity of act regulating fishing in streams stocked by fish and game commissioners; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 76, 42 L. ed. 954, 18 Sup. Ct. Rep. 513, Affirming 47 Neb. 572, 41 L. R. A. 486, 53 Am. St. Rep. 557, 66 N. W. 624, upholding validity of act authorizing city to require railroad companies to construct and repair viaducts over its streets; *Colon v. Lisk*, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302, holding act providing for summary seizure and forfeiture of boat owned or used by person interfering with oysters or shell fish of another not authorized under police power; *Flushing v. Carraher*, 87 Hun, 64, 33 N. Y. Supp. 951, declaring ordinance forbidding keeping of cows within 200 feet of any dwelling, without special permit, invalid; *New York Sanitary Utilization Co. v. Health Department*, 61 App. Div. 113, 70 N. Y. Supp. 510, Affirming 32 Misc. 582, 67 N. Y. Supp. 324, denying constitutionality of act directing removal by health board of garbage plants from city; *Bell v. Gaynor*, 14 Misc. 338, 36 N. Y. Supp. 122, questioning constitutionality of act forbidding use of milk cans without consent of owner; *Jew Ho v. Williamson*, 103 Fed. 19, holding quarantine of district of twelve blocks, containing more than 10,000 persons, where only nine persons were supposed to have died from bubonic plague, unreasonable; *Eckhardt v. Buffalo*, 19 App. Div. 17, 46 N. Y. Supp. 204 (concurring opinion), holding health commissioners of city, after abating privy vault, without power to build new closet and drain at expense of \$300 in different place; *Haag v. Mt. Vernon*, 41 App. Div. 369, 58 N. Y. Supp. 581, denying power of board of health to construct swamp drain at cost of \$10,000 and to levy assessment by foot frontage upon real estate to pay for same; *New York v. Herdje*,

68 App. Div. 374, 74 N. Y. Supp. 104, holding owner not relieved from operation of amended building law, enacted in exercise of police power, because of permit to build and letting of contract under original act; *Regan v. Fosdick*, 19 Misc. 493, 43 N. Y. Supp. 1102, denying that renewal of lease is implied by holding over of tenant, due to compulsory quarantine by health board under police power; *Tenement House Department v. Moeschén*, 89 App. Div. 534, 85 N. Y. Supp. 704, holding act requiring school sinks in tenement houses to be replaced by individual water closets, reasonable exercise of police powers.

Cited in footnotes to *State v. Speyer*, 29 L. R. A. 573, which holds unreasonable, resolution against maintaining pig pen within 100 feet of street or inhabited house; *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings; *State v. Hyman*, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

Cited in notes (36 L. R. A. 613) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 168) on municipal power over buildings and other structures as nuisances; (61 L. R. A. 118) on establishment and regulation of municipal water supply.

— Restrictions upon lawful occupations.

Cited in *Grossman v. Caminez*, 79 App. Div. 21, 79 N. Y. Supp. 900, holding act forbidding sale of real property by agent, without written consent of owner, unconstitutional; *Whiteley v. Terry*, 83 App. Div. 200, 82 N. Y. Supp. 89, holding same act constitutional; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 149, 43 L. R. A. 276, 68 Am. St. Rep. 763, 51 N. E. 1006 (dissenting opinion), majority holding act forbidding business of brokerage in passage tickets unconstitutional.

— Delegation of power.

Distinguished in *Schaezlein v. Cabaniss*, 135 Cal. 471, 56 L. R. A. 735, 87 Am. St. Rep. 122, 67 Pac. 755, holding that power to provide for proper sanitation of factories cannot be delegated to commissioner of bureau of labor statistics.

Right to compel supply of gas at flat rates.

Cited in footnote to *Indiana Natural & I. Gas Co. v. State*, 57 L. R. A. 761, which holds that consumer cannot compel gas company, authorized to charge meter or flat rates, to supply him at flat rate, unless meter rate be shown to be unjust discrimination.

Due process of law.

Cited in *Fire Department v. Gilmour*, 149 N. Y. 459, 52 Am. St. Rep. 747, 44 N. E. 177, denying necessity of notice of investigation before issuance of order for removal of combustibles; *People ex rel. Renshaw v. Gillespie*, 25 App. Div. 93, 48 N. Y. Supp. 882, upholding, under statute, order of justice of peace, made without notice, directing owner to kill vicious dog; *Cartwright v. Cohoes*, 39 App. Div. 73, 56 N. Y. Supp. 731, holding health board not obliged to hear anybody with reference to abatement of privy nuisance; *Westchester Electric R. Co. v. Angevine*, 52 App. Div. 241, 65 N. Y. Supp. 376, and *Golden v. Health Department*, 21 App. Div. 424, 47 N. Y. Supp. 623, holding orders of board of health as to abatement of alleged nuisance reviewable in court; *Re Boston & A. R. Co.* 64 App. Div. 261, 72 N. Y. Supp. 32, refusing to set aside deter-

mination of commissioners directing abolition of grade crossing; *Egan v. Health Department*, 20 Misc. 40, 45 N. Y. Supp. 325, denying right of owner to notice before making of order by health board relating to sanitary condition of tenement house; *Fox v. Mohawk & H. R. Humane Soc.* 20 Misc. 467, 46 N. Y. Supp. 232, upholding act authorizing killing of unlicensed dogs without compensation to owners; *State v. Main*, 69 Conn. 138, 36 L. R. A. 628, 61 Am. St. Rep. 30, 37 Atl. 80, upholding validity of act permitting summary destruction of peach trees affected with "yellows;" *Sprigg v. Garrett Park*, 89 Md. 412, 43 Atl. 813, denying right of owner of premises to notice of ordinance and order authorizing abatement of cesspool; *Harrington v. Providence*, 20 R. I. 245, 38 L. R. A. 320, 38 Atl. 1, upholding act authorizing aldermen to order, without notice, owner to connect land with sewer and to fill up other drainage receptacles; *State v. Sponaule*, 45 W. Va. 430, 43 L. R. A. 734, 32 S. E. 283, holding provision in Federal Constitution as to due process of law not violated by state Constitution permitting forfeiture of land for violation of tax statutes.

27 L. R. A. 718, *PEOPLE ex rel. NECHAMCUS v. CITY PRISON*, 144 N. Y. 529, 64 N. Y. S. R. 51, 39 N. E. 686.

Police powers.

Cited in *People v. Havnor*, 149 N. Y. 201, 31 L. R. A. 691, 52 Am. St. Rep. 707, 43 N. E. 541, upholding act prohibiting Sunday barbering, except in city of New York and village of Saratoga; *Colon v. Lisk*, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302, holding act providing for summary seizure of boats used by persons interfering with oysters or shell fish belonging to another unconstitutional; *People v. Lochner*, 177 N. Y. 153, 101 Am. St. Rep. 773, 69 N. E. 373, Affirming 73 App. Div. 125, 76 N. Y. Supp. 396, upholding act regulating hours of labor in bakery and confectionery establishments; *Bell v. Gaynor*, 14 Misc. 338, 36 N. Y. Supp. 122, questioning constitutionality of act prohibiting use of milk cans bearing name or initials of owner, without consent of such owner or agent; *Morris v. Columbus*, 102 Ga. 798, 42 L. R. A. 179, 66 Am. St. Rep. 243, 30 S. E. 850; *Com. v. Pear*, 183 Mass. 245, 66 N. E. 719, upholding act authorizing compulsory vaccination; *People v. Smith*, 108 Mich. 531, 32 L. R. A. 856, 62 Am. St. Rep. 715, 66 N. W. 382, upholding act requiring emery wheels to be provided with blowers; *Lore v. American Mfg. Co.* 160 Mo. 622, 61 S. W. 678, upholding act requiring cogwheel guards to spinning machines in jute manufactory; *State v. Holden*, 14 Utah, 91, 37 L. R. A. 106, 46 Pac. 756, upholding act prohibiting persons from laboring in mines more than eight hours a day; *New York v. Chelsea Jute Mills*, 43 Misc. 269, 88 N. Y. Supp. 1085, upholding act forbidding employment in any service of child under fourteen years of age, during school term.

Cited in footnotes to *State v. Speyer*, 29 L. R. A. 573, which holds unreasonable resolution against maintaining pig pen within 100 feet of street or inhabited house; *State v. Hyman*, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

Distinguished in *Bronk v. Barckley*, 13 App. Div. 76, 43 N. Y. Supp. 400, holding contract for prison labor not abrogated by subsequent constitutional and legislative provisions enacted in pursuance of police powers, prohibiting such contracts.

— **Restrictions upon lawful occupations.**

Cited in *State v. Zeno*, 79 Minn. 84, 48 L. R. A. 90, 79 Am. St. Rep. 422, 88 N. W. 748, upholding act requiring registration of barbers; *Ex parte Lucas*, 100 Mo. 233, 61 S. W. 218, upholding act requiring licensing of barbers; *People v. O'Connell*, 1 App. Div. 111, 36 N. Y. Supp. 1092, reaffirming constitutionality of act providing for licenses by examining boards of plumbers; *State ex rel. Winkler v. Benzenberg*, 101 Wis. 177, 76 N. W. 345, and *State v. Gardner*, 58 Ohio St. 609, 41 L. R. A. 691, footnote p. 689, 65 Am. St. Rep. 785, 51 N. E. 136, upholding right of legislature to require plumbers to undergo examination before being licensed to work; *Schnaier v. Navarre Hotel & Importation Co.* 82 App. Div. 29, 81 N. Y. Supp. 633, holding act requiring master plumbers to hold certificate of competency from examining board constitutional; *State ex rel. Burroughs v. Webster*, 150 Ind. 618, 41 L. R. A. 217, 50 N. E. 750, upholding act requiring licensing of physicians; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 149, 43 L. R. A. 276, 68 Am. St. Rep. 763, 51 N. E. 1006 (dissenting opinion), majority denying constitutionality of act prohibiting sale of passage tickets by brokers.

Powers conferred upon local authorities.

Cited in *Grannan v. Westchester Racing Asso.* 153 N. Y. 461, 47 N. E. 896, upholding right of jockey club, under statutes, to rule person off turf for disobedience of reasonable rules; *Rathbone v. Wirth*, 150 N. Y. 518, 34 L. R. A. 429, 45 N. E. 15 (dissenting opinion), majority holding clause in act providing membership in political parties having largest vote, test of eligibility to office of police commissioner, unconstitutional.

Due process of law.

Cited in *Re Jensen*, 28 Misc. 382, 59 N. Y. Supp. 653, declaring act providing for payment by city, without notice, of counsel fees and expenses of officials, acquitted of criminal charge, unconstitutional.

Contracts by unlicensed plumbers.

Cited in *Johnston v. Dahlgren*, 31 App. Div. 206, 52 N. Y. Supp. 555, denying enforceability of plumbing contract by unregistered plumbers.

Presumption as to validity of acts of health boards.

Cited in *People ex rel. Lieberman v. Vandecarr*, 81 App. Div. 129, 80 N. Y. Supp. 1108, holding board of health presumed to have been warranted in revoking permit for sale of milk, in absence of evidence to contrary.

27 L. R. A. 724, *WALSH v. FITCHBURG R. CO.* 145 N. Y. 301, 64 N. Y. S.

R. 711, 45 Am. St. Rep. 615, 39 N. E. 1068.

Injuries to child trespassers and licensees.

Cited in *Kelly v. Smith*, 29 App. Div. 350, 51 N. Y. Supp. 413, denying liability of owner of building for death of boy by use of fire escape ladder, taken from its place without former's knowledge; *DeBoer v. Brooklyn Wharf & Warehouse Co.* 51 App. Div. 291, 64 N. Y. Supp. 925, holding warehouse company liable for negligent killing of child licensee on its premises; *Fitzgerald v. Rodgers*, 58 App. Div. 301, 68 N. Y. Supp. 946, denying liability of contractor for injury to ten-year-old boy caused in playing with winch left in uncompleted highway; *Travell v. Bannerman*, 71 App. Div. 441, 75 N. Y. Supp. 866, majority denying liability of proprietor of gun factory for injury to fourteen-year-old boy by explosion of refuse taken by boys from defendant's lot; *Wilson v. American*

Bridge Co. 74 App. Div. 601, 77 N. Y. Supp. 820, holding bridge company liable for scalding boy on railroad embankment by steam from exhaust pipe; *Albert v. New York*, 75 App. Div. 557, 78 N. Y. Supp. 355, denying liability of city for death of boy killed by falling from unfinished sea wall; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 411, 54 L. R. A. 320, 39 S. E. 82, denying liability of railroad company for drowning of boy in water in excavation on its premises; *Ryan v. Towar*, 128 Mich. 476, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, denying liability of owner for injury to child trespassers playing with unused water wheel; *O'Leary v. Brooks Elevator Co.* 7 N. D. 563, 41 L. R. A. 680, 75 N. W. 910, denying liability for injury to boy trespasser caught in shafting while endeavoring to get cane at direction of partially blind uncle; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 594, 52 N. E. 1013, denying liability of railroad company for mere negligent injury to seven-year-old trespasser on tracks; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 434, 57 L. R. A. 570, footnote p. 561, 90 N. W. 95, holding railroad company liable for injuries to young children by unfastened turntable in unfenced lot near public way; *Coleman v. Robert Graves Co.* 39 Misc. 85, 78 N. Y. Supp. 893, denying liability of defendant for injury to nine-year-old child whose dress was set on fire while she was poking hot ashes with stick; *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 320, 40 Atl. 614, denying liability of railroad company for injury to child playing with turntable without invitation; *Delaware, L. & W. R. Co. v. Reich*. 61 N. J. L. 638, 41 L. R. A. 833, footnote p. 831, 68 Am. St. Rep. 727, 40 Atl. 682, denying liability for injury to child playing on turntable on owner's private property; *Ritz v. Wheeling*, 45 W. Va. 270, 43 L. R. A. 153, 31 S. E. 993, denying liability of city for death of four-year-old child drowned in reservoir; *Paolino v. McKendall*, 24 R. I. 436, 60 L. R. A. 136, 96 Am. St. Rep. 736, 53 Atl. 268, holding occupier of land, burning rubbish thereon, not liable for injury to children approaching too near the fire; *Haack v. Brooklyn Labor Lyceum Asso.* 93 App. Div. 495, 87 N. Y. Supp. 814, holding owner of premises bound to use reasonable care to protect licensee under twelve years of age, from injury from falling wall.

Cited in footnotes to *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 59 L. R. A. 920, which holds railroad company liable for injury to child on turntable not guarded or properly fastened; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Savannah, F. & W. R. Co. v. Waller*, 34 L. R. A. 459, which denies liability of railroad company for injury to seven-year-old boy running under freight car to get ball, at request of employee; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street, after loosening brake; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Distinguished in *Lenz v. Aldrich*, 6 App. Div. 183, 39 N. Y. Supp. 1022 (dissenting opinion), majority denying liability of house owner for injury to child, due to rotten clothes-line pole in yard where child was playing; *Wittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 412, 62 N. Y. Supp. 297 hold-

ing electric light company liable for injury to boy trespasser on elevated road property, due to shock from negligently placed wire.

Rule as to adult trespassers and licensees.

Cited in *Connelly v. Erie R. Co.* 68 App. Div. 543, 74 N. Y. Supp. 277, denying liability of carrier to licensee for burning of railroad ties in fire kindled by locomotive sparks; *Knight v. Lanier*, 69 App. Div. 457, 74 N. Y. Supp. 999, holding automobile owner liable for careless and heedless injury to plaintiff, caused by frightening latter's horse in private lane; *Wells v. Brooklyn Heights R. Co.* 34 Misc. 46, 68 N. Y. Supp. 305, holding elevated railroad corporation owes mere licensee duty of reasonable vigilance and care to prevent injury; *Leavitt v. Mudge Shoe Co.* 69 N. H. 598, 45 Atl. 558, denying duty of defendant to keep elevator locked against trespassers.

Injury to trespassing animals.

Cited in *Oeslein v. Zautcke*, 92 Wis. 179, 66 N. W. 108, holding active vigilance not required of landowner to prevent horse from trespassing on premises, so as to prevent its being killed by straying thence upon railroad tracks.

Res ipsa loquitur.

Cited in *Groarke v. Laemmle*, 56 App. Div. 63, 67 N. Y. Supp. 409, holding proof that milk wagon standing in sloping yard ran down and struck boy insufficient to establish defendant's negligence.

27 L. R. A. 728, *COCHRANE v. FROSTBURG*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703.

Ordinances relating to animals running at large.

Cited in *Hagerstown v. Witmer*, 86 Md. 300, 39 L. R. A. 659, 37 Atl. 965, upholding validity of ordinance providing for killing of dogs running at large.

Cited in footnote to *Elliott v. Kitchens*, 33 L. R. A. 364, which holds three-months-old colt not running at large within meaning of ordinance, when following dam in street.

Cited in note (39 L. R. A. 675, 677) on municipal power over nuisance affecting highways and waters.

Municipal duties and liabilities.

Cited in *Hagerstown v. Klotz*, 93 Md. 440, 54 L. R. A. 941, 86 Am. St. Rep. 437, 49 Atl. 836, holding duty of municipality to protect persons from injury not discharged by mere passage of ordinance regulating speed of bicycles; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 363, 35 S. W. 341, holding city liable for negligence in failure to supply water to extinguish fire.

27 L. R. A. 733, *SEEVERS v. GABEL*, 94 Iowa, 75, 58 Am. St. Rep. 381, 62 N. W. 669.

Who must bear loss of destruction of property by fire.

Cited in *Norton v. Melick*, 97 Iowa, 567, 66 N. W. 780, denying liability of agent not negligent, for destruction of property in his possession by fire.

Distinguished in *Butterick Pub. Co. v. Bailey*, 105 Iowa, 335, 75 N. W. 189, holding vendee under contract providing for return of goods, liable for their destruction by fire.

27 L. R. A. 735, *GREENSTREET v. THORNTON*, 60 Ark. 369, 30 S. W. 347.

Effect of judgment against dead person.

Cited in note (49 L. R. A. 154, 170) on effect of judgment entered against dead person.

27 L. R. A. 737, *STATE ex rel. RICHARDS v. CINCINNATI*, 52 Ohio St. 419, 40 N. E. 508.

Amendments as to statutes.

Cited in *Walsh v. State*, 142 Ind. 361, 33 L. R. A. 393, footnote p. 392, 41 N. E. 65, authorizing removal of constitutional objections to statute by subsequent amendments; *Miller v. Hixson*, 64 Ohio St. 50, 59 N. E. 749, holding amendment to statute extending time during which special tax for constructing road could be levied, retroactive as to roads built before its enactment; *English & S.-A. Mortg. & Invest. Co. v. Hardy*, 93 Tex. 300, 55 S. W. 169, holding valid amendment to unconstitutional act not invalidated by unconstitutionality of former legislation.

Power to change boundary lines of municipalities.

Cited in *State ex rel. Hildreth v. Cincinnati*, 3 Ohio N. P. 128, upholding ordinance making annexed territory, containing small number of voters, part of existing ward; *Taggart v. Claypool*, 145 Ind. 596, 32 L. R. A. 588, footnote p. 586. 44 N. E. 18, holding annexation to city not taking of property; *Woolverton v. Albany*, 152 Ind. 79, 52 N. E. 455, holding courts without jurisdiction to entertain action to disannex territory; *South Morgantown v. Morgantown*, 49 W. Va. 731, 40 S. E. 15, upholding power of legislature to consolidate municipalities.

Cited in footnotes to *Kuhn v. Port Townsend*, 29 L. R. A. 445, which holds mere irregularities no ground for attack on annexation of territory to city; *Denver v. Coulehan*, 27 L. R. A. 751, which denies legislative power to annex noncontiguous territory to city; *Forsyth v. Hammond*, 30 L. R. A. 576, which denies jurisdiction of city council to annex lands on petition of nonadjacent land-owners; *State ex rel. West v. Des Moines*, 31 L. R. A. 186, which refuses to disturb jurisdiction of city over territory annexed under void statute, after undisputed exercise of authority for several years; *Re North Milwaukee*, 33 L. R. A. 638, which holds void, act requiring court to determine whether or not territory should be incorporated as village; *Kansas City v. Clark*, 52 L. R. A. 321, which sustains exemption of agricultural lands from statute extending city boundaries.

Cited in notes (34 L. R. A. 196) on municipal taxation of rural lands within limits of corporation; (60 L. R. A. 565) on power to cure unconstitutional statute by amendment.

Classification of cities.

Cited in *State ex rel. Monnett v. Baker*, 55 Ohio St. 10, 44 N. E. 516, upholding constitutionality of classification of cities, based on population, permitting cities to become members of particular class without additional legislation; *Re Brown*, 6 Ohio N. P. 181, upholding as proper classification, act failing to require public auditors of cities of first class to verify their reports.

Quo warranto.

Cited in *State ex rel. Strimple v. Bingham*, 14 Ohio C. C. 247, upholding juris-

diction in quo warranto to oust municipal corporation assuming to exercise franchise not conferred by law.

27 L. R. A. 751, *DENVER v. COULEHAN*, 20 Colo. 471, 39 Pac. 425.

Powers of legislature.

Cited in *Meskeu v. Highlands*, 9 Colo. App. 257, 47 Pac. 846, upholding power of legislature to authorize cities and towns to prohibit sales of liquor within, and for distance of mile beyond, their limits.

Cited in note (55 L. R. A. 849) on power of legislature to enact code or compilation of laws, or amend many or designated sections thereof by a single statute.

Boundaries of municipalities.

Cited in *Montclair v. Thomas*, 31 Colo. 329, 73 Pac. 48, holding town discontinued by constitutional amendment consolidating it with city.

Cited in footnote to *Kansas City v. Clark*, 52 L. R. A. 321, which sustains exemption of agricultural lands from statute extending city boundaries.

27 L. R. A. 757, *AMERICAN SUGAR REF. CO. v. FANCHER*, 145 N. Y. 552, 65 N. Y. S. R. 506, 40 N. E. 206.

Equity jurisdiction in actions to recover property.

Cited in *Missouri Broom Mfg. Co. v. Guymon*, 53 C. C. A. 21, 115 Fed. 117, holding action maintainable in equity for recovery of property sold by reason of false representation of vendee.

Recovery of property wrongfully obtained.

Cited in *Bird v. Lanphear*, 92 Hun, 571, 36 N. Y. Supp. 1069, holding action maintainable by vendees to recover commissions paid by vendors on false representation by defendant that no commissions were to be paid; *Converse v. Sickles*, 146 N. Y. 206, 48 Am. St. Rep. 790, 40 N. E. 777, Reversing 16 App. Div. 51, 44 N. Y. Supp. 1080, upholding right of vendor to disaffirm fraudulent sale and follow proceeds in hands of sheriff; *Bird v. Lanphear*, 11 App. Div. 614, 42 N. Y. Supp. 623, holding complaint demanding accounting for moneys fraudulently obtained in purchase of real estate, sufficient; *Deitz v. Field*, 10 App. Div. 427, 41 N. Y. Supp. 1087, Affirming 17 Misc. 27, 39 N. Y. Supp. 257, denying right to recover possession of securities after recovery in action for conversion; *Sheffield v. Mitchell*, 31 App. Div. 270, 52 N. Y. Supp. 925, upholding right of vendor of property obtained by vendee by fraud, to follow identified proceeds into hands of fraudulent transferee; *Seitz v. Seitz*, 59 App. Div. 153, 69 N. Y. Supp. 170, holding that constructive *ex maleficio* or *ex delicto* trust arises to enable equity to follow proceeds of dishonest dealing; *Phelan v. Dowhs*, 59 App. Div. 285, 69 N. Y. Supp. 375, Affirming 31 Misc. 522, 64 N. Y. Supp. 737, holding funds of company, used without its consent for cash payment on foreclosure sale, recoverable from referee; *Dayton v. H. B. Claffin Co.* 41 N. Y. Supp. 849, upholding right of firm to proceeds of insurance policy payable to widow of employee, premiums having been paid with money stolen from employers; *Whitehead v. O'Sullivan*, 12 Misc. 582, 33 N. Y. Supp. 1098, upholding right to satisfaction of attorney's lien out of identified proceeds in receiver's hands of sale of property to which it attached; *Walsh v. National Broadway Bank*, 13 Misc. 5, 33 N. Y. Supp. 998, holding action maintainable against bank by principal for money wrongfully deposited by agent in his own name; *Hallahan v. Webber*, 15 Misc. 332, 37 N. Y. Supp. 613, upholding right of vendor, rescinding sale for fraud, to recover pro-

ceeds of goods subsequently sold by assignee of vendee; *Howell v. Berger*, 19 Misc. 316, 44 N. Y. Supp. 259, upholding right of vendor to follow proceeds of goods obtained by fraud in hands of vendee's administrators; *Bank of Stockham v. Alter*, 61 Neb. 364, 85 N. W. 300, holding plaintiff entitled to proceeds of sale of mortgaged property by bank with knowledge of plaintiff's lien; *Bank Comrs. v. Security Trust Co.* 70 N. H. 548, 49 Atl. 113, holding beneficial owner not entitled to preference over general creditors of insolvent, unless he can trace property into specific property in hands of representative.

Cited in footnote to *Drovers' & Mechanics' Nat. Bank v. Roller*, 36 L. R. A. 767, which holds that money collected by trustees of insolvent for sales by him as commission merchant belong to consignor when capable of identification.

Distinguished in *Hatch v. Fourth Nat. Bank*, 147 N. Y. 193, 41 N. E. 403, holding bank not liable to refund to third person proceeds of collateral securities unlawfully pledged by customer in regular course of business; *Newburgh Sav. Bank v. Woodbury*, 173 N. Y. 58, 65 N. E. 858, holding money paid drafted men under void conscription act not recoverable from them.

— Estoppel.

Cited in *National Bank of Deposit v. Rogers*, 166 N. Y. 390, 59 N. E. 922, holding firm and assignee estopped from asserting, because of nonpossession, invalidity of lien for money borrowed to pay duties on goods.

Constructive trusts in funds.

Cited in footnote to *Anglo-American Sav. & Loan Asso. v. Campbell*, 43 L. R. A. 622, which sustains constructive trust in favor of persons contributing labor or materials for building, in full amount agreed to be advanced by third person.

Title of goods obtained by false pretenses.

Cited in *W. H. Sawyer Lumber Co. v. Boston & A. R. Co.* 173 Mass. 506, 53 N. E. 912, holding that, apparently, under New York law, obtaining of goods under false pretenses does not prevent passing of title.

27 L. R. A. 762, *KANSAS CITY, M. & B. R. CO. v. SMITH*, 72 Miss. 677, 48 Am. St. Rep. 579, 17 So. 78.

Interference with surface waters.

Cited in *Yazoo & M. Valley R. Co. v. Davis*, 73 Miss. 689, 32 L. R. A. 263, 55 Am. St. Rep. 562, 19 So. 487, denying liability of railroad company for obstruction of flow of water by properly constructed embankment; *Jordan v. Benwood*, 42 W. Va. 317, 36 L. R. A. 521, 57 Am. St. Rep. 859, 26 S. E. 266, denying liability of city for injury to land by surface water by reason of change of grade of street; *Frisbie v. Cowen*, 18 App. D. C. 391, denying right of railroad company to accumulate surface water and cast it upon adjacent lands.

27 L. R. A. 766, *PENNSYLVANIA R. CO. v. MONTGOMERY COUNTY PASS. R. CO.* 167 Pa. 62, 46 Am. St. Rep. 659, 31 Atl. 468.

Railways on country roads.

Cited in *Pennsylvania R. Co. v. Greensburg & H. Electric Street R. Co.* 176 Pa. 576, 36 L. R. A. 846, 35 Atl. 122, holding right of street car companies to build tracks along "streets or highways" not limited strictly to those called streets; *Willis v. Erie City Pass. R. Co.* 188 Pa. 66, 41 Atl. 307, denying right to

construct practically double track railway on road, under guise of building switches.

Cited in footnote to *Baltimore v. Baltimore*, C. & E. M. Pass. R. Co. 33 L. R. A. 503, which holds local passenger railway on turnpike road not "street railway."

Construction and operation of street railway; consents.

Cited in *Thompson v. Citizens Traction Co.* 181 Pa. 137, 40 W. N. C. 249, 37 Atl. 205, holding action maintainable by abutting owners for damages for construction, without consent, of street railway on public road; *Osborne v. Delaware County & P. Electric R. Co.* 9 Pa. Super. Ct. 636, 44 W. N. C. 200, Reversing 7 Del. Co. Rep. 376, holding trolley road having been laid, abutting owner's remedy is action for damages; *Collins v. Carbondale Traction Co.* 5 Pa. Dist. R. 19, holding operation of street railway on side of highway, without consent of municipal authorities, a nuisance; *Trenton Cut-Off R. Co. v. Newton Electric Street R. Co.* 8 Pa. Dist. R. 552, denying right of street railway without consent, to cross tracks of steam railway at point other than highway; *Pennsylvania R. Co. v. Turtle Creek Valley Electric R. Co.* 179 Pa. 590, 36 Atl. 348; *Rahn Twp. v. Tamaqua & L. Street R. Co.* 167 Pa. 89, 31 Atl. 472; *Reading Co. v. Schuylkill Valley Traction Co.* 14 Montg. Co. L. Rep. 12; *Lehigh Coal & Nav. Co. v. Inter-County Street R. Co.* 167 Pa. 84, 31 Atl. 471,—holding, under charter authorizing construction of street railway through several townships, consent of all is necessary before beginning work of building; *Tamaqua & L. Street R. Co. v. Inter-County Street R. Co.* 167 Pa. 100, 31 Atl. 473, holding consent of supervisor to use of roads for street railway, obtained by threats and bribery, invalid; *Scranton & P. Traction Co. v. Delaware & H. Canal Co.* 1 Pa. Super. Ct. 412, holding that none but abutting owners can question right of street railway to lay tracks in township road, with consent of municipal authorities; *Pennsylvania Canal Co. v. Lewisburg, M. & W. Pass. R. Co.* 203 Pa. 287, 52 Atl. 1135, 10 Pa. Super. Ct. 421, Which Reversed 20 Pa. Co. Ct. 551, 7 Pa. Dist. R. 245, denying right of street railway, authorized to occupy highway, to cross, without consent, canal highway bridge owned by canal company; *Middletown, H. & S. Street R. Co. v. Middletown Electric R. Co.* 2 Dauphin Co. Rep. 324, holding consent of local authorities and abutting property owners indispensable to right to build street railroad in highway; *Upper Providence Twp. v. Trappe & L. Electric Street R. Co.* 17 Montg. Co. L. Rep. 171, and *Upper Providence Twp. v. Trappe & L. Electric Street R. Co.* 8 Northampton Co. Rep. 97, holding stipulation as to limit of beginning of construction complied with where work was begun in any of townships of route; *Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co.* 6 Pa. Dist. R. 491, holding failure to obtain continuous route would authorize abutting owner to withdraw consent; *Van Voorhis v. Pittsburg & C. Street R. Co.* 34 Pittsb. L. J. N. S. 153, holding franchise granted by municipal authorities to street railway company to construct feed line on street not named in charter, void; *North Pennsylvania R. Co. v. Inland Traction Co.* 205 Pa. 582, 55 Atl. 774, Affirming 18 Montg. Co. L. Rep. 135, upholding right of railroad company to lay tracks on side of township road for which it has consent of abutting owners; *Dempster v. United Traction Co.* 205 Pa. 76, 54 Atl. 501, holding that street railways cannot be constructed in townships of first class without consent of abutting property owners; *Perkiomen R. Co. v. Collegeville Electric Street R. Co.* 14 Montg. Co. L. Rep. 10, holding that construction of street rail-

ways in cities and boroughs should meet with more favor than in country districts.

— **Right to injunctive relief.**

Cited in *Pennsylvania R. Co. v. Glenwood & D. Electric Street R. Co.* 184 Pa. 234, 41 W. N. C. 445, 39 Atl. 80, denying injunction to restrain building of overhead crossing, after street railway had adopted complainant's suggestion at large cost; *Bradford City v. Pennsylvania & N. Y. Teleg. & Teleph. Co.* 26 Pa. Co. Ct. 345, refusing injunction on ground that abutting owner was estopped from objecting by acquiescence; *Loyalsock Twp. v. Montoursville Pass. R. Co.* 7 Pa. Dist. R. 292, denying temporary injunction to prevent railway company from running cars in highway, pending hearing on merits; *Minnich v. Lancaster, M. & N. H. R. Co.* 6 Lack. Legal News, 278, 24 Pa. Co. Ct. 315, 7 Northampton Co. Rep. 308, 17 Lanc. L. Rev. 386, upholding right of abutting owner to restrain construction of street railway on his half of turnpike; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 161, 36 Atl. 1107, holding railway company may be enjoined from building road not substantially following chartered route; *Shimer v. Easton & N. Street Co.* 7 Northampton Co. Rep. 250, holding abutting owner's right to injunctive relief waived by verbal consent and knowledge of progress of building of road; *Meixell v. Northampton Central Street R. Co.* 7 Northampton Co. Rep. 276, denying injunction at suit of abutting owner to restrain operation of street railway in highway, where complainant claimed he had not given valid consent; *Canton Twp. v. Washington & C. R. Co.* 34 Pittsb. L. J. N. S. 145, holding right to injunctive relief against construction of railway lost by acquiescence therein until expenditure of large sums by company.

Distinguished in *Heilman v. Lebanon & A. Street R. Co.* 175 Pa. 191, 34 Atl. 647, and *Becker v. Lebanon & M. Street R. Co.* 188 Pa. 495, 43 W. N. C. 231, 41 Atl. 612, refusing to enjoin operation of railway on tardy application of abutting owner, where injury to complainant was slight and readily compensable; *Messner v. Lykens & W. Valley Street R. Co.* 13 Pa. Super. Ct. 435, refusing injunction to restrain completion of railway where complainant was actuated by improper motives.

— **Street railways as additional servitude.**

Cited in *Jaynes v. Omaha Street R. Co.* 53 Neb. 649, 39 L. R. A. 757, footnote p. 751, 74 N. W. 67, and *Fidelity Ins. T. & S. D. Co. v. Philadelphia & B. Pass. R. Co.* 6 Pa. Dist. R. 738, holding trolley railway additional burden on street; *Ehret v. Camden & T. R. Co.* 60 N. J. Eq. 248, 46 Atl. 578, holding question whether construction of "trolley" upon country highway imposes additional servitude, unsettled; *Ehret v. Camden & T. R. Co.* 61 N. J. Eq. 174, 47 Atl. 562, holding construction of "trolley" railway on country highway does not impose additional servitude; *Merrick v. Intramontaine R. Co.* 118 N. C. 1083, 24 S. E. 667, holding additional servitude not imposed by construction of street passenger railway on street; *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 97, 41 L. R. A. 580, footnote p. 575, 67 Am. St. Rep. 844, 74 N. W. 538, holding electric passenger railroad on country highway, additional burden; *Valley Forge Park Commission v. Phoenixville & B. Electric R. Co.* 27 Pa. Co. Ct. 111, 18 Montg. Co. L. Rep. 144, holding additional servitude imposed by occupancy of country road by railway.

Cited in footnotes to *State ex rel. Roebling v. Trenton Pass. R. Co.* 33 L. R. A.

129, which holds substitution of trolley system for horses does not create additional burden; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 37 L. R. A. 856, which holds electric railway in village street, additional servitude.

Poles for electric wires in highway.

Cited in *Zanziger v. Wayne Electric Light Co.* 6 Pa. Dist. R. 578, 7 Del. Co. Rep. 11, holding action to enjoin erection of electric wire poles until payment of damages maintainable by abutting owner; *Bucks County Light, H. & P. Co. v. Philadelphia & T. R. Co.* 27 Pa. Co. Ct. 2, restraining railway company, as abutting owner, from tearing down electric company's poles in highway; *Bradford v. New York & P. Teleph. & Teleg. Co.* 206 Pa. 586, 56 Atl. 41, holding that city cannot compel removal of telegraph poles and wires from streets after delaying action for more than twenty-one years.

Distinguished in *Brown v. Radnor Twp. Electric Light Co.* 208 Pa. 457, 57 Atl. 904, holding that abutting owner cannot enjoin erection of poles for electric wires on turnpike, where power to erect them given by legislature.

Action of public bodies in official character.

Cited in *Mitchell v. Kearns*, 16 Pa. Super. Ct. 360, continuing temporary injunction to restrain school board from carrying out contract for purchase of books, made without consulting all members of board; *American Road Mach. Co. v. Washington Twp.* 9 Pa. Super. Ct. 108, 43 W. N. C. 280, holding township not bound by individual signatures of its supervisors to contract; *Climax Road Mach. Co. v. Allegheny Twp.* 10 Pa. Super. Ct. 441, holding lack of minutes not fatal to contract authorized at meeting of road commissioners; *Logan v. Rochester Twp.* 21 Pa. Super. Ct. 117, holding one of two supervisors not authorized to bind town for reconstruction of road, where the other merely told him to go ahead and put it in good repair.

27 L. R. A. 769, *SALENO v. NEOSHO*, 127 Mo. 627, 48 Am. St. Rep. 653, 30 S. W. 190.

Municipal contracts.

Cited in *Neosho City Water Co. v. Neosho*, 136 Mo. 507, 38 S. W. 89, reaffirming validity of ordinances relating to water supply of city of Neosho; *Webb City & C. Waterworks Co. v. Webb City*, 78 Mo. App. 430, holding city of fourth class liable on contract for fire hydrant rents.

Cited in footnotes to *Westminster Water Co. v. Westminster*, 64 L. R. A. 630, which denies city's power to contract to pay water company specified percentage of assessed valuation in perpetuity for water supply; *Indianapolis v. Wann*, 31 L. R. A. 743, which holds contract for street lights for five years, payable monthly, void.

Formalities in execution of contracts.

Cited in *McShane v. School Dist. No. 5*, 70 Mo. App. 628, holding execution in duplicate not essential to validity of teacher's contract with district board; *Aurora Water Co. v. Aurora*, 129 Mo. 578, 31 S. W. 946, holding acceptance of ordinance legally passed, relating to construction of water works by contractors, valid contract; *Verdin v. St. Louis*, 131 Mo. 135, 33 S. W. 480 (dissenting opinion by Sherwood, J.), who holds failure to indorse estimate of maintenance on ordinance not fatal omission; *Perkins v. Independent School Dist.* 99 Mo. App. 486, 74 S. W. 122, holding written offer of services at stated compensation, and resolu-

tion of board accepting at different figure, not written contract signed by parties.

Cited in note (61 L. R. A. 64) on establishment and regulation of municipal water supply, as to form of contract.

Formalities in passage of ordinances.

Cited in *Moore v. Perry*, 119 Iowa, 429, 93 N. W. 510, holding ordinance signed by officers of council in absence of mayor, invalid.

Municipal indebtedness within meaning of Constitution.

Cited in *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 223, 32 L. R. A. 166, footnote p. 157, 31 S. W. 756, and *Denver v. Hubbard*, 17 Colo. App. 352, 68 Pac. 993, holding contract for term of years, with annual payments, creates indebtedness for only amount falling due yearly; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 20, 43 L. ed. 349, 19 Sup. Ct. Rep. 77, upholding right of city to stipulate for supply of water for twenty-five years at yearly rental, notwithstanding aggregate rentals may exceed debt limit; *Cain v. Wyoming*, 104 Ill. App. 543, and *Herman v. Oconto*, 110 Wis. 673, 86 N. W. 681, holding contracts for services, payable annually, not to be computed for entire period in estimating municipal indebtedness; *Swanson v. Ottumwa*, 118 Iowa, 172, 59 L. R. A. 625, 91 N. W. 1048, holding water supply bonds, payable out of sinking fund raised by special tax, not municipal indebtedness within meaning of Constitution.

Cited in footnotes to *Kelly v. Minneapolis*, 30 L. R. A. 281, which requires deduction of amount of sinking fund from total apparent debt to ascertain actual debt; *McBean v. Fresno*, 31 L. R. A. 794, which holds limitation of city indebtedness not violated by contract to pay annual sum for term of years, if such annual sum within limit; *Brashear v. Madison*, 33 L. R. A. 474, which holds constitutional limit of indebtedness not violated by appropriation to buy fire alarm apparatus, when sufficient on hand appropriated for fire purposes; *La Porte v. Gamewell Fire Alarm Teleg. Co.* 35 L. R. A. 686, which holds city contract for water or light does not create indebtedness for aggregate sum of all instalments; *South Bend v. Reynolds*, 49 L. R. A. 795, which holds limitation of city debt not exceeded by contract for erection of city hall for which yearly rent to be paid, with option to purchase; *State ex rel. Helena Waterworks Co. v. Helena*, 55 L. R. A. 336, which holds contract for water supply for term of years within provision as to limitation of city indebtedness.

27 L. R. A. 773, *VAN OSDELL v. CHAMPION*, 89 Wis. 661, 46 Am. St. Rep. 864, 62 N. W. 539.

Conditions annexed to devises and conveyances.

Cited in *Zillmer v. Landguth*, 94 Wis. 609, 69 N. W. 568, holding condition annexed to devise in fee, restraining power of alienation for certain period, void; *Danforth v. Oshkosh*, 119 Wis. 279, 97 N. W. 258, holding that conveyance of land to city, to be used perpetually for library, subject to revert to heirs in case not so used, passes title in fee.

Spendthrift trusts.

Cited in footnotes to *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Re Qua v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interests,

accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate, free from debts of beneficiary.

27 L. R. A. 776, *STATE ex rel. DUNN v. NOYES*, 87 Wis. 340, 41 Am. St. Rep. 45, 58 N. W. 386.

Grand juries; validity of indictment.

Cited in *People v. Thompson*, 122 Mich. 415, 81 N. W. 344, holding indictment found by grand jury of twenty-one jurors valid; *State v. Brewster*, 70 Vt. 350, 42 L. R. A. 448, 40 Atl. 1037, holding indictment not invalidated because of presence of state attorney's stenographer in room for purpose of taking testimony of witnesses; *People v. Reigel*, 120 Mich. 86, 78 N. W. 1017, refusing to quash indictment for irregularity in drawing grand jury.

Cited in footnote to *Zanone v. State*, 35 L. R. A. 556, which holds illegal, jury summoned from country districts to exclusion of city residents.

Cited in notes (27 L. R. A. 852) on number of grand jurors necessary or proper to act; (28 L. R. A. 205) on qualification of grand jurors.

Habeas corpus.

Cited in *Re Roszcynialla*, 90 Wis. 536, 75 N. W. 167, holding that writ of habeas corpus only raises question of jurisdiction of court or officer to issue process upon which prisoner is held; *State ex rel. Isenring v. Polacheck*, 101 Wis. 433, 77 N. W. 708, holding habeas corpus not proper way to procure discharge of legislator arrested during recess of legislature; *State ex rel. Durner v. Huegin*, 110 Wis. 222, 62 L. R. A. 730, 85 N. W. 1046, upholding right of public attorney to employ assistant counsel in habeas corpus proceeding; *State ex rel. Durner v. Huegin*, 110 Wis. 240, 62 L. R. A. 737, 85 N. W. 1046, holding court on habeas corpus may examine proceedings before magistrate committing defendant for trial.

27 L. R. A. 791, *LONG v. HESS*, 154 Ill. 482, 40 N. E. 335.

Release of inheritance.

Distinguished in *Stolenburg v. Diercks*, 117 Iowa, 31, 90 N. W. 525, holding release of inheritance not limited to estate of the ancestors in their own country, where release was made.

27 L. R. A. 797, *HOLLAND v. SILVER BOW COUNTY*, 15 Mont. 460, 39 Pac. 575.

Taxation of property of nonresident.

Cited in *Savings & L. Soc. v. Multnomah County*, 169 U. S. 431, 42 L. ed. 806, 18 Sup. Ct. Rep. 392, upholding constitutionality of state act taxing mortgages of land held by nonresident mortgagees.

Cited in footnotes to *Re Whiting*, 34 L. R. A. 232, which holds bonds of foreign corporation within state, though owned by nonresident, subject to transfer tax; *Buck v. Miller*, 37 L. R. A. 384, which holds money and securities retained in state in business of buying and selling property, taxable there though owner domiciled elsewhere; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 45 L. R. A. 524, which holds situs of debt due nonresident to be at creditor's domicile for purpose of taxation; *Allen v. National State Bank*, 52 L. R. A.

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therein; Cook v. Lee, 72 N. H. 571, 58 Atl. 511, holding action main

widow to set aside conveyance by husband in fraud of her rights.

Cited in footnotes to Small v. Small, 30 L. R. A. 243, which upholds

children of bulk of estate consisting of personalty, as against widow; Smith

Smith, 34 L. R. A. 49, which holds delivery by husband just before death, of

deed of all realty, made years before, fraudulent as to wife.

What constitutes sufficient delivery to complete gift.

Cited in footnote to King v. Smith, 54 L. R. A. 708, which sustains delivery of
gift to donee by third person after donor's final loss of consciousness.

27 L. R. A. 802, FRAME v. FELIX, 167 Pa. 47, 31 Atl. 375.

Public contracts.

Cited in Deysher v. Reading, 18 Pa. Co. Ct. 611, holding that board of health
may bind municipality by contract; Moran v. Thompson, 20 Wash. 537, 56 Pac.
29, denying validity of contract where no opportunity was afforded for com-
petitive bidding.

Cited in footnotes to Mulnix v. Mutual Ben. L. Ins. Co. 33 L. R. A. 827, which
denies legislative right to authorize secretary of state to purchase in open
market, instead of from lowest bidder; Colorado Paving Co. v. Murphy, 37 L.
R. A. 630, which denies absolute right of lowest responsible bidder to city con-
tract.

Actions by taxpayers.

Cited in Graeff v. Felix, 24 Pa. Co. Ct. 659, upholding right of taxpayer to in-
junction to restrain city water department from acquiring land for park pur-
poses.

27 L. R. A. 808, PUGET SOUND DRESSED BEEF & PACKING CO. v. JEFFS,
11 Wash. 466, 48 Am. St. Rep. 885, 39 Pac. 962.

Property exempt from levy.

Cited in Winsor v. McLachlan, 12 Wash. 156, 40 Pac. 727, denying exemp-

tion of proceeds of insurance policy from garnishment, record not showing insured property was exempt; *Traders' Nat. Bank v. Schorr*, 20 Wash. 8, 72 Am. St. Rep. 17, 54 Pac. 543, holding proceeds of exempt property also exempt from execution; *Wabash R. Co. v. Bowring*, 103 Mo. App. 163, 77 S. W. 106, holding hog of abnormal size, used for exhibition purposes, not within statute exempting ten head of hogs for use of family for food.

27 L. R. A. 811, *VANBEBBER v. PLUNKETT*, 26 Or. 562, 38 Pac. 707.

Account stated.

Cited in *Voight v. Brooks*, 19 Mont. 375, 48 Pac. 549, holding action maintainable on account stated on implied promise to pay balance.

Proper questions for jury.

Approved in *Barr v. Rader*, 33 Or. 376, 54 Pac. 210, and *Perkins v. McCullough*, 36 Or. 148, 59 Pac. 182, holding refusal of nonsuit proper where there is any evidence tending to prove issues; *Rose v. Wollenberg*, 31 Or. 285, 39 L. R. A. 384, 65 Am. St. Rep. 826 44 Pac. 382, holding relative liability of sureties between themselves under parol agreement question for jury; *Serles v. Serles*, 35 Or. 293, 57 Pac. 634, holding that if there is any evidence tending to prove a given fact, it should go to jury; *Haines v. McKinnon*, 35 Or. 582, 57 Pac. 903 (dissenting opinion), majority holding good faith of purported sale of unmaturing crop under ambiguous bill of sale, question for jury; *First Nat. Bank v. Fire Asso.* 33 Or. 188, 53 Pac. 8, holding circumstantial evidence tending to connect owners of burned stock with incendiary fire sufficient to take case to jury.

Cited in footnote to *Miller v. Freeman*, 51 L. R. A. 504, which denies right of one partner to sue another at law, for damages for breach of contract, without dissolution of firm.

27 L. R. A. 827, *NATIONAL WATERWORKS CO. v. KANSAS CITY*, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

Exceptions to sufficiency of conveyances of waterworks system in 65 Fed. 692.

Application of interveners for portion of money paid for waterworks system by city in 78 Fed. 429.

Rights arising at termination of franchise or lease.

Cited in *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 382, 57 Pac. 210, and *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 734, denying right of city to reduce water rates after contract term with water company, until city had tendered payment for improvements as required by contract; *Stein v. McGrath*, 128 Ala. 180, 30 So. 792, holding water works franchise remains in grantee until right of repurchase under contract is exercised by grantor; *Swift v. Sheehy*, 88 Fed. 926, holding implied lien upon premises for value of improvements by lessee, under lease providing for payment for same by lessor, enforceable in equity.

Purchase of water works by municipality.

Cited in footnotes to *Citizens' Gaslight Co. v. Wakefield*, 31 L. R. A. 457, which requires town electing to establish electric light plant to purchase one already established; *Bristol v. Bristol & W. Waterworks*, 32 L. R. A. 740, which holds enforceable, contract by town to purchase water works.

Right of existing water company to supply municipality.

Cited in footnote to *North Springs Water Co. v. Tacoma*, 47 L. R. A. 214, which sustains city's right to build own water works after granting franchise to water company.

Value of water works system.

Cited in *Newburyport Water Co. v. Newburyport*, 168 Mass. 554, 47 N. E. 533, refusing to recommit to commission to find value of water works system, because of exclusion of testimony as to net earnings in past; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 382, 60 N. E. 977, upholding allowance for "fair value" of water plant in addition to cost of duplication; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 595 holding value of franchise and business of going water works company is to be taken into consideration, in addition to cost of duplication, in fixing compensation; *Kennebec Water Dist. v. Waterville*, 97 Me. 207, 60 L. R. A. 864, 54 Atl. 6, holding actual cost of plant with proper allowances for depreciation competent, but not conclusive, evidence of value.

Estoppel by acceptance.

Cited in *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 530, 22 C. A. 192, 40 U. S. App. 257, 76 Fed. 292, holding acceptance by city of extensions and additions to water works system and use of hydrants, fatal to defense in action for rentals that pipe laid was too small; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 229, 69 Pac. 176, holding city acquiescing in source of water supply for many years estopped from ousting company on ground of unsanitary condition of water.

Establishment and regulation of municipal water supply.

Cited in note (61 L. R. A. 46, 48, 49, 71, 107) on establishment and regulation of municipal water supply.

27 L. R. A. 840, *PITTSBURGH, C. C. & ST. L. R. CO. v. SULLIVAN*, 141 Ind. 83, 50 Am. St. Rep. 313, 40 N. E. 138.

Pleading.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 378, 56 N. E. 917; *Tibbet v. Zurbuch*, 22 Ind. App. 361, 52 N. E. 815; *Moon v. Pittsburgh Plate Glass Co.* 24 Ind. App. 41, 56 N. E. 108 (dissenting opinion by Henley, J.); *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 575, 52 N. E. 1013, — holding that complaint must be construed upon theory most apparent and clearly outlined by facts alleged; *Cleveland, C. C. & St. L. R. Co. v. Dugan*, 18 Ind. App. 438, 48 N. E. 238, holding complaint must be maintained, if at all, upon definite theory.

Liability of master for acts of servant or agent.

Cited in footnotes to *Nelson Business College Co. v. Lloyd*, 46 L. R. A. 314, which holds employer liable for servant's wilful or malicious acts in course of employment; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand, while pretending to throw at boys playing on cotton bales.

Voluntary medical and surgical attendance.

Cited in *Wabash R. Co. v. Kelley*, 153 Ind. 131, 52 N. E. 152 holding railroad company deducting portion of employee's wages for maintenance of hospital liable for malpractice of its surgeon; *American Tin-Plate Co. v. Guy*, 25 Ind. App. 591, 58 N. E. 738, holding corporation deducting portion of employee's wages for medical services liable for negligence in furnishing same; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 645, 50 S. W. 173, holding railway company making compulsory reduction in employee's wages for medical and surgical attendance liable for negligence of physician employed; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 450, 74 S. W. 456, holding master not liable for malpractice of its relief department surgeon, selected with due care.

Cited in footnote to *Hearns v. Waterbury Hospital*, 31 L. R. A. 224, which denies liability of charitable hospital for wrongful neglect of its servants.

Cited in note (28 L. R. A. 549) on duty of master to furnish medical aid to servant.

27 L. R. A. 843, *LEAVELL v. WESTERN U. TELEG. CO.* 116 N. C. 211, 47 Am. St. Rep. 798, 21 S. E. 391.

Power of legislature to regulate freight and tolls.

Cited in *Corporation Commission v. Seaboard Air Line System*, 127 N. C. 288, 37 S. E. 266, upholding power of corporation commission to fix reasonable freight rate.

Cited in note (33 L. R. A. 181) on legislative power to fix tolls, rates, or prices.

Railroad commission, an administrative court.

Cited in *State ex rel. Pate v. Wilmington & W. R. Co.* 122 N. C. 881, 29 S. E. 334, and *State ex rel. Caldwell v. Wilson*, 121 N. C. 474, 28 S. E. 554 (dissenting opinion), majority holding railroad commission created by statute, an administrative court.

27 L. R. A. 844, *SOUTHERN HOME BLDG. & LOAN ASSO. v. HOME INS. CO.* 94 Ga. 167, 47 Am. St. Rep. 147, 21 S. E. 375.

Insurance contracts.

Cited in *Graham v. Niagara F. Ins. Co.* 106 Ga. 842, 32 S. E. 579, holding stipulations in policy as to statement of loss and time for suit, conditions precedent to recovery; *Graham v. Niagara F. Ins. Co.* 106 Ga. 844, 32 S. E. 579, holding local agent without authority to restore insured's forfeited right of action, by waiver of conditions; *Cannon v. Phoenix Ins. Co.* 110 Ga. 566, 78 Am. St. Rep. 124, 35 S. E. 775, holding stipulation in policy as to time and manner of making proofs of loss, condition precedent to recovery; *Southern F. Ins. Co. v. Knight*, 111 Ga. 627, 52 L. R. A. 72, footnote p. 70, 78 Am. St. Rep. 216, 36 S. E. 821, holding policy not avoided by failure to furnish proofs of loss within time specified.

Cited in footnotes to *Oakland Home Ins. Co. v. Bank of Commerce*, 36 L. R. A. 673, which holds policy not avoided as to mortgagee's interest by insured's violation of provision against transfer of property without consent; *Peabody v. Satterlee*, 52 L. R. A. 956, which requires reception, not mere mailing, of state-

ment as to time and origin of fire within time specified; Woodmen Acci. Asso. v. Byers, 55 L. R. A. 291, which holds failure to give notice of injury excused by derangement of insured; Delaware Ins. Co. v. Greer, 61 L. R. A. 137, which holds mortgagee's indemnity placed at risk of every act and omission of mortgagor which would avoid latter's interest.

Distinguished in Queen Ins. Co. v. Dearborn Sav. L. & Bldg. Asso. 175 Ill. 118, 51 N. E. 717, holding mortgagee, under terms of policy, not bound to make proof of loss.

27 L. R. A. 846, STATE v. BELVEL, 89 Iowa, 405, 56 N. W. 545.

Objections to juries, jurors, and irregular indictments.

Cited in State v. Kouhns, 103 Iowa, 726, 73 N. W. 353, holding irregularity in drawing of grand jury waived by plea of not guilty; State v. Pickett, 103 Iowa, 720, 39 L. R. A. 304, 73 N. W. 346, holding objection that juror in criminal case is unable to read or write English language waived by failure to examine him; People v. Reigel, 120 Mich. 87, 78 N. W. 1017, holding statutory objections to grand jury only, available on motion to quash indictment; State *ex rel.* Dunn v. Noyes, 87 Wis. 347, 27 L. R. A. 791, 41 Am. St. Rep. 45, 58 N. W. 386, holding indictments by grand jury holding over beyond term for which summoned not subject to collateral attack.

Cited in footnotes to State v. Caldwell, 41 L. R. A. 718, which holds changes in number of grand jurors, and in number necessary to agree on verdict by petit jury, not *ex post facto* law; State v. Vincent, 52 L. R. A. 83, which holds indictment found by less than twenty-three grand jurors demurrable.

Cited in notes (27 L. R. A. 783, 790) on organization of grand jury; (23 L. R. A. 33, 38) on number of grand jurors necessary to concur in finding indictment; (43 L. R. A. 33) on number and agreement of jurors necessary to constitute valid verdict.

Application for continuance.

Cited in Lane v. State, 67 Ark. 293, 54 S. W. 870, holding affidavits as to diligence and good faith in efforts to secure testimony of absent witness admissible, on application for continuance.

Change of venue.

Cited in State v. Helm, 92 Iowa, 543, 61 N. W. 246, refusing to interfere with court's discretion in refusing change of venue on conflicting affidavits.

Cruel and unusual punishments.

Cited in note (35 L. R. A. 573) on cruel and unusual punishments.

27 L. R. A. 854, GLOBE PUB. CO. v. STATE BANK, 41 Neb. 175, 59 N. W. 683.

Action to set aside judgment as to certain defendants in Perry v. Johnston, 95 Fed. 323.

Effect of repeal of statute on suit pending thereunder.

Distinguished in Omaha Coal, Coke & Lime Co. v. Suess, 54 Neb. 382, 74 N. W. 620, holding repeal of statute before judgment rendered thereunder, no defense to creditor's bill to enforce such judgment.

Penal statutes.

Cited in Ashley v. Frame, 4 Kan. App. 272, 45 Pac. 927, holding action to

enforce statutory liability of bank officers, penal; *Seaton v. Grimm*, 110 Iowa, 151, 81 N. W. 225, holding statutes relating to individual liability of stockholders for failure to comply with statutory requirements, penal; *Winchester v. Howard*, 136 Cal. 450, 89 Am. St. Rep. 153, 64 Pac. 692 (dissenting opinion by McFarland, J.), who holds statute imposing liability on corporate officials for amounts embezzled by officers of corporation, penal.

De facto corporations.

Cited in *Hogue v. Capital Nat. Bank*, 47 Neb. 933, 66 N. W. 1036, denying individual liability of stockholders of *de facto* corporation for technical defects in organization; *Kleckner v. Turk*, 45 Neb. 189, 63 N. W. 469, holding persons contracting with *de facto* corporation estopped from denying its corporate existence.

Judicial ascertainment of indebtedness.

Followed in *Ball v. Wicks*, 45 Neb. 368, 63 N. W. 806, holding action to enforce statutory liability against stockholders not maintainable until after judgment against corporation.

Cited in *German Nat. Bank v. Farmers & M. Bank*, 54 Neb. 595, 74 N. W. 1086; *Hastings v. Barnd*, 55 Neb. 97, 75 N. W. 49; *State v. German Sav. Bank*, 50 Neb. 742, 70 N. W. 221; *Farmers Loan & T. Co. v. Funk*, 49 Neb. 337, 68 N. W. 520,—holding indebtedness of banking corporation must be judicially ascertained before enforcement of individual liability of stockholders; *Van Pelt v. Gardner*, 54 Neb. 706, 74 N. W. 1083, holding individual liability of stockholders accrues on return unsatisfied of execution against corporation; *Wehn v. Fall*, 55 Neb. 552, 70 Am. St. Rep. 397, 76 N. W. 13, holding remedy against dissolved corporation must be exhausted before proceeding against stockholder.

Distinguished in *Wyman v. Williams*, 53 Neb. 673, 74 N. W. 48, upholding right of receiver to maintain action for unpaid assessment on stock as asset of corporation; *New Hampshire Sav. Bank v. Richey*, 58 C. C. A. 300, 121 Fed. 962, holding that creditor of corporation can only maintain suit against stockholders, under Nebraska statute, after he has reduced claim to judgment.

27 L. R. A. 862, *MORGAN v. HUDNELL*, 52 Ohio St. 552, 49 Am. St. Rep. 741, 40 N. E. 716.

Damages by domestic animals.

Cited in footnotes to *Briscoe v. Alfrey*, 30 L. R. A. 607, which denies liability of owner of jack which escaped without his negligence, for filly killed by it; *May v. Poindexter*, 47 L. R. A. 588, which holds owner liable for trespass of animals turned loose by him on unfenced lands.

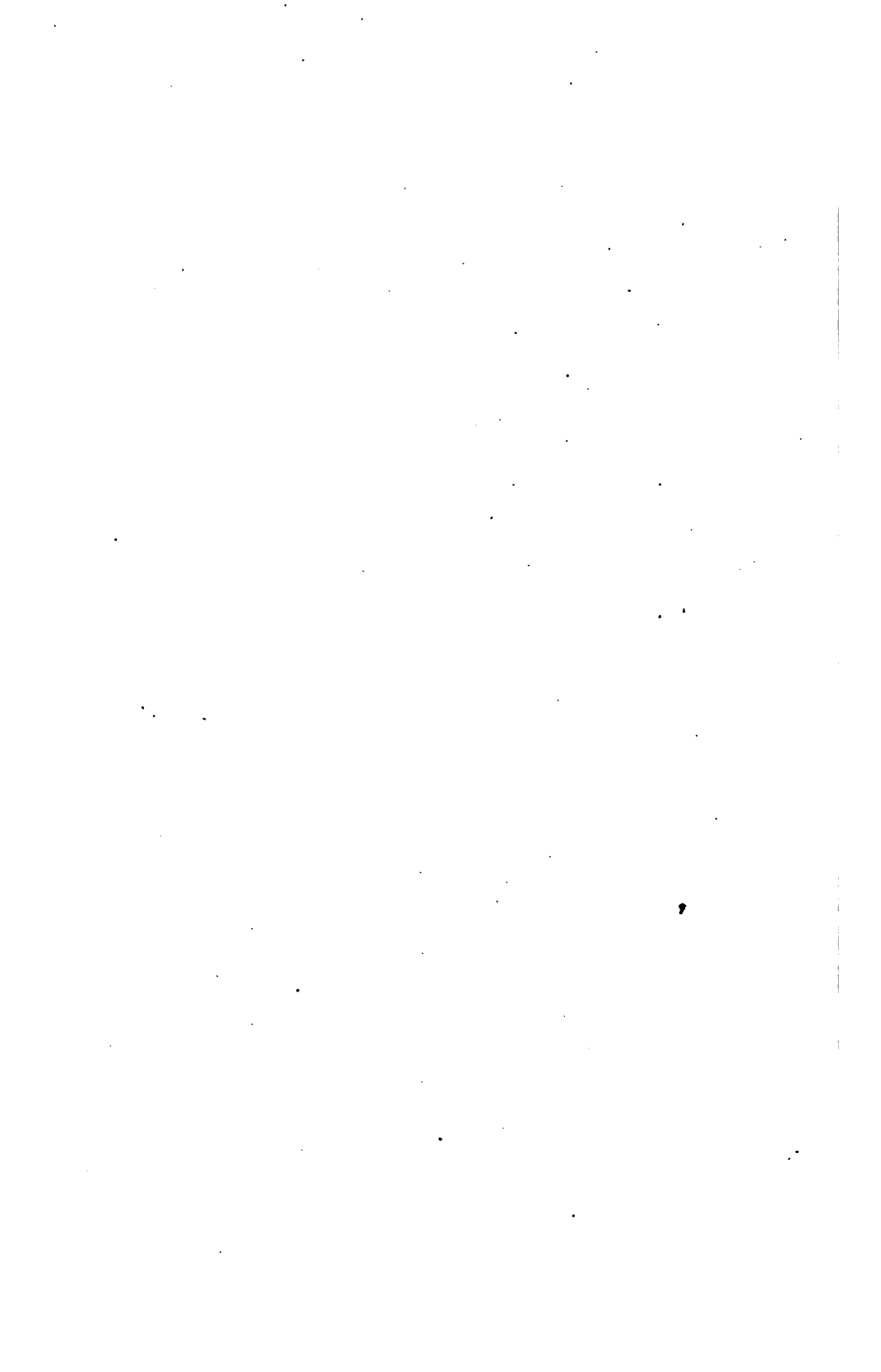
Animals straying upon uninclosed land.

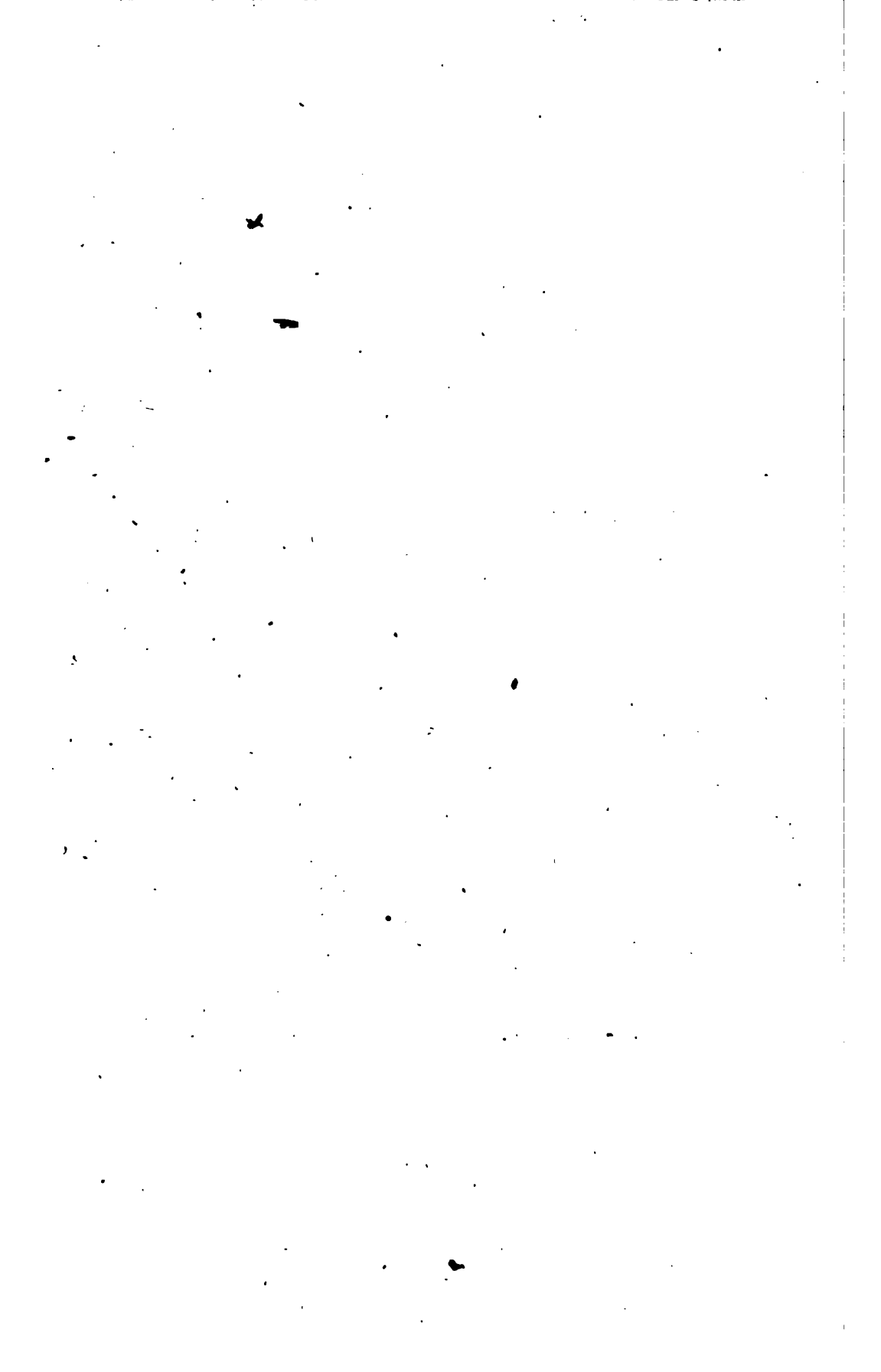
Cited in *Ferguson v. Miami Powder Co.* 9 Ohio C. C. 448, denying liability of owner of uninclosed land for death of cattle straying thereon and eating poison lawfully used in his business.

Grant of right of pasturage.

Cited in *Gilland v. Union P. R. Co.* 6 Wyo. 198, 43 Pac. 508, holding no interest in land conveyed by mere granting by lessee to another, right of joint pasturage.

J







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